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COMPARATIVE TABLES

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TABLE No. I—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

TABLE No. II—This Table shows serially the pages of the other REPORTS and JOURNALS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER with corresponding references of all other JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, LAHORE SERIES for 1924, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 5 LAHORE.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 5 Lahore—All India Reporter.

ILR	A I R			ILR	A I R.			ILR	A I R.			ILR	A I R.		
1	1924	*L*	440	134	1924	*L*	457	312	1924	*L*	557	440	1925	*L*	229
11	"	"	437	137	"	"	530	317	"	"	611	443	"	"	225
16	"	"	451	140	"	"	498	324	"	"	609	448	"	"	228
20	"	"	449	147	"	"	513	329	"	"	571	450	1922	"	217
23	"	*P C*	2	192	"	*PC*	121	356	"	"	538	455	1925	"	189
27	"	*L*	435	200	"	"	113	364	1925	"	35	461	"	"	194
34	"	"	452	212	1923	*L*	353	368	"	"	25	465	"	"	196
36	"	"	454	218	1924	"	545	371	"	"	31	473	"	"	222
38	1923	"	575	227	"	"	548	375	"	"	32	476	"	"	187
50	1924	*P C*	1	237	"	"	584	379	"	"	15	481	"	"	1
54	"	*L*	448	239	"	"	595	382	"	"	31	486	"	"	202
56	"	"	453	52	1925	"	39	385	"	"	29	492	"	"	209
59	"	"	432	257	1924	"	582	389	"	"	24	497	"	"	217
67	"	"	450	260	"	"	473	392	"	"	22	509	1924	"	713
70	"	"	429	263	"	"	541	396	"	"	19	511	1925	"	240
75	"	"	439	268	"	"	455	404	"	"	85	515	"	"	236
80	"	"	431	274	"	"	556	406	"	"	75	519	"	"	243
84	"	"	444	278	"	*P C*	117	409	"	"	206	523	"	"	255
92	"	*PC*	126					414	"	"	222				
105	"	*L*	493	288	"	*L*	425	416	"	"	185	527	"	"	262
109	"	"	495	298	1925	"	223	421	"	"	89	535	"	"	258
114	"	"	494	301	1924	"	559	425	1924	*PC*	183	543	"	"	252
117	"	"	505	305		"	581	429	1925	*L*	124	547	"	"	247
129	"	"	531	208	"	"	600	435	"	"	83	550	"	"	266

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N. B.—Column No. 1 *denotes pages of other* JOURNALS.
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1	1924	*L*	1	183	1924	*L*	462	340	1924	*L*	731	502	1925	*L*	261
25	"	"	65	187	"	"	466	343	1925	"	113	504	"	"	242
31	1923	"	590	192	"	"	461	345	"	"	126	506	"	"	246
35	1924	"	457	194	"	"	484	346	"	"	116	508	"	"	251
39	1923	"	523	197	"	"	474	349	1924	"	156	510	"	"	256
42	"	"	299	200	"	"	490	351	1925	"	65	513	1922	"	356
44	1924	"	82	204	"	"	470	355	"	"	1	516	1925	"	239
45	"	"	469	205	"	"	536	358	1924	"	744	518	"	"	248
47	1923	"	500	206	"	"	529	360	1925	"	124	522	"	"	264
50	"	"	601	208	"	"	498	370	1924	"	727	525	"	"	238
54	"	"	315	213	"	"	588	375	"	"	729	527	"	"	244
59	1924	"	109	216	"	"	538	379	1925	"	16	529	"	"	253
62	1923	"	598	219	"	"	570	385	"	"	117	533	1923	"	319
67	1924	"	115	221	"	"	562	389	"	"	127	538	1925	"	209
69	1923	"	579	224	"	"	646	391	"	"	125	542	"	"	272
72	"	"	632	227	"	"	564	393	"	"	119	546	1924	"	584
78	"	"	286	230	"	"	640	395	1923	"	657	548	1925	"	287
82	1924	"	103	232	1925	"	158	398	1925	"	127	550	"	"	281
84	"	"	479	234	1924	"	638	402	"	"	204	551	1924	*PC*	183
86	"	"	142	237	"	"	594	408	"	"	123	554	1925	*L*	284
89	1923	"	544	240	"	"	571	412	"	"	122	558	1924	"	425
93	1924	"	464	261	1925	"	145	418	"	"	296	564	"	"	544
97	"	"	145	265	1924	"	600	419	1924	"	729	566	1925	"	275
99	1923	"	480	268	"	"	555	421	1925	"	128	567	1924	"	682
103	1924	"	104	271	"	"	720	422	1924	"	732	571	"	"	623
110	1923	"	286	280	1925	"	44	424	"	"	742	572	"	"	616
111	"	"	291	284	"	"	257	437	1925	"	114	575	"	"	733
115	1924	"	12	286	1924	"	713	441	"	"	141	578	1925	"	279
125	1923	"	295	295	"	"	716	442	"	"	163	579	"	"	282
127	1924	"	465	298	"	"	718	446	1924	"	337	584	"	"	281
130	"	"	492	299	1925	"	63	452	1923	"	589	585	"	"	229
133	"	"	500	302	"	"	61	454	1924	"	543	587	"	"	88
137	"	"	471	306	1924	"	724	457	1923	"	401	588	1924	"	557
142	"	"	486	307	1925	"	55	460	1924	"	187	593	1925	"	278
145	"	"	455	310	"	"	52	462	1925	"	132	595	"	"	75
151	"	"	468	311	1924	"	719	464	"	"	155	597	"	"	250
153	"	"	487	313	"	"	685	467	"	"	192	600	"	"	291
155	"	"	459	316	1925	"	241	469	"	"	151	601	"	"	222
160	"	"	489	317	1924	"	654	471	"	"	171	604	"	"	280
162	"	"	502	318	"	"	718	474	"	"	94	606	"	"	237
166	"	"	481	320	"	"	722	478	"	"	103	608	"	"	268
170	"	"	482	323	"	"	654	481	"	"	289	618	"	"	288
174	"	"	480	326	1925	"	42	483	"	"	230	620	"	"	279
176	"	"	486	331	"	"	113	486	1923	"	436	622	"	"	274
180	"	"	473	334	"	"	24	491	1924	"	123	625	"	"	276
182	"	"	533	336	"	"	216	500	1925	"	267	630	"	"	286

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4	"	L	680	123	"	M	372	227	1924	O	341	319a	"	L	329
5	1923	L	315	125	"	L	258	228	1923	L	336	319b	"	R	132
7	"	M	694	127	1923	A	83	229	1924	R	35	320	"	A	609
13	1924	N	27	129	1925	R	9	231	"	M	373	321	1924	P	42
15	"	N	35	131	1924	L	622	233	"	R	23	325	1925	C	146
17	"	P	347	132	"	N	166	234	1923	L	335	327	1924	A	299
27	1923	C	727	134	"	S	129	236	1924	R	31	330	"	B	47
31	1922	P	532	138	"	M	31	238	1923	L	337	332	"	A	194
34	1923	C	484	139	1923	M	606	241	"	R	268	333	"	B	51
35	1924	P	498	140	"	C	651	244	1924	M	478	336	"	O	32
39	1925	O	60	141	1924	N	33	245	"	R	22	337	1923	L	11
40	1924	P	131	145	"	M	232	246	1923	L	344	338	1924	B	105
42	"	A	84	147	"	N	29	247	1924	R	93	342	1923	L	267
43	"	L	667	149	1923	C	407	252	1923	L	385	343	"	C	647
45a	"	A	142	150	"	B	255	255	1924	R	169	345	1922	L	443
45b	1923	L	436	155	1924	N	121	257	"	R	209	346	1924	N	313
48	1925	O	46	156	1923	C	654	259	1923	L	389	348	"	A	186
49	"	O	1	159	1924	N	171	261	1924	R	165	349	"	N	311
56	1924	M	397	161	1924	L	123	264	1923	L	391	350	"	O	345
58	1923	L	429	169	"	N	172	266	1922	A	335	352	"	M	669
60	1924	N	19	170	1923	C	561	267	1924	R	113	353	"	N	294
63	"	N	119	171	1924	N	23	269	"	M	230	354	"	M	587
64	1923	M	687	172	1923	R	214	270	"	R	98	356	"	N	281
65	1924	M	129	173	1924	L	168	273	"	R	87	359	1925	O	44
66	1925	O	36	174	"	L	90	274	1923	L	394	361	1924	M	657
67	1924	N	60	177	"	C	104	275	1924	R	171	366	1925	O	49
68	"	L	104	184	1923	C	401	276	1925	L	48	367	1924	M	729
71	"	N	118	185	1924	R	17	277a	1924	R	160	369	1922	P	209
72	"	A	76	189	"	C	114	277b	1923	M	688	370	1924	M	549
73	"	M	192	190	1923	C	717	278	"	O	8	371	1923	R	81
74	"	L	669	191a	1924	C	229	279	"	L	333	373	"	L	686
75	"	M	239	191b	"	R	213	280	"	M	595	374	1924	M	540
78	"	L	678	192	"	C	192	281	1924	M	265	375	1923	L	622
81	"	P	708	193	"	R	65	289	"	C	182	377a	1925	C	107
82	"	L	617	194	1923	O	161	290	"	M	539	377b	1924	L	17
83	"	N	32	196	1924	R	63	291a	1923	C	577	381	"	R	173
84	"	L	261	198	1923	O	163	291b	"	L	340	385	"	L	109
85	1923	R	197	200	"	A	476	293	1924	C	196	386a	1922	L	403
87	1924	L	627	203	1924	R	85	294a	1923	M	133	386b	1923	L	512
88	"	P	711	204	1923	A	469	297	"	A	192	387	1922	A	292
89a	"	L	630	205	1924	R	67	298	"	L	408	388	1923	B	242
89b	"	P	786	207	1923	R	247	299	"	A	480	391	1925	O	295
91	"	L	672	209a	1924	M	351	303a	1925	C	263	395	1923	L	508
92	1923	A	386	209b	"	L	675	305	1923	A	322	396	1924	M	584
93	1924	L	257	210	"	M	391	308	"	L	415	398	1923	L	509
94	"	M	624	212	"	M	338	310a	1925	M	228	399	"	L	513
95	"	L	605	214	1923	R	161	310b	1925	C	80	400	1924	A	143
104	1925	L	225	215	1924	M	387	311a	1923	R	119	401	1925	M	106
111	"	R	140	217	1923	R	216	311b	1925	C	101	409	1923	L	516
113	1924	L	660	218	"	A	473	312	1924	A	130	410	1924	L	663
114	1922	P	286	219	"	C	403	313	1924	O	342	412	1922	P	249
116	1924	L	624	220	"	A	483	314	1923	L	419	415	1924	L	670
119	"	L	569	221	1924	M	730					417	"	N	301
120	"	L	667	222	1923	C	594					424	1923	L	537

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428	1925	*S*	34	531	1924	*B*	184	650	"	*L*	131	748	1923	*C*	97
430	1924	*L*	110	533	1922	*L*	410	651	"	*A*	245	750	1924	*A*	269
431	1922	*P*	498	537	"	*A*	273	652*a*	1923	*L*	73	751	1925	*L*	23
433	1924	*O*	338	538	"	*O*	228	652*b*	1924	*A*	201	753	1924	*M*	393
435	1924	*L*	585	539	1923	*L*	617	653	1923	*R*	145	758	"	*C*	321
439	1925	*S*	177	541	1922	*P*	210	654	1924	*A*	319	761	1925	*S*	116
440	1924	*O*	331	544	1924	*L*	680	655*a*	"	*A*	185	772	1924	*A*	455
442	"	*M*	487	545*a*	1922	*P*	294	655*b*	1925	*L*	111	773	"	*C*	449
445	1925	*O*	51	545*b*	"	*P*	227	657	1924	*N*	49	776	"	*C*	323
446	1924	*P*	283	546	1922	*P*	12	660	1923	*B*	194	781	"	*A*	451
448	1925	*S*	177	547	"	*L*	260	661	"	*C*	649	783	1923	*L*	40
449	1924	*P*	635	551	1925	*L*	149	662	1925	*S*	127	785	1924	*O*	314
453	"	*N*	297	552	1924	*A*	454	665	1924	*A*	185	786	"	*B*	335
454	"	*A*	461	553	"	*R*	106	666*a*	"	*L*	529	789	1925	*S*	57
455	"	*P*	717	554	"	*M*	375	666*b*	1923	*R*	248	790	1924	*M*	350
457	"	*L*	623	555	"	*A*	666	669*a*	1925	*C*	154	792	"	*M*	384
458		*P*	695	556*a*	"	*M*	735	669*b*	1923	*L*	155	794	"	*O*	64
459	"	*N*	287	556*b*	1925	*N*	40	670	1924	*P*	782	795	"	*A*	664
460	"	*C*	153	557	"	*P*	158	674	1925	*C*	263	796	"	*O*	80
462	1925	*S*	193	560*a*	1923	*L*	35	675	1923	*R*	68	797	"	*B*	333
463	1924	*A*	437	560*b*	"	*L*	36	676	"	*L*	155	798	"	*A*	665
464	1923	*C*	662	561	1922	*P*	494	679	1925	*C*	262	799	1923	*C*	668
465	1924	*L*	591	563	1924	*M*	555	680	"	*L*	119	800	1925	*A*	4
466	"	*A*	316	565	1923	*R*	147	682	"	*N*	33	804	1924	*L*	84
467*a*	"	*A*	592	566	1924	*M*	227	683	1924	*A*	413	806	"	*A*	675
467*b*	1923	*C*	517	563*a*	1923	*L*	160	684	1923	*R*	135	807	1925	*C*	248
471	1924	*L*	616	568*b*	"	*A*	86	685	1924	*L*	62	808	"	*L*	166
472	"	*A*	694	569	1924	*M*	160	687	1925	*P*	112	809	1924	*R*	72
473	"	*N*	162	570	1925	*O*	179	688	1924	*A*	296	810	1925	*L*	159
474	"	*A*	314	571	"	*S*	99	689	"	*A*	253	811	1923	*L*	232
475	"	*N*	120	572	1924	*M*	229	691	1923	*L*	43	815	1924	*L*	449
476	"	*A*	694	573	1923	*C*	649	693	1924	*A*	441	817	"	*C*	257
477	"	*A*	381	576	"	*L*	619	696	1925	*P*	154	900	"	*A*	662
481	"	*A*	696	579	"	*O*	167	697	1924	*L*	453	901	1925	*C*	266
482	"	*R*	172	584	1924	*M*	389	698	"	*O*	403	902	1924	*A*	338
483	1923	*A*	610	586	1923	*R*	140	699	1923	*R*	245	906*a*	"	*P*	783
485	1924	*R*	100	587	"	*R*	143	700	1925	*L*	142	906*b*	"	*A*	306
486	1923	*A*	595	588	"	*L*	88	702	1924	*M*	585	907	"	*R*	256
487	1924	*R*	172	590	1925	*P*	115	703	1923	*A*	545	912	"	*N*	114
488	"	*A*	435	592	1923	*A*	285	705*a*	1925	*L*	137	913	"	*O*	335
489	"	*R*	212	594	1924	*P*	564	705*b*	"	*C*	353	914	"	*L*	498
490	"	*A*	207	612	"	*A*	558	707	"	*L*	153	917	1925	*O*	183
492	1923	*C*	725	614	1925	*S*	59	709	"	*S*	71	919	"	*P*	17
494	"	*L*	692	615	1924	*A*	618	710	"	*L*	135	922	1924	*N*	253
495	"	*L*	683	618	"	*R*	99	711	1924	*P*	791	924	"	*R*	245
497	"	*A*	91	620	1925	*S*	83	712	1925	*L*	153	928	"	*L*	437
517	"	*L*	687	623	1923	*R*	139	713	1924	*N*	51	930	"	*R*	244
518	1922	*L B*	40	624	1924	*A*	317	715	"	*M*	379	931	"	*L*	451
519	1923	*L*	691	625	1925	*L*	49	721	1925	*L*	139	933	"	*R*	294
520	"	*L*	666	628	"	*A*	99	724	1924	*P*	813	937	"	*C*	812
522	1924	*C*	329	629	1924	*L*	595	727	"	*A*	215	939	1922	*L*	263
523	1923	*L*	689	634	1925	*L*	146	729	"	*A*	187	941	1924	*C*	813
525	"	*L*	93	636	1924	*P*	754	730	"	*M*	587	942	"	*A*	192
526	"	*C*	674	638	1925	*L*	101	731	"	*M*	86	944	"	*C*	981
527	"	*C*	707	641	1924	*M*	340	732	"	*C*	476				

Cr.LJ	A. I. R.			Cr.LJ	A. I. R.			Cr.LJ	A. I. R.			Cr.LJ	A. I. R.		
945	1924	C	771	1057	1925	S	105	1161	1925	O	109	1270	1924	C	63
947	"	A	190	1064	"	N	36	1161	1924	R	178	1271	1925	L	142
949	"	O	367	1066	1924	O	366	1162	1925	O	158	1271	"	O	200
950	"	A	202	1067	1925	N	78	1166	1924	A	675	1272	"	L	137
951	"	M	815	1070	"	M	64	1169	1925	O	65	1274	"	P	250
952	"	A	195	1073	"	N	123	1172	1924	A	569	1275	"	M	245
954	1923	P	537	1075	"	O	62	1173	1925	O	50	1276	1924	P	764
956	1924	A	220	07	"	N	37	1175	1924	R	241	1277	"	A	770
960	"	B	321	1079	1924	N	121	1178	"	P	767	1280	"	R	293
961	"	A	197	1080	1925	C	268	1181	1925	N	136	1281	"	B	492
964	"	A	211	1081	"	O	149	1185	"	M	183	1284	"	C	956
965a	"	B	332	1082	1924	C	389	1185	"	O	52	1287	"	B	511
965b	"	A	230	1084	"	M	799	1186	1924	P	563	1289	1925	L	148
966	"	B	320	1085	"	C	392	1186	1925	C	160	1290	1924	B	484
967a	"	A	214	1087	1925	O	89	1188	1924	B	365	1292	"	A	766
967b	"	A	224	1088	1924	C	230	1189	1925	O	167	1293	"	B	485
968	"	B	337	1089	1925	P	279	1190	1924	A	781	1294	"	A	616
970	"	A	203	1091	"	C	339	1193	1925	M	367	1295	"	P	804
972	"	P	691	1093	1924	O	250	1194	"	O	227	1297	1925	M	1
975	"	M	668	1095	"	C	986	1194	1924	B	308	1303	1924	R	295
976	"	L	502	1096	"	M	808	1195	"	S	1	1304	"	M	896
978	"	M	795	1098	1925	C	149	1199	1923	L	603	1305	"	R	291
979	"	L	481	1102	1924	B	303	1200	"	L	238	1308	"	A	768
981	"	A	411	1104	1925	C	186	1201	1924	L	609	1310	"	R	307
983	"	L	482	1106	1924	R	168	1203	"	C	893	1311	1923	L	621
985	"	P	500	1107	"	C	980	1206	1923	A	599	1312	"	P	297
989	1925	L	121	1109	1925	N	142	1207	1924	O	369	1312	"	L	458
990	1924	B	116	1112	"	C	191	1209	"	C	985	1313	1924	O	425
992	"	A	492	1113	1924	A	565	1211	"	A	101	1313	"	C	18
993	"	A	438	1115	"	C	848	1213	1925	M	136	1341	1925	N	119
996	"	P	784	1116	1925	O	110	1214	"	N	74	1342	"	L	16
997	"	C	616	1116	1924	C	231	1217	1924	C	960	1345	1924	A	267
999	"	A	539	1118	1925	O	130	1221	"	M	816	1347	"	L	727
100	"	C	701	1119	1924	C	714	1223	1925	S	70	1349	1923	B	262
1003	"	A	320	1121	"	R	179	1224	1924	O	448	1350	1924	L	729
1004	1925	N	50	1123	"	B	347	1224	1925	S	75	1352	"	R	320
1005	1924	A	209	1124	"	L	454	1226	1924	O	371	1355	1925	N	172
1005	"	L	733	1125	"	O	295	1226	1925	S	57	1357	"	P	322
1007	"	A	666	1125	1925	C	238	1228	1924	P	388	135	"	S	184
1007	"	O	399	1127	1924	O	402	1235	"	C	816	1361	"	L	237
1008	"	A	578	1127	"	B	334	1237	1925	P	183	1362	"	S	246
1009	1925	M	39	1129	"	O	411	1239	1924	A	779	1363	"	N	228
1012	1924	C	687	1131	"	L	269	1241	1925	L	157	1368	"	S	190
1018	1925	P	152	1132	"	O	435	1242	1924	A	77	1371	1924	C	338
1020	1924	L	734	1135	"	B	432	1244	"	A	765	1374	1925	O	90
1024	"	C	643	1136	"	R	109	1245	1925	L	129	1375	1924	C	1035
1026	"	O	368	1139	1925	O	152	1246	1924	A	784	1375	1925	O	233
102	"	C	705	1140	1924	L	253	1247	"	M	899	1377	"	S	204
1032	1925	O	69	1145	1925	O	135	1249	1925	A	73	1378	1924	R	331
1034	1924	C	502	1146	1924	R	207	1253	"	C	192	1380	1925	O	228
1041	"	M	805	1147	1925	O	144	1254	"	M	364	1382	1924	B	385
1044	"	C	618	1148	1924	B	70	1255	"	P	55	1383	1925	M	123
1047	1925	P	167	1149	1925	O	138	1258	1924	C	1018	1385	1923	P	228
1048	1924	C	809	1150	1924	C	95	1264	"	R	289	1386	1925	C	494
1050	"	L	450	1151	1925	O	130	1266	1925	P	165	1389	"	M	375
1051	"	C	713												
1053	"	C	908	1152			147	1269	"	L	168	1390	1924	A	265

75 Indian Cases = All India Reporter.

I C.	A I R.			I C.	A I R.			I C.	A I R.			I C.	A I R.		
1	1925	P	316	114	1924	A	717	292	1924	O	297	428	1924	L	633
2	1925	C	389	115	"	M	84	294	"	R	16	430	"	P	37
6	"	R	160	118	1923	B	473	295	1923	R	174	433	"	P	280
7	"	P C	114	123	1924	P	825	296	"	R	188	435	"	C	638
11	1924	C	98	128	1922	B	335	299	1922	B	28-	440	1923	N	332
14	1923	A	25	129	1924	C	1	304	1923	R	159	441	"	L	652
17	1924	M	18	145	"	C	317	305	"	P	581	443	"	C	436
18	"	P	811	148	1923	A	601	309a	"	R	244	445	1925	M	381
20	1923	C	732	158	"	N	313	309b	1924	A	12	447	1923	C	701
22	1924	P	820	159	1924	A	131	312	"	P	471	449	"	L	575
24	1923	L	595	161	1923	M	713	316	"	A	111	454	1922	A	318
26	1924	P	812	165	"	L	290	317	1923	L	523	456	1924	L	142
27	"	C	248	166	1924	R	13	319	1924	C	80	457	1922	A	332
31	1923	R	261	170	"	M	94	321	"	P	339	458	1923	L	284
35	"	A	50	171	1925	R	99	322	1923	R	156	460	1924	A	167
38	1924	M	197	172	"	M	224	323	"	A	350	461	1923	L	581
41	"	C	414	173	1924	C	145	325	1924	C	168	465	1924	M	117
46	"	M	130	177	"	P	250	328	1923	R	153	466	"	C	115
53	"	P	94	183	1923	L	587	330	1924	A	935	469	"	P	831
55	"	C	56	185	1922	P	550	331	1923	O	109	471	"	M	7
57	"	L	145	188	1923	B	32	334	1924	M	124	472	1922	A	394
58	"	P	463	189	1924	M	369	335	1922	A	408	474	1923	C	331
61	1922	B	390	193	1922	B	433	336	1924	M	88	476	"	M	700
64	1923	L	302	196	1923	C	302	339	"	A	137	485	1922	A	383
65	"	P	438	200	"	R	150	343a	1923	R	154	487	1923	L	506
67	"	B	71	201	"	C	613	343b	1924	P	241	489	"	M	686
69	"	P	546	203a	1924	C	158	346	"	C	85	490	"	L	281
70	"	B	65	203b	1923	B	107	351	"	A	94	491	"	M	703
71	"	R	141	209	1924	P	100	353a	"	A	77	495	1922	A	333
72	1924	P	46	217	1923	R	246	353b	1923	R	157	496	1923	L	283
74	1923	R	225	218	"	C	444	356	"	L	600	497	"	S	20
75	1922	C	364	219	1924	M	95	357	"	R	144	502a	"	P C	102
77	1923	L	291	221	1922	B	444	358a	"	R	152	502b	1924	A	116
79	"	L	295	225	1923	R	238	358b	1924	A	186	506	1923	C	675
80	"	N	297	227	1924	O	154	359	1923	L	598	508	1924	P	647
81	1924	C	74	231	1923	C	716	361	"	A	618	520	"	L	82
87	1923	L	480	233	"	B	75	362	"	C	658	521	"	C	57
89	1924	C	84	237	1924	R	139	363	"	P	437	527	1923	A	334
90	1923	L	503	238	"	A	273	364	"	C	614	528	1924	L	143
91	1924	P	809	244	"	A	313	365	"	L	270	529	1923	C	456
93	"	M	207	250	"	M	154	367	1925	C	574	531	1924	P	145
94	1923	L	544	254	"	A	176	368	1923	L	286	533	"	C	53
96	1924	P	174	255	"	C	90	369	1924	M	217	535	"	P	509
98	"	P	439	260	"	M	388	375	1923	L	632	537	1923	C	723
99	1923	L	299	261	1923	L	510	378	1924	P	458	538	1924	P	534
100	1924	A	66	265	"	P	529	379	"	C	52	541	1923	C	690
101	"	L	567	266	1924	A	443	381	1925	P	337	542	1924	L	162
102	1923	B	401	267	1925	O	264	387	1923	A	551	543	"	N	115
103	"	L	592	269	1923	L	511	390	1924	M	46	544	"	N	48
104	1924	A	48	270	"	A	571	392	1923	P C	138	545	1923	L	500
105	1923	C	682	280	"	A	586	404	1924	A	60	546	"	P C	93
107	"	L	301	281	"	C	429	406	"	M	81	548	1924	N	152
108	1924	A	927	283	1922	B	449	411	"	P	326	549	1923	S	17
109	1923	L	579	284	1923	P	514	419	1923	L	514	553	"	A	335
111	1924	A	938	287	"	P C	87	421	"	C	694	555	1924	L	144
112	1925	M	63					427	1922	P	548				

75 Indian Cases = All India Reporter (*Contd.*)

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
556	1923	*P C*	86	674	1924	*L*	689	784*b*	1925	*A*	31	888*b*	1924	*M*	586
557	"	*C*	570	676*a*	1923	*A*	361	785	1924	*A*	169	889	1923	*N*	37
559	1924	*N*	69	676*b*	"	*P*	572	786	1923	*L*	24	892	1924	*L*	673
561	1923	*B*	213	679	"	*A*	365	787	1924	*N*	12	893	1923	*B*	404
562	"	*L*	590	680	"	*L*	307	789	1925	*L*	69	896	1924	*L*	511
564	1924	*N*	178	681*a*	1924	*P*	184	790	1924	*O*	351	898	"	*A*	79
566	"	*M*	102	681*b*	1923	*A*	367	791	1923	*L*	445	899	"	*N*	198
567	1923	*C*	329	682	"	*C*	685	792	"	*A*	523	901	"	*M*	234
569	"	*B*	216	686	"	*A*	337	793	"	*L*	446	902	"	*N*	195
570	1924	*P*	823	687	1924	*N*	236	794	1924	*P*	1	903	"	*L*	692
572	"	*M*	163	689	1923	*L*	317	812	1923	*L*	431	906	1923	*N*	324
579	"	*O*	209	691	1924	*M*	375	813	1924	*A*	727	908	1924	*L*	361
589	1923	*N*	293	692	"	*L*	680	814	"	*M*	602	909	"	*F*	607
590	"	*L*	425	693	1923	*L*	315	816	"	*A*	833	910	"	*L*	700
592	1924	*N*	141	695	"	*M*	694	817	"	*N*	145	913	"	*L*	677
593	1923	*A*	338	701	1924	*N*	27	818	"	*L*	636	914	1923	*N*	326
595	1925	*N*	224	703	"	*N*	35	820	"	*N*	123	915	"	*L*	655
596	1923	*A*	403	705	"	*P*	347	821	1925	*P*	31	917	1924	*N*	196
597	"	*A*	306	715	1923	*C*	727	823	1923	*N*	333	919	1923	*L*	680
601	1924	*P*	793	719	1922	*P*	532	824	1924	*L*	645	922	1924	*A*	828
603	1923	*A*	382	722	1923	*C*	484	826	"	*N*	117	925	"	*N*	225
604	1924	*M*	399	723	1924	*P*	498	827	1923	*L*	396	927	"	*L*	544
605	1923	*A*	398	727	1925	*O*	60	829	1924	*N*	190	928*a*	"	*L*	668
607	"	*A*	371	728	1924	*P*	131	830	"	*M*	241	928*b*	"	*P*	687
608	1924	*L*	628	730	"	*A*	84	833	"	*N*	176	931	"	*A*	832
609	1923	*A*	407	731	"	*L*	667	835	"	*A*	57	932	"	*N*	234
610	"	*L*	443	733*a*	"	*A*	142	837	1925	*L*	47	934	"	*L*	561
612	"	*A*	30	733*b*	1923	*L*	436	838	1924	*M*	187	936	"	*O*	309
613	1924	*M*	116	736	1925	*O*	46	841	"	*P*	440	938	"	*L*	365
614	1923	*A*	48	737	1924	*L*	619	844	"	*L*	615	940	1923	*L*	459
615	1924	*L*	631	739	"	*M*	56	846	"	*P*	591	942	1924	*P*	452
616	1923	*A*	72	740	1923	*L*	675	848*a*	"	*L*	651	945	"	*L*	688
617	1922	*B*	438	743*a*	"	*B*	303	848*b*	1923	*M*	679	946	"	*P*	336
619	1923	*A*	373	743*b*	"	*L*	694	849	1924	*L*	593	950	1923	*L*	638
620	1924	*M*	515	745	1924	*L*	649	850	"	*M*	274	953	1924	*A*	812
621	1923	*A*	374	746	1923	*L*	679	855	"	*L*	537	955	"	*P*	213
622	1924	*N*	199	747	1924	*L*	589	856	"	*P*	506	975	"	*P*	822
623	1925	*M*	59	749	"	*N*	39	858	"	*L*	583	977	"	*M*	129
624	1923	*A*	404	751	1923	*A*	150	859	"	*P*	526	978	1925	*O*	36
625	"	*C*	499	752	1924	*N*	46	861	"	*L*	686	979	1924	*N*	60
626	"	*O*	185	753	1925	*O*	1	863	"	*P*	507	980	"	*L*	104
654	"	*L*	286	760	1924	*M*	397	866	"	*L*	647	983	"	*N*	118
655	"	*A*	340	762	1923	*L*	429	868	"	*O*	317	984	"	*A*	76
656	"	*L*	303	764	1924	*N*	19	870	"	*L*	634	985	"	*M*	192
657	"	*A*	341	767	"	*N*	119	871	"	*P*	161	986	"	*L*	669
659	"	*L*	305	768	1923	*M*	687	872	"	*A*	721	987	"	*M*	239
660	"	*N*	169	769	1924	*N*	17	874	"	*N*	226	990	"	*L*	678
662	"	*L*	288	770	"	*O*	49	875	1925	*O*	305	993	"	*N*	44
663	"	*A*	344	774	1923	*L*	359	876	1924	*M*	398	995	"	*L*	553
664	1924	*N*	77	777	1924	*A*	157	877	1925	*L*	45	997	1925	*P*	113
666	1923	*A*	346	779	"	*L*	552	878	"	*N*	193	999	1923	*N*	329
667	"	*L*	309	780	1923	*P*	278	879	1923	*P*	129	1001	1924	*L*	671
669	"	*A*	342	781	"	*L*	438	880	1925	*L*	144	1002	1925	*P*	254
670	1924	*P*	511	782	1924	*N*	242	881	1924	*M*	151	1004	"	*A*	85
672	1923	*A*	382	784*a*	"	*L*	592	885	"	*L*	690	1013	1923	*L*	658
673	"	*M*	693					888*a*	1925	*O*	72	1014	1924	*S*	9

75 Indian Cases = All India Reporter (*Concld.*)

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1016	1924	*M*	105	1024	1924	*L*	188	1036	1924	*P*	209	1046	1924	*P*	211
1020	"	*L*	603	1027	"	*L*	676	1039	"	*L*	604	1048	"	*L*	702
1022	1923	*P*	464	1031	"	*P*	655	1040	"	*L*	639	1053	"	*A*	183
1027	1924	*L*	650	1034	"	*L*	643	1041	"	*S*	49	1055	"	*L*	599
				1035	"	*S*	56	1043	"	*L*	707	1056	"	*L*	656

76 Indian Cases = All India Reporter.

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1924	*L*	504	84	1924	*S*	5	185	1924	*L*	568	282	1925	*S*	9
2	"	*P*	33	89	"	*P*	502	186	"	*L*	632	285	1924	*L*	629
6	1925	*L*	37	90	"	*S*	105	187	"	*M*	372	286	"	*S*	127
8	1924	*P*	269	91	"	*L*	151	189	"	*L*	258	288	"	*N*	26
10	"	*L*	368	95	"	*N*	175	191	1923	*A*	83	289	"	*M*	232
12	1923	*A*	134	104	1925	*L*	225	193	"	*N*	327	291	"	*N*	29
14	1924	*L*	666	111	"	*R*	140	194	"	*P*	562	293	1923	*C*	407
16	"	*L*	674	113	1923	*P*	525	196	1925	*L*	41	294	"	*B*	255
17	"	*P*	708	115	"	*B*	82	197	1924	*S*	22	299	1924	*N*	121
18	"	*L*	617	119	1924	*S*	47	198	"	*L*	621	300	1923	*C*	654
19	"	*N*	32	121	1925	*L*	62	200	"	*N*	189	303	1924	*N*	171
20	"	*L*	261	122	1924	*N*	61	201	"	*L*	566	305	1923	*N*	321
21	1923	*R*	197	123	1925	*L*	71	202	1923	*L*	654	306	1924	*M*	159
23	1924	*L*	627	124	1924	*M*	386	203	1924	*S*	35	307*a*	1925	*R*	103
24	"	*P*	711	125	1925	*L*	68	206	"	*L*	695	309	1924	*S*	134
25*a*	"	*L*	630	126	1924	*M*	178	207	1923	*M*	690	311	1923	*C*	342
25*b*	"	*P*	786	128	1925	*L*	27	212	1924	*M*	92	314	1925	*S*	2
27	"	*L*	672	131	1924	*N*	346	213	1923	*C*	177	316	1923	*C*	344
28	1923	*A*	386	134	"	*L*	606	215	"	*B*	236	317	"	*B*	218
29	1924	*L*	257	135	1923	*L*	673	217	"	*B*	415	324	"	*C*	351
30	"	*M*	624	136	"	*P*	226	218	1924	*N*	214	327	1924	*N*	22
31	"	*L*	605	139	924	*L*	662	220	"	*C*	330	328	1923	*C*	356
33	1924	*O*	344	144	"	*L*	635	224	"	*N*	122	331	1924	*M*	108
34	1923	*B*	44	145	922	*B*	451	225	1925	*R*	9	335	1925	*O*	99
35	1924	*L*	641	147	1924	*L*	263	227	1924	*L*	622	336	"	*C*	105
37	"	*P*	817	148	1923	*B*	36	228	"	*N*	166	337	"	*S*	4
40	"	*L*	659	150	924	*L*	534	230	"	*S*	129	341	1924	*N*	157
42	"	*P*	244	152	923	*B*	170	234	"	*M*	31	342	"	*M*	98
44	"	*N*	216	154	1924	*M*	364	235	1923	*M*	606	343	"	*C*	167
45	1925	*L*	60	155	1922	*B*	177	236	"	*C*	651	345	1925	*S*	1
46	"	*N*	31	157	1924	*L*	510	237	1924	*N*	33	347	1924	*P*	310
47	"	*L*	60	158	"	*N*	395	241	1923	*C*	121	349	"	*N*	232
48	"	*L*	157	161	1925	*R*	150	250	1924	*S*	122	1538	"	*S*	64
49	1923	*P*	597	164	1924	*N*	210	252	1923	*C*	368	158	"	*C*	185
52	1924	*S*	38	166	1925	*R*	96	254	1924	*L*	608	359	"	*S*	41
55	"	*P*	118	168	1924	*P*	785	255	1923	*N*	101	365	"	*C*	483
57	"	*N*	238	170	"	*R*	358	256	1924	*L*	532	368	"	*N*	180
60	"	*P*	816	172	"	*L*	543	257	"	*P*	775	370	923	*A*	613
61	"	*M*	93	173	"	*M*	767	259	"	*L*	652	374	1924	*N*	327
68	"	*P*	611	174	"	*L*	602	261	925	*S*	12	375*a*	1923	*A*	536
71	1922	*B*	402	176	"	*L*	644	265	1923	*B*	191	375*b*	1924	*M*	63
73	1923	*B*	90	177	"	*L*	660	267	"	*L*	184	380	"	*S*	69
76	1924	*M*	224	178	1922	*P*	286	269	1924	*M*	144	382	1923	*C*	373
77	1925	*L*	70	180	1924	*L*	624	272	"	*L*	696	385	1924	*L*	123
78	1922	*B*	361	183	"	*L*	569	275	"	*S*	132	393	"	*N*	172
82	1924	*N*	24	184	"	*L*	667	277	1923	*P*	592				

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
394	1923	C	561	521b	1923	B	370	636	1924	B	517	754c	1923	L	374
395	1924	N	23	522	"	R	254	637	"	N	155	756	1924	M	212
396	1923	R	214	525a	"	A	464	638	"	B	523	759	"	L	657
397	1924	L	168	525b	1924	R	47	639	"	R	123	761	"	M	145
398	"	L	90	527	1923	A	77	641a	"	M	351	763	"	O	52
401	1923	C	365	529	1924	L	132	641b	"	L	675	764	1923	B	409
405	1924	B	516	533	1923	C	552	642	"	M	391	765	1924	A	225
407	"	C	97	534	1924	O	60	644	"	M	338	766	1923	C	567
408	"	S	17	535	"	L	116	646	1923	R	161	767a	1924	M	118
413	1923	C	335	549	1923	B	371	647	1924	M	387	767b	1923	C	569
417	1924	C	104	550	"	L	593	649	1923	R	216	769	1924	M	186
424	1923	C	401	551	"	B	379	650	"	A	473	770	1923	L	368
425	1924	R	17	553	"	L	585	651	"	C	403	772	"	N	322
429	"	C	114	555	"	B	304	652	"	A	483	774	1924	O	157
430	1923	C	717	556	"	A	485	653	1924	M	730	778	"	S	124
431a	1924	C	229	557	1924	B	39	654	1923	C	594	781	1923	M	497
431b	"	R	213	559	1923	B	382	655	1924	N	68	785	1924	R	161
432	"	C	192	561	1924	R	65	657	"	S	89	786	"	M	225
433	1923	B	51	562	1923	O	161	659	1923	B	383	788	"	R	134
441	"	R	208	564	1924	R	63	660	1924	S	91	789	"	M	326
442	"	B	60	566	1923	O	163	665	"	R	83	791	"	R	161
444	"	C	361	568	"	A	476	668	1923	N	330	793	"	M	307
445	1924	L	129	571	1924	R	85	669	1924	R	88	794	"	R	119
448	1923	C	362	572	1923	A	469	670	"	M	161	798	"	M	354
449	"	R	196	573	1924	R	67	672	"	R	101	802	"	R	68
451	1924	N	257	575	1923	R	247	677	1923	R	195	805	"	M	223
452	"	P	700	577	"	C	506	679	1924	R	2	807	"	R	141
455	1923	C	572	578	1924	B	520	689	1923	L	342	809	"	M	709
458	"	R	163	579	1923	C	513	691	1924	O	341	819	"	R	136
467	1924	M	57	582	"	L	356	692	1923	L	336	811	"	M	231
473	1923	A	456	583	"	C	516	693	1924	R	35	812	1923	R	205
474	"	L	584	585	"	A	452	695	"	M	373	813	1924	M	396
475	"	R	202	586	"	C	505	697	"	R	23	814	1923	R	271
478	"	B	407	588	1924	R	61	698	1923	L	333	816	1924	R	131
479	"	R	185	589	1923	L	352	700	1924	R	31	817	"	R	209
481	"	C	369	591	1925	B	27	702	1923	L	337	819	1923	L	389
482	1924	R	2	592	1923	L	353	705	"	R	268	821	1924	R	165
492	1923	C	370	594	"	P C	167	708	1924	M	478	824	1923	L	391
493	"	R	226	597	"	R	22	709	"	R	22	826	1922	A	335
494a	"	C	377	598	"	C	575	710	1923	L	344	827	1924	R	113
494b	"	R	257	600	"	R	252	711	1924	R	9	829	"	M	230
496	1924	L	362	603	"	C	578	716	1923	L	385	830	"	R	98
499	1923	C	535	604	1924	L	565	719	1924	R	169	833	1923	M	684
500	"	O	162	605	"	L	115	721	"	M	25	835	1924	R	46
501	1924	L	166	607	1923	B	432	729	"	R	86	836	"	M	114
502	1925	M	50	612	"	R	239	730	"	M	480	838	"	R	71
503	1924	O	348	615	1924	N	111	733	1923	L	363	840	"	M	278
504	1923	R	199	617	1923	R	237	738	1924	P	793	841	"	R	42
507	"	A	463	618	"	A	15	739	"	S	57	843	"	M	485
508	"	R	222	620	"	R	218	742	1923	L	362	844	1923	L	394
510	1924	C	528	624b	"	R	232	747	"	L	371	845	1924	M	189
511	"	C	118	629	1925	B	209	749	"	A	159	852	1923	L	392
516	1923	A	463	632	1924	N	188	750	1924	M	367	853	"	M	659
517	1924	C	138	634	"	N	158	751	1923	L	369	855	1924	R	155
519	1923	R	193	635a	"	B	522	752	1924	M	158	861	"	M	209
521a	"	A	464	635a	1924	N	124	754a	1922	B	79				

76 Indian Cases=All India Reporter (*Concld.*)

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
862	1923	*A*	140	910	1923	*P C*	211	971	1923	*A*	480	1025	1923	*A*	322
863	1922	*U B*	18	915	1922	*C*	459	975*a*	1925	*C*	263	1028	"	*L*	415
865	1924	*R*	87	916	1923	*L*	404	977	1924	*M*	147	1030	1924	*M*	228
866	1923	*L*	394	917	1924	*C*	128	980	1923	*N*	317	1030	1925	*C*	80
867	1924	*R*	171	921	1923	*L*	401	983	"	*A*	161	1031	1923	*R*	119
868	1925	*L*	48	922	1923	*P C*	160	985	"	*C*	99	1031	1925	*C*	104
869*a*	1924	*R*	160	927	1924	*P*	273	988	1924	*P*	164	1032	1924	*A*	130
869*b*	1923	*M*	688	929	1923	*P C*	171	990	1925	*C*	139	1033	1924	*O*	342
870	"	*O*	8	932	1922	*A*	445	991	1923	*P*	337	1034	1923	*L*	419
871	"	*L*	333	937	1923	*B*	471	992	1924	*M*	312	1035	1922	*B*	368
872	"	*M*	595	940	"	*P*	386	996	1923	*P C*	122	1037	1923	*L*	332
873	1924	*M*	265	946	"	*L*	406	1003	1924	*M*	513	1039	"	*L*	329
881	1922	*M*	341	948	"	*P C*	29	1006	"	*M*	358	1039	"	*R*	132
884	"	*N*	60	950	1924	*P*	65	1007	1923	*L*	411	1040	"	*A*	609
886	1924	*M*	271	953	1925	*S*	42	1009	1925	*C*	158	1041	"	*M*	227
891	1923	*L*	339	961	1924	*C*	182	1010	1923	*L*	412	1041	1924	*B*	112
893	1924	*M*	378	962	"	*M*	539	1011	1924	*M*	336	1042	"	*M*	316
894	"	*M*	296	963*a*	1923	*C*	577	1013	1923	*L*	413	1049	1923	*P*	303
895	1923	*B*	30	963*b*	"	*L*	340	1014	1924	*B*	33	1050	1924	*O*	244
896	1924	*M*	359	965	1924	*C*	196	1017	1925	*O*	45	1050	1923	*A*	361
897	1923	*B*	79	966*a*	1923	*M*	133	1018	1924	*M*	297	1052	1923	*C*	558
901	1922	*C*	479	969	"	*A*	192	1021	1925	*O*	64	1053	1925	*O*	47
905	1924	*M*	279	970	"	*L*	408	1023	1924	*B*	98	1055	"	*O*	35

77 Indian Cases=All India Reporter

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1923	*P*	564	79	1924	*O*	203	150	1924	*B*	41	230	1924	*A*	186
10	"	*C*	699	82	"	*A*	302	154	1923	*C*	417	237	"	*N*	311
12	1924	*M*	100	83	1923	*B*	177	157	1925	*P*	201	238	"	*O*	345
14	1923	*P*	483	91	"	*A*	79	171	1924	*B*	166	240	"	*M*	669
17	1922	*B*	321	92	"	*B*	467	174	1923	*L*	268	241	"	*B*	65
26	1923	*C*	681	97	1922	*A*	519	176	1922	*L*	101	247	"	*B*	187
27	"	*A*	520	100	1923	*P C*	194	177	1924	*P*	42	251	1922	*L*	235
29	"	*C*	714	107	1922	*A*	411	181	1925	*C*	146	252	1924	*P*	185
30	1924	*A*	54	109	1924	*O*	234	183	1924	*A*	299	253	1923	*C*	619
32	"	*P*	88	112	1922	*A*	438	186	"	*B*	47	257	1922	*L*	193
35	"	*A*	305	113	"	*A*	410	188	"	*A*	194	258	1923	*R*	113
37	"	"	225	115	1923	*O*	272	189	"	*B*	51	260	1924	*P*	39
39	"	*M*	205	116*a*	1922	*L*	58	192	"	*O*	32	261	1923	*C*	25
41	"	*N*	14	116*b*	1923	*O*	271	193	"	*C*	216	264	1924	*M*	111
44	1922	*P C*	226	117	1922	*B*	347	206	"	*B*	100	266	"	*B*	232
46	1924	*N*	101	120	1924	*O*	142	207	1923	*L*	116	274	1922	*L*	57
48	"	*M*	310	122	1923	*A*	7	209	"	*P*	576	275	1924	*B*	119
50	1923	*N*	334	125	1924	*O*	40	214	1924	*M*	308	289	"	*N*	294
52	1922	*A*	510	129	1922	*A*	481	216	"	*M*	208	290	"	*M*	587
53	1923	*R*	110	131	1924	*B*	154	219	1922	*B*	420	292	"	*N*	281
56	"	*A*	123	133	1922	*A*	504	222	"	*L*	39	295	1925	*O*	44
57	1924	*A*	40	137	1923	*B*	417	224	1924	*B*	140	297	1924	*M*	657
63	1923	*P C*	156	139	1922	*A*	336	225	1923	*L*	11	302	1925	*O*	49
66	1924	*A*	20	140	1923	*A*	140	226	1924	*B*	105	303	1924	*M*	729
70	"	*M*	236	141	"	*P C*	95	230	1923	*L*	267	305	"	*B*	150
73	"	*P*	235	144	1924	*A*	81	231	"	*C*	647	306	1922	*O*	200
77	1923	*C*	568	146	1923	*B*	478	233	1922	*L*	443	307	1924	*B*	178
78	1924	*O*	243	148	1924	*M*	365	234	1924	*N*	313				

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
310	1923	*O*	12.	446	1923	*L*	509	562	1924	*D*	152	750	1923	*PC*	146
327	1922	*L*	185	447	"	*L*	513	564	1923	*C*	82	756	"	*A*	554
329	1924	*O*	120	448	1924	*A*	143	568	1924	*M*	201	758	1924	*M*	177
333	..	*L*	141	449	1923	*B*	294	572	1923	*A*	586	760	1923	*A*	559
334	1922	*P*	213	450	"	*C*	485	576	"	*C*	382	761*a*	1922	*L B*	40
336*a*	"	*L*	290	463	"	*B*	296	580	1924	*M*	438	761*b*	1924	*N*	55
336*b*	1924	*B*	170	464	1924	*M*	281	585	"	*L*	251	762	1923	*L*	564
337	"	*O*	208	471	1923	*L*	505	587	"	*P*	267	764*a*	1924	*M*	512
338	"	*L*	148	472	"	*B*	293	588	"	*L*	427	764*b*	1923	*L*	565
340	"	*O*	147	473	"	*L*	497	589	"	*P*	259	765	1924	*M*	483
342	"	*B*	58	474	..	*B*	299	592	1922	*O*	249	766	"	*M*	582
346	"	*O*	140	475	"	*L*	502	593	1924	*N*	301	768	1923	*O*	158
347	"	*M*	252	476	"	*B*	368	600	1923	*L*	537	771	"	*O*	159
352	"	*O*	124	477*a*	"	*L*	504	602	"	*L*	539	772	1924	*M*	474
353	"	*O*	141	477*b*	"	*B*	302	604	1925	*S*	34	774	1923	*C*	582
355	1923	*PC*	184	478	"	*L*	506	606	1924	*L*	110	776	"	*O*	160
357	1924	*P*	160	479	"	*B*	364	607	1922	*P*	498	777	1924	*M*	491
358	"	*O*	149	481	1925	*M*	106	609	1924	*A*	150	781	"	*M*	646
362	"	*R*	139	489	1923	*L*	516	611	"	*P*	27	783	"	*C*	456
364	1923	*C*	615	490	1924	*L*	663	616	1923	*L*	14	787	"	*M*	565
368	1924	*R*	129	492	1922	*P*	249	618	1924	*O*	125	790	1923	*C*	501
372	"	*R*	48	495	1924	*L*	670	619	1923	*C*	599	795	1924	*C*	233
378	1923	*P*	589	497	1923	*B*	268	620	1924	*N*	42	798	1922	*N*	227
380	1924	*R*	135	500*a*	"	*P*	575	621	1923	*M*	574	801	1924	*P*	635
382*a*	1922	*A*	319	500*b*	"	*B*	271	623	"	*C*	553	805	"	*N*	297
382*b*	1924	*R*	144	502*a*	1922	*A*	337	628	1924	*M*	608	806	"	*A*	461
383	"	*O*	118	502*b*	1923	*B*	359	630	1923	*A*	489	807	"	*P*	717
385	"	*R*	148	504	1924	*M*	449	631	1924	*M*	137	809	"	*L*	623
391	"	*O*	115	506	1923	*B*	361	638	1923	*A*	527	810	"	*P*	695
393	"	*R*	127	509	"	*L*	534	640	1924	*N*	1	811	"	*N*	287
398	"	*L*	107	511	1924	*M*	567	654	1923	*B*	321	812	"	*C*	153
400	1923	*R*	55	515	1922	*B*	147	689	1924	*PC*	50	814	1925	*S*	193
401	1924	*P*	113	516	1923	*L*	522	694	"	*A*	82	815	1924	*A*	437
402	"	*R*	165	517	1922	*A*	496	695	1923	*O*	45	816	1923	*C*	662
403	"	*P*	220	518	1923	*L*	530	697	1922	*O*	15	817	1924	*L*	591
408	1923	*R*	22	520	1922	*C*	163	699	1924	*B*	182	818	"	*A*	316
409	1924	*L*	65	521	"	*B*	156	701	..	*O*	30	819*a*	"	*A*	592
412	1923	*B*	281	522	..	*C*	180	702	"	*B*	157	819*b*	1923	*C*	517
416	"	*L*	513	523	1923	*L*	548	705	1923	*A*	563	823	1924	*L*	616
417	1922	*P*	209	527	1922	*A*	497	707	1924	*C*	197	824	"	*A*	694
418	1924	*M*	549	529	1924	*C*	334	718	"	*P*	69	825	"	*N*	162
419	1923	*R*	81	532	1923	*L*	551	721	1924	*O*	338	826	"	*A*	314
421	"	*L*	686	534	1922	*C*	181	723	"	*L*	585	827	"	*N*	120
422	1924	*M*	540	535	1923	*L*	553	727	1925	*S*	177	828	"	*A*	694
423	1923	*L*	622	538	"	*L*	559	728	1924	*O*	331	829	"	*A*	381
425*a*	1925	*C*	107	539	1922	*A*	278	730	"	*M*	487	833	1923	*C*	708
425*b*	1924	*L*	17	541	"	*L*	390	733	1925	*O*	51	839	"	*O*	113
429	"	*R*	173	542	1924	*M*	360	734	1924	*P*	283	848	1922	*P*	569
433	"	*L*	109	547	"	*M*	611	736	1925	*S*	177	851	1924	*P*	537
434*a*	1922	*L*	403	548	"	*B*	260	737	1924	*O*	44	862	1923	*A*	169
434*b*	1923	*L*	512	551	"	*C*	647	738	"	*N*	112	864	1924	*R*	132
435	1922	*A*	292	553*a*	1924	*O*	254	740	"	*M*	286	865	"	*P*	354
436	1923	*B*	242	553*b*	1922	*L*	323	747	"	*B*	180	866	"	*R*	153
439	1925	*O*	295	556	"	*C*	148	749*a*	"	*O*	48	868	"	*C*	117
443	1923	*L*	508	558	1923	*C*	57	749*b*	"	*B*	228	869	"	*L*	225
444	1924	*M*	584	561	1922	*L*	451	753	"	*A*	294				

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I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.		
871	1923	*A*	600	903	1923	*L*	665	942	1922	*M*	405	1003	1923	*L*	617
872	"	*L*	695	905	"	*R*	23	943	1923	*B*	3	1005	1922	*P*	210
874	"	*O*	252	906	"	*L*	668	949	1924	*C*	473	1008	1924	*L*	630
875	"	*A*	575	907	1924	*C*	327	952	1923	*B*	148	1009	1922	*PC*	384
877	1924	*R*	89	908	1923	*L*	684	955	"	*A*	170	1015	1924	*C*	513
878	1923	*B*	449	909	"	*A*	173	957	1922	*P*	507	1020	1923	*A*	122
879	"	*L*	671	910	"	*C*	691	961	1923	*A*	91	1021	"	*R*	215
881	1924	*A*	696	911	"	*N*	107	981	"	*L*	687	1022	"	*C*	603
882	1924	*R*	172	913	"	*A*	167	982	1922	*LB*	40	1025	"	*C*	585
883	1923	*A*	610	914	"	*B*	464	983	1923	*L*	691	1028	1925	*O*	75
885	1924	*R*	100	917	1922	*M*	404	984	"	*L*	666	1030	1923	*C*	669
886	1923	*A*	595	918	1923	*A*	165	986	1924	*C*	329	1032	1924	*A*	613
887	1924	*R*	172	920	"	*R*	84	987	1923	*L*	689	1035	1923	*C*	138
888	"	*A*	435	922	1922	*M*	390	989	"	*L*	92	1037	"	*N*	17
889	"	*R*	212	923	"	*LB*	37	990	"	*C*	674	1039	1922	*P*	387
890	"	*A*	207	926	1923	*L*	685	991	"	*C*	707	1041	1923	*PC*	59
892	1923	*C*	725	927	"	*A*	14	993	1922	*C*	409	1044	1922	*C*	222
894	"	*L*	692	929	1922	*P*	429	995	1924	*B*	184	1046	1924	*A*	8
895	"	*L*	683	933	1923	*A*	161	997	1922	*L*	410	1047	1923	*C*	149
897	"	*S*	50	940	1923	*A*	163	1001	"	*A*	273	1048	"	*PC*	1
901*a*	"	*B*	480	941	1922	*B*	11	1002	"	*O*	228	1054	"	*P*	28
901*b*	"	*L*	674									1055	1924	*B*	155

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I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.		
1	1925	*M*	169	71	1925	*S*	54	1236	1924	*O*	405	168	1925	*M*	347
3	"	*L*	160	72	1924	*N*	325	125	1925	*C*	570	169	"	*C*	404
6	"	*M*	402	74	"	*L*	457	126	"	*C*	81	171	1924	*A*	743
7	1924	*C*	124	76	"	*M*	489	127	1924	*N*	401	173	"	*M*	696
11	1923	*L*	669	77	"	*N*	393	132	1925	*C*	509	174	1925	*C*	537
12	1925	*M*	158	79	"	*N*	159	133	1924	*M*	557	176	1924	*M*	537
14	1924	*C*	905	80	1925	*L*	180	134	"	*N*	383	177	1923	*N*	301
15	1925	*L*	96	82	1924	*M*	521	136	"	*N*	81	180	1924	*A*	362
16	"	*M*	328	84	1925	*S*	102	138	1925	*O*	260	183	1925	*L*	110
19	"	*P*	308	85	1924	*O*	319	139	"	*C*	338	185	1924	*N*	330
22	"	*L*	208	87	"	*L*	709	140	1924	*N*	361	188	"	*P*	795
23	"	*S*	207	90	"	*M*	472	142	"	*M*	592	189	1925	*A*	29
34	1924	*N*	358	91	"	*M*	523	145	"	*A*	318	190	1924	*A*	836
36	1925	*L*	150	95	"	*N*	344	147	"	*N*	323	191	1925	*A*	190
37	1924	*M*	741	96	"	*O*	408	148	"	*L*	685	193	1924	*A*	450
45	1925	*C*	545	98	"	*M*	561	149	1925	*C*	515	194	"	*N*	204
47*a*	1924	*N*	108	103	1923	*L*	648	150	1924	*O*	415	198	"	*N*	263
47*b*	1925	*O*	270	104	1924	*N*	103	152	"	*L*	492	200	1925	*P*	1
49	"	*S*	153	106	1925	*O*	267	154	"	*N*	279	214*a*	1924	*A*	729
52	1924	*M*	749	108	"	*M*	325	156	"	*M*	605	214*b*	1925	*N*	197
57	1925	*L*	152	112	1924	*N*	160	157	"	*O*	389	215	"	*A*	203
58	1924	*N*	373	113	1925	*L*	183	159	"	*L*	682	218	"	*N*	194
60	1925	*S*	89	115	"	*A*	200	161	"	*L*	480	219	1924	*C*	1042
61	1923	*L*	643	117	"	*C*	574	162	1925	*C*	521	221	"	*A*	709
63	1924	*N*	372	118*a*	1924	*N*	408	163	1924	*L*	681	222	"	*A*	370
64	"	*M*	786	118*b*	"	*M*	611	164	"	*A*	433	224*a*	"	*P*	712
65	1925	*O*	161	120	"	*M*	446	165	"	*M*	616	224*b*	"	*P*	714
68	"	*L*	172	121	1925	*O*	61	166	"	*A*	520	225	"	*A*	313
70	1924	*M*	603	123*a*	1924	*L*	675	167	"	*A*	529				

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I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
226	1924	A	474	371	1924	A	537	467	1924	P	706	601	1924	N	98
228	"	P	709	372	"	N	41	469	1925	P	251	604	1925	L	191
230	1925	S	186	373	"	A	910	472	"	P	161	605	1924	P	443
232	"	O	235	374	1925	L	92	474	1924	P	449	608	1925	L	175
234	"	N	9	376	1924	N	89	476	"	P	515	609	"	P	148
236	"	C	299	378	"	O	400	478	1925	P	298	613	1924	P	772
238	"	M	301	380	"	N	360	479	"	P	304	614a	1925	L	189
239	1924	N	97	382	"	A	534	480	1924	A	831	614b	1924	P	484
241	1925	L	233	383	1925	L	196	482	"	P	716	617	"	L	484
243	1924	A	365	384	1924	N	398	483	"	P	81	619	"	A	465
248	"	N	220	387	"	O	330	489	"	P	517	620	"	P	491
249	1925	S	195	389	"	A	908	492	1925	P	194	625	"	M	614
256	1924	O	252	390	"	N	345	495	"	P	16	626	"	A	493
260	"	N	200	391	"	A	561	497	1924	C	900	628	1925	A	194
265	"	A	373	393	"	O	218	503	1925	C	524	630	1924	P	353
266	"	L	137	398	"	N	363	505	1924	M	612	631	"	A	811
270	"	N	216	402	"	A	355	506	"	A	392	632	1925	N	193
274	1925	M	161	404	"	L	455	508	"	A	925	633	1924	A	862
277	"	A	193	407	"	M	541	510	1925	N	195	636	1925	N	120
278	1924	N	284	408a	"	P	771	511	1924	P	572	637	1924	A	873
279	1925	S	193	408b	"	L	487	514	"	C	623	639	"	N	378
282	"	O	241	409	1925	S	98	517	1925	L	199	642	"	A	415
284	1924	N	319	411	"	O	39	519	1924	A	449	649	1925	A	28
285	"	L	681	413	"	C	518	521	1925	S	150	650	1924	N	337
287	"	M	589	414	1924	M	493	525	1924	C	898	651	1925	A	199
291	"	N	185	415	"	P	596	530	1925	P	193	652	"	A	205
294	"	M	461	416	"	A	446	531	1924	A	841	653	1924	P	594
296	"	M	476	417	"	L	473	532	1925	N	51	654	"	A	933
299	1925	M	360	418	1925	S	136	534	"	S	35	656	"	N	229
303	1924	P	594	426	1924	O	417	535	"	N	63	659	"	A	603
306	"	P	711	427	1925	C	512	536	1924	M	458	661	"	C	839
307	"	P	525	429	1924	A	307	539	"	A	710	666	"	A	856
308	"	N	211	431	1925	N	196	540	"	O	367	668	1925	C	485
310	"	P	800	432	1924	S	149	542	"	N	129	677	1924	A	867
312	1925	P	37	434	"	A	691	547	1925	O	11	679	"	C	855
315	1924	P	803	435	"	M	489	557	"	C	481	701	"	P	593
316	"	A	434	436	1925	P	145	559	1924	A	422	703	"	N	169
317	1925	C	286	437	"	N	66	561	"	L	724	705a	1925	N	30
320	"	O	202	438	"	S	67	563	"	A	394	705b	1924	P	551
326	1924	A	909	441	1924	A	414	564	"	M	607	710	1925	C	557
330	"	N	367	443	"	L	657	565	1925	P	326	711	1924	N	348
335	1925	C	475	444	1925	L	78	570	1924	L	474	717	1925	L	108
338	1924	N	208	445a	"	L	174	572	"	N	153	719	1924	C	654
340	1925	O	278	445b	1924	N	220	573	"	M	692	722	1925	N	32
343	1924	N	132	446	1925	N	48	574	"	O	360	723	1924	P	586
345	"	A	557	447	"	L	170	579	1925	L	195	727	1925	C	552
346	"	L	539	449	"	C	306	580	1924	N	309	730	1924	N	381
347	"	N	335	450	"	L	227	582	"	A	480	731	"	C	801
349	1925	A	198	451	"	L	231	583	1925	S	49	735	1925	S	62
350	1924	L	471	453	1924	L	545	586	1924	A	42	736	1924	N	154
353	1925	C	530	457	1925	P	288	587	"	A	542	738	1925	O	132
357	1924	N	84	460	1924	L	448	588	"	P	580				
358	"	A	503	461	1925	N	174	593	"	P	245	742	"	C	276
359	"	O	321	463	"	P	291	595	1925	A	241	743	1924	N	249
367	"	N	83	465	1924	P	604	596	"	S	112	744	1925	C	498
368	1925	L	105	466	1925	P	336	599	"	C	538	746	1924	N	293

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I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
747	1924	*C*	783	840	1925	*S*	175	927	1924	*M*	625	1007	1924	*M*	649
749	"	*P*	420	849	1924	*A*	814	930	1925	*S*	171	1008	"	*A*	609
763	1925	*L*	186	850	1925	*O*	16	932	1924	*L*	698	1011	"	*N*	146
764	"	*O*	220	853	1924	*N*	419	934	"	*A*	514	101	"	*M*	511
766	1924	*P*	576	857	"	*M*	830	938	"	*M*	701	1014	"	*A*	218
771	1925	*L*	98	859	1925	*C*	166	940	1925	*S*	130	1015	"	*N*	156
772	1924	*N*	285	862	"	*N*	61	944	"	*P*	198	1016	1925	*A*	39
774	1925	*P*	291	863	1924	*A*	429	946	1924	*N*	354	1017	1924	*M*	529
776	"	*O*	225	865	"	*N*	375	950	1925	*M*	212	1018	"	*A*	357
780	1924	*N*	133	868	1925	*S*	164	953	"	*S*	60	102	"	*A*	746
782	1925	*L*	90	872	1924	*N*	256	955	1924	*A*	837	1023	"	*A*	444
783	1924	*P*	474	873	"	*A*	838	956	"	*N*	408	1024	1925	*A*	36
794*a*	1924	*P*	528	874	"	*C*	715	958	"	*C*	633	1025	1924	*N*	162
794*b*	1925	*S*	93	877	"	*A*	840	959	1925	*L*	101	1026	"	*A*	834
796	1924	*P*	459	878	"	*O*	397	960	"	*N*	178	1029	1925	*L*	97
802	1925	*L*	242	881*a*	"	*A*	723	962	"	*C*	324	1030	1924	*A*	696
802*b*	"	*C*	471	881*b*	1925	*C*	561	966	1924	*N*	290	103	"	*N*	165
804	1924	*O*	425	885	1924	*P*	613	968	1924	*M*	623	1033	1925	*A*	130
806	1925	*S*	86	887	"	*N*	240	969	"	*N*	417	1033	"	*L*	76
807	1924	*P*	547	889	"	*P*	446	971	1925	*L*	77	1035	1924	*A*	427
811	"	*N*	136	893	"	*A*	254	972	"	*S*	74	1037	"	*A*	360
814	"	*A*	813	895	"	*O*	266	977	1924	*A*	995	1039	1925	*S*	126
816	1925	*C*	184	901	1925	*C*	357	978	1925	*S*	178	1041	1924	*A*	431
817	"	*S*	26	904	1924	*A*	227	981	1924	*N*	387	1042	1925	*L*	86
828	1924	*A*	730												
829	"	*M*	527	905	"	*S*	141	987	"	*N*	142	1043	1924	*A*	842
831	"	*M*	687	908	"	*C*	814	991*a*	"	*L*	662	104	"	*N*	148
832	"	*M*	638	911	"	*A*	513	991*b*	"	*N*	308	04	"	*A*	815
834	"	*N*	264	919	"	*P*	806	993	1925	*S*	51	1050	1925	*A*	202
836	1925	*C*	564	921	"	*M*	601	995	"	*L*	17	1051	"	*M*	221
840	1924	*N*	73	923	1925	*P*	118	993	1924	*N*	27	105	1924	*N*	227
844	"	*A*	724	926	"	*L*	84	1001	1925	*C*	21	1055	"	*M*	711

79 Indian Cases = All India Reporter.

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1924	*P*	71	55	1925	*L*	64	92	1924	*M*	731	45	1925	*L*	67
2	"	*M*	542	56	1924	*P*	667	104	1925	*O*	9	144	1924	*M*	494
5	"	*P*	104	57	1925	*L*	176	106	1924	*A*	726	61	"	*N*	275
8	"	*L*	69	59	"	*S*	36	107	1925	*L*	87	165	1925	*L*	79
9	1923	*P*	265	66	1924	*N*	147	109	1924	*M*	597	68	1924	*N*	292
19	1924	*N*	315	67	"	*L*	725	13	"	*N*	295	170	1925	*L*	245
21	"	*O*	40	69	"	*A*	929	115	1925	*L*	184	171	"	*L*	130
22	"	*N*	16	74	"	*L*	548	117	1924	*N*	222	173	1924	*M*	254
24	1925	*L*	98	77*a*	1923	*A*	281	120	"	*L*	432	74	"	*A*	384
25	1924	*A*	160	77*b*	"	*C*	659	23	"	*N*	298	78	1923	*L*	89
26	"	*P*	64	81	1924	*L*	562	125	1925	*L*	54	179	"	*B*	173
30	1925	*S*	13	82	1923	*A*	146	126	1924	*C*	725	182	"	*L*	647
35	1924	*O*	378	84	1925	*L*	99	132	1925	*L*	57	83	1924	*P*	240
39	1925	*L*	5	85	1923	*A*	203	134	1924	*A*	477	185	"	*L*	1a2
40	1923	*M*	35	86	1925	*L*	59	137	1925	*M*	134	86	1923	*B*	429
41	1924	*A*	274	87	1924	*A*	119	138	"	*L*	174	188	"	*P*	597
43	1925	*L*	5	89	1925	*S*	140	139	1924	*N*	79	191	"	*C*	704
44	1924	*M*	578	91	"	*L*	34	140	1925	*L*	178	192	"	*B*	456
48	"	*N*	338					142	"	*N*	1				

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
194	1924	*L*	239	325	1924	*M*	309	444	1925	*L*	258	566	1924	*A*	678
197	1923	*B*	459	326	"	*C*	827	445	1924	*S*	13	567*a*	1925	*C*	399
199	"	*P*	324	327	"	*A*	735	448	"	*L*	68	567*b*	1924	*A*	669
200	"	*B*	428	330	1925	*C*	555	450	"	*A*	103	569	1925	*C*	461
201	1924	*L*	181	332	1924	*A*	161	451	"	*L*	570	571	1923	*P*	325
208*a*	1923	*B*	419	333	"	*C*	239	452	1923	*P C*	178	572	1924	*L*	97
208*b*	1924	*L*	169	334	"	*A*	692	461	1924	*L*	640	575	"	*A*	740
210	1923	*B*	39	335	1923	*P*	585	462	1923	*L*	252	576	"	*O*	189
211	"	*L*	41	338	1924	*A*	713	464	"	*A*	214	577	"	*A*	229
213	1924	*A*	559	340	"	*M*	185	466	1925	*S*	167	578	"	*O*	186
214	"	*O*	62	341	"	*A*	177	470	1923	*A*	255	579*a*	1923	*L*	601
217	"	*A*	448	343	"	*M*	621	471	1924	*N*	269	579*b*	1924	*R*	102
218	1923	*C*	609	345	"	*A*	682	473	1923	*A*	220	584	"	*A*	371
220	"	*A*	187	346	"	*C*	877	482	1924	*R*	177	586	1925	*C*	420
221	"	*L*	138	349	"	*A*	816	484	1925	*L*	180	587	1924	*A*	479
225	"	*A*	185	351	1925	*C*	510	485	1924	*R*	200	588	"	*C*	988
226	"	*B*	441	353	1924	*A*	911	486	1923	*A*	115	590	"	*A*	937
232	"	*A*	191	354	1925	*C*	541	488	1925	*L*	82	592	"	*P C*	36
233	"	*L*	47	358	1924	*A*	597	489*a*	1923	*B*	41	594	"	*P*	346
234	"	*A*	197	360	1925	*C*	435	489*b*	1924	*C*	388	596	"	*N*	173
237	"	*O*	38	363	1924	*A*	376	491*a*	1923	*B*	42	598	"	*P*	698
238	"	*A*	206	365	1925	*C*	411	492*b*	1924	*C*	384	599	"	*A*	430
242	"	*C*	639	367	1924	*A*	231	494	1923	*L*	172	601	"	*P*	522
244	"	*R*	236	369	1925	*C*	522	495	1924	*A*	390	602	"	*N*	288
245	"	*B*	172	371	"	*A*	244	497	1925	*L*	156	605	"	*A*	263
246	"	*A*	65	372	1924	*M*	119	498	1923	*A*	271	608	"	*M*	455
248	"	*L*	646	376	1925	*S*	112	500	1923	*L*	174	609	"	*N*	385
249	"	*R*	41	381	1924	*A*	173	501	1924	*R*	105	612	"	*A*	375
250	1922	*PC*	317	384	1925	*S*	72	503	1923	*A*	182	614	"	*N*	191
257	1924	*C*	135	389	1924	*A*	731	504*a*	1924	*R*	208	619	"	*M*	833
260	"	*L*	200	393	"	*N*	18	505	"	*R*	163	621	"	*N*	422
271	"	*C*	139	394	1925	*A*	206	506*b*	"	*R*	137	623	1925	*M*	426
273	1923	*R*	40	395	1924	*M*	345	508	1923	*A*	180	625	1924	*N*	318
274	"	*O*	246	400	"	*N*	163	510	1924	*M*	292	626	"	*A*	444
278	"	*R*	44	402	1923	*A*	364	514	"	*A*	461	627	"	*N*	406
280	"	*R*	98	403	1925	*C*	419	517*a*	1923	*B*	393	630	"	*A*	424
281	"	*L*	151	405	1924	*A*	869	517*b*	1924	*A*	379	632	1925	*M*	51
284*a*	"	*R*	98	407	"	*B*	71	520	"	*C*	600	633	1924	*N*	384
284*b*	"	*L*	652	408*a*	1923	*A*	413	532	"	*A*	261	634	"	*A*	391
287	1924	*C*	517	408*b*	1924	*M*	368	535	1925	*S*	95	635	"	*M*	473
291	1923	*R*	265	409	"	*S*	139	538	1924	*A*	719	636	"	*N*	328
296	1924	*A*	916	411	1923	*A*	415	539	1923	*S*	35	639	"	*P*	520
298	"	*C*	251	412	1925	*C*	408	542	"	*A*	181	640	"	*A*	445
303	1923	*A*	261	414	1924	*P*	126	543	"	*L*	532	641	"	*N*	183
305	1924	*C*	337	417	"	*A*	541	545	1924	*O*	304	644	"	*O*	232
308	1923	*A*	171	418	"	*M*	645	546	1922	*L*	396	645	"	*A*	447
309	1924	*C*	383	420	"	*P*	96	547	1925	*O*	283	646	1925	*M*	153
310	"	*A*	178	422	1923	*N*	265	548	1922	*L*	399	648	"	*C*	181
312	"	*C*	345	428	1924	*L*	594	550	1925	*O*	234	651	1924	*M*	324
314	"	*A*	153	429	"	*A*	396	551	1922	*L*	259	654	"	*O*	56
317	1925	*C*	516	432	"	*R*	194	552	1925	*O*	109	658	1925	*M*	137
318	1924	*A*	615	438	"	*A*	86	556	1924	*A*	751	660	1924	*O*	419
319	1925	*C*	500	440	1923	*L*	21	557	1925	*C*	423	662	"	*N*	300
320	1924	*A*	229	441	1924	*R*	45	560	1924	*A*	720	663	"	*O*	306
322	"	*M*	387	442	"	*L*	646	561	1924	*M*	482				
323	"	*A*	682	443	1925	*M*	172	562	"	*A*	180	665	"	*A*	944

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666	1924	O	205	794	1925	P	40	897	1925	P	197	971	1924	P C	137
668	"	N	316	798	1924	M	485	899	1924	M	770	978	1925	C	426
670	1925	L	2	799	"	O	392	900	"	P	696	980	1923	L	660
685	1924	O	230	800	"	M	464	902	"	M	845	982	1924	C	969
687	"	L	738	803	"	A	310	903	1925	N	17	984	1923	L	54
691	1925	O	106	806	"	M	457	907	1924	A	870	986	1925	S	83
693	1924	A	69	808	1923	L	208	908	"	P	694	990	1923	L	56
695	"	O	305	809	1924	M	214	910	1925	M	141	991	1925	C	533
696	"	P	40	812	1923	L	208	911	"	N	62	995	1923	L	634
697	"	O	145	813	"	R	149	913	1924	P	640	997	1924	A	668
704	"	B	317	814	"	L	239	914	1925	S	181	998	1923	L	636
705	"	R	182	815	1924	R	143	916	1924	A	689	1001	1924	A	905
716	1925	O	289	816	"	A	540	917	1925	M	49	1002	1925	N	2
718a	1924	R	192	817	1923	R	138	920	"	S	218	1007	1924	A	919
718b	"	M	832	818a	1924	M	715	922	"	O	74	1008	"	O	394
719	"	R	193	818b	1923	R	250	924	"	C	175	1010	"	A	677
722	"	O	295	825	1924	P C	5	928	1924	M	420	1011	"	M	676
723	"	B	324	841	1922	S	41	940	"	P C	48	1012	"	B	325
724	"	R	181	845	1924	M	828	942	1925	O	92	1017	1924	M	448
725	"	O	255	847	1922	S	18	944	1924	P C	2	1019	"	A	912
729	"	R	221	848	1925	O	34	945	"	A	730	1022	1925	O	73
740	"	L	435	850	1924	M	761	946	"	P C	1	1023	1924	A	536
742	"	R	60	852	"	C	374	947	"	M	721	1024	1925	O	70
743	"	L	452	857	1925	M	171	948	"	P C	3	1025	1924	A	507
744	"	R	45	858	1924	P	605	950	"	O	420	1026	1925	O	24
745	"	C	774	860	"	M	622	951	"	A	920	1029	1924	A	918
747	"	R	81	861	"	A	350	953	"	M	644	1031	1925	O	140
749	"	B	302	869	1925	M	430	954	"	A	921	1033	"	O	291
750	"	R	232	870	"	N	11	955	1925	O	37	1036	1924	A	745
753	"	B	310	874	1924	M	723	957	1923	L	659	1038	"	C	977
755	"	R	145	880	1925	O	77	958	1924	M	796	1041	"	A	573
757	"	C	552	881	"	M	143	960	"	A	744	1042	"	C	761
766	"	R	204	884	1924	N	410	961	"	P C	56	1047	"	A	844
769	"	B	370	886	"	M	787	964	1925	O	42	1048	1922	C	140
779	"	M	210	888	1925	O	28	966	1924	M	595	1049	1924	A	711
780	"	B	313	891	"	M	218	968a	"	O	406	1051	"	O	390
784	"	O	69	893	1924	A	617	968b	"	M	107	1053	"	A	806
				894	"	M	466					1055	1925	O	91

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I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1924	N	425	21	1924	A	800	55	1924	C	895	83	1925	O	253
4	1925	A	8	22	1925	C	482	57	1925	O	257	85	"	M	695
5	"	M	62	25	1924	A	848	59	1924	N	413	87	1924	C	637
6	1924	A	855	26	1925	O	547	62	1925	O	273	92	"	M	431
7	1925	O	269	31	1924	A	902	63	1924	A	881	100	1925	C	513
8	1924	A	906	34	1925	P	59	67	1925	P	140	103	1924	M	673
10	1925	C	332	39	1924	A	794	71	"	O	257	106	"	A	860
12	1924	A	748	40	1925	O	287	72	1924	A	851	108	"	M	411
14	1925	C	497	42	1924	A	802	75a	1925	O	105				
16	1924	A	570	44	1925	C	187	75b	1924	B	102	139	"	M	771
17	1925	O	230	48	"	O	108	79	1925	M	125	141	1925	S	159
19	1924	A	760	49	1924	N	258	81	1924	O	377	147	1924	M	450
20	"	C	990	54	1925	O	112	82	"	M	722	151	"	C	490

I. C.	A.I.R.			I. C.	A.I.R.			I. C.	A.I.R.			I. C.	A.I.R.		
154	1924	*M*	77[illegible]	275	1924	*C*	[illegible]81	413	1924	*A*	388	527	1925	*L*	145
158	"	*PC*	117	278	1925	*M*	188	415	"	*B*	447	529	1924	*B*	349
162	"	*B*	305	279	1924	*C*	92	418	"	*B*	421	530	"	*L*	638
163	"	*M*	530	282	"	*B*	346	419	"	*C*	446	531	"	*B*	306
170	1923	*L*	641	283	1925	*N*	15	422	"	*B*	394	534	"	*L*	538
172	1922	*C*	279	285	"	*O*	71	424	"	*P*	524	536	"	*B*	311
173	1924	*B*	353	286	"	*N*	54	425	"	*B*	395	538	"	*C*	188
177	1923	*L*	607	290*a*	"	*C*	169	426	1925	*C*	299	540	1925	*O*	98
178	"	*B*	395	290*b*	"	*M*	151	427	1924	*B*	449	541	1924	*M*	763
179	1924	*R*	262	292	"	*C*	170	428	1925	*C*	296	543	1925	*O*	250
180	1923	*B*	414	294	1924	*C*	508	430	1924	*B*	390	544	"	*P*	210
181	"	*L*	608	297	1923	*A*	199	432	1925	*C*	257	550	1924	*A*	324
182	"	*B*	386	300	1924	*C*	193	435	1924	*B*	437	554	"	*M*	617
183	1922	*A*	47	303	"	*S*	4	441	1924	*O*	347	556	1925	*O*	107
185	1924	*B*	441	307	"	*C*	159	444	1925	*O*	128	557	1924	*M*	783
187	1922	*P*	222	308	1922	*P*	24	446	"	*A*	5	560	"	*O*	404
189	"	*B*	296	313*a*	1924	*C*	811	447	1924	*O*	34	561	"	*M*	720
192	"	*C*	1	313*b*	1923	*A*	269	453	"	*B*	467	563	"	*P*	582
193	1924	*PC*	125	315	1922	*C*	18	454	1925	*O*	136	567	"	*M*	617
194	1922	*L*	68	316	1924	*L*	486	457	1924	*O*	265	569	1925	*O*	103
195	1923	*C*	622	317	"	*C*	405	458	"	*B*	459	570	1924	*P*	342
197	"	*L*	605	321	"	*L*	468	459	"	*O*	106	571	1925	*M*	56
199	1922	*O*	216	322	"	*N*	71	459*b*	1923	*C*	410	572	1924	*P*	521
200	1923	*C*	663	323	1923	*C*	689	467	1925	*O*	132	573	"	*M*	766
203	1924	*PC*	12[illegible]	324	1924	*L*	459	468	1924	*B*	444	575	1925	*P*	153
205	"	*C*	493	327	1924	*O*	34[illegible]	469	1925	*O*	317	576	1924	*O*	418
208	"	*B*	410	329	"	*L*	465	470	"	*N*	118	577	"	*C*	143
210	"	*C*	487	330	1925	*O*	2[illegible]2	471	1924	*O*	49	579	"	*A*	742
213	"	*O*	193	332	1924	*L*	500	474	"	*B*	468	580	"	*C*	156
228	"	*M*	682	333	"	*O*	273	475	"	*O*	46	582	1925	*O*	182
233	1925	*M*	265	349	1925	*N*	7	477	"	*B*	434	583	"	*S*	63
234	1924	*B*	382	353*a*	1924	*M*	790	480	"	*O*	28	588	1924	*P*	263
235	1923	*L*	630	353*b*	1923	*C*	715	482	"	*B*	472	589	"	*C*	183
237	1924	*B*	392	355*a*	1924	*M*	619	483	"	*O*	307	590	"	*N*	94
238	"	*R*	263	355	1925	*N*	127	485	1923	*C*	182	591	1925	*O*	97
239	"	*B*	383	357	1924	*C*	558	492	1924	*O*	133	592	1924	*A*	593
241	"	*A*	467	362	1925	*N*	65	494	"	*L*	260	596	1925	*S*	51
249	"	*B*	426	363	1924	*M*	453	495	"	*O*	128	598	1924	*C*	212
251	1923	*L*	629	366	"	*L*	571	496	"	*L*	170	600	1925	*O*	113
253	1924	*B*	330	375	1925	*N*	108	498	1923	*C*	445	601	1924	*A*	518
255	"	*R*	260	376	1924	*M*	400	503	1924	*L*	223	602	1925	*O*	178
256	"	*B*	385	377	1923	*P*	517	504	1925	*O*	139	604	1924	*M*	846
257	"	*C*	172	378	1924	*M*	708	506	1924	*L*	564	606	1925	*O*	210
259*a*	"	*B*	368	380	"	*A*	879	507	"	*B*	322	607	"	*N*	104
259*b*	"	*R*	266	381	"	*PC*	143	509	1925	*L*	158	612*a*	"	*O*	189
260	"	*B*	380	388	"	*M*	610	510	1924	*C*	524	612*b*	1924	*C*	173
261	"	*R*	264	389	"	*N*	429	512	"	*B*	360	615	1925	*M*	175
263	"	*R*	398	393	"	*B*	387	513*a*	"	*C*	208	617	"	*O*	148
264	1923	*L*	626	397	"	*M*	713	513*b*	"	*O*	432	618	1924	*M*	811
266*a*	1924	*B*	352	399	1925	*A*	37	515	"	*B*	339	619	1925	*O*	208
266*b*	1923	*L*	628	401	1924	*M*	764	519	"	*L*	479	620	1924	*M*	769
267	1924	*B*	344	403	"	*S*	151	520	"	*B*	350	622	1925	*O*	199
268	1925	*O*	101	405	"	*N*	29	522	"	*L*	464				
269	1924	*B*	507	406	1924	*A*	504	523	"	*B*	381	623	1924	*C*	148
271	1925	*O*	274	409	1925	*A*	40	525	"	*L*	469	626	1925	*N*	185
274	1924	*B*	345	411	1924	*PC*	133	526	"	*B*	318	627	1924	*A*	571

Comparative Tables

80 Indian Cases=All India Reporter (*Concld.*)

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
628*a*	1925	*O*	17	717	1924	*A*	256	800	1924	*O*	438	931	1925	*C*	157
628*b*	1924	*C*	236	720	"	*B*	62	805	"	*C*	657	932	"	*M*	132
631	1925	*O*	143	722	1925	*A*	117	807	"	*PC*	162	933	1924	*A*	905
632	1923	*C*	719	724	"	*M*	357	819	"	*O*	222	935*a*	1925	*M*	433
635	1925	*N*	39	725	"	*A*	144	820	"	*PC*	183	935*b*	"	*A*	133
637	1924	*C*	186	727	"	*L*	167	821	1925	*O*	201	938	1924	*M*	893
639	"	*N*	416	728	"	*A*	42	822	1924	*PC*	186	939	"	*A*	793
641	"	*PC*	106	731	1924	*M*	836	823	"	*P*	513	940	1925	*M*	134
642	1925	*S*	18	732	1925	*A*	49	826*a*	"	*PC*	191	941	"	*A*	53
645	1924	*PC*	109	734	"	*N*	124	826*b*	"	*O*	372	942	1924	*M*	813
648	"	*B*	130	735	1924	*L*	533	827	"	*PC*	144	944	1925	*A*	34
649*a*	1925	*A*	57	736	1925	*N*	121	833	"	*O*	408	946	"	*N*	77
649*b*	1924	*L*	536	737	1924	*A*	605	835	"	*PC*	150	947	"	*A*	123
650	1925	*O*	153	741	"	*L*	462	840	"	*C*	83	949	"	*N*	119
651	1923	*C*	703	743	1925	*A*	68	841		*PC*	156	950	"	*A*	58
652	1924	*P*	343	744	1924	*R*	217	847	1925	*O*	118	953	1924	*L*	439
654	"	*C*	214	745	"	*P*	527	849	1924	*C*	176	955	"	*S*	87
655	1925	*P*	41	746	"	*R*	237	855	1925	*O*	212	956	"	*P*	664
658	1924	*M*	680	748	"	*B*	440	858	"	*C*	335	960	"	*L*	431
661	"	*A*	530	749	"	*R*	219	860	"	*O*	188	965	"	*PC*	113
664	"	*M*	797	752	"	*B*	359	861	"	*C*	318	969	"	*S*	105
667*a*	1925	*O*	150	753	"	*R*	240	862	1924	*B*	399	980	"	*P*	657
667*b*	1924	*P*	673	754	"	*B*	351	874	"	*A*	845	987	1925	*C*	245
674	"	*O*	261	755	"	*C*	620	877	1925	*M*	14	992	"	*M*	379
678	1925	*C*	360	758	"	*B*	420	881	1924	*C*	661	994	1924	*S*	97
679	"	*O*	237	759	"	*R*	235	885	1925	*N*	111	998	"	*L*	444
682	"	*C*	315	761*a*	"	*B*	416	890	1924	*A*	796	1002	"	*S*	101
683	"	*O*	224	761*b*	"	*P*	496	892	"	*M*	887	1006	1922	*A*	321
684	1924	*A*	551	763	"	*B*	417	896	"	*A*	718	1007	1924	*B*	419
690	"	*L*	429	765	"	*L*	58	898	1925	*C*	340	1009	"	*S*	117
692	1925	*O*	171	766	"	*B*	422	899	"	*A*	93	1012	1925	*L*	91
694*a*	1924	*L*	461	769	"	*N*	125	901	"	*P*	139	1013	1924	*PC*	187
694*b*	1925	*O*	163	773	"	*B*	366	902	1924	*A*	859	1017	"	*C*	153
696	1924	*L*	466	775	"	*O*	31	903	1925	*C*	302	1019	"	*PC*	103
698	"	*O*	215	777	"	*PC*	28	905	"	*N*	82	1021	1923	*A*	261
700	"	*L*	490	781	"	*O*	224	914	"	*C*	322	1023	1924	*PC*	175
702	1925	*C*	249	786	1925	*C*	253	916	"	*A*	95	1030	"	*P*	663
705*a*	1924	*L*	470	787	1924	*A*	510	917	"	*C*	305	1031	"	*PC*	88
705*b*	1925	*C*	308	788	"	*PC*	121	918	"	*O*	125	1034	"	*C*	341
706	"	*O*	255	790	"	*C*	874	920	"	*N*	68	1038	"	*PC*	40
708	"	*C*	293	791	"	*PC*	184	925	"	*M*	261	1041	1923	*A*	176
710	"	*P*	145	794	"	*C*	994	926	"	*P*	181	1045	"	*L*	649
712	"	*L*	132	796	"	*O*	165	929	"	*M*	427	1049	1924	*B*	413
716	"	*P*	160	798	"	*C*	658					1053	1925	*M*	421

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I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1924	*A*	692	33*a*	1922	*P*	294	44*a*	1924	*M*	735	564	1923	*L*	160
2	1925	*C*	233	33*b*	"	*P*	227	44*b*	1925	*N*	40	565	"	*A*	86
7	"	*N*	157	34	"	*P*	12	45	"	*P*	158	57	1924	*M*	160
10	1924	*A*	523	35	"	*L*	260	48*a*	1923	*L*	35	58	1925	*O*	179
15	"	*O*	393	39	1925	*L*	149	48*b*	"	*L*	36	59	"	*S*	99
17	"	*C*	424	40	1924	*A*	454	49	1922	*P*	494	60	1924	*M*	229
25	"	*A*	321	41	"	*R*	106	51	1924	*M*	555	61	1923	*C*	619
29	"	*C*	245	42	"	*M*	375	53	1923	*R*	147	64	"	*L*	619
32	1923	*R*	76	43	"	*A*	666	54	1924	*M*	227	67	"	*O*	167

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
72	1924	*M*	389	186	1924	*O*	403	318	1924	*A*	665	535	1925	*P*	17
74	1923	*R*	140	187	1923	*R*	245	319	1923	*C*	668	538	1924	*N*	253
75	"	*R*	143	188	1925	*L*	142	320	1925	*A*	4	540	"	*R*	245
76	"	*L*	88	190	1924	*M*	585	321	1924	*P*	207	544	"	*L*	437
78	1925	*P*	115	191	1923	*A*	545	322	1923	*L*	227	546	"	*R*	244
80	1923	*A*	285	193*a*	1925	*L*	137	324	1924	*P*	203	547	"	*L*	451
82	1924	*P*	564	193*b*	"	*C*	353	325	1923	*L*	222	549	"	*R*	294
100	"	*A*	558	195	"	*L*	153	326	1924	*P*	248	553	"	*C*	812
102	1925	*S*	59	197	"	*S*	71	328	"	*R*	64	555	1922	*L*	263
103	1924	*A*	618	198	"	*L*	135	329	1923	*L*	250	557	1924	*C*	813
106	"	*R*	91	199	1924	*P*	791	331	"	*L*	245	558	"	*A*	192
108	1925	*S*	88	200	1925	*L*	152	333	1924	*O*	311	560	"	*C*	981
111	1923	*R*	139	201	1924	*N*	51	336	1923	*L*	243	561	"	*C*	778
112	1924	*A*	317	203	"	*M*	379	337	1924	*L*	84	562	1925	*O*	53
113	1925	*L*	49	209	1925	*L*	139	342	"	*A*	675	564	1924	*C*	648
116	"	*A*	99	212	1924	*P*	813	343	1925	*C*	248	566	1925	*O*	88
117	1924	*L*	595	215	"	*A*	215	344	"	*L*	166	567	1924	*C*	838
122	1925	*L*	146	217	"	*A*	187	345	1924	*R*	72	568	"	*L*	584
124	1924	*P*	754	218	"	*M*	587	346	1925	*L*	159	569	"	*C*	686
126	1925	*L*	101	219	"	*M*	86	347	1923	*L*	232	570	1925	*O*	100
129	1924	*M*	340	220	"	*C*	476	351	1924	*L*	449	571	1924	*C*	769
134	1925	*S*	90	226	1925	*P*	26	353	"	*C*	257	573	1925	*O*	142
138	"	*L*	131	236	1923	*C*	97	436	"	*A*	602	574	1924	*C*	665
139	"	*A*	245	238	1924	*A*	269	437	1925	*C*	266	576	"	*P C*	202
140*a*	1923	*L*	73	239	1925	*L*	23	438	1924	*A*	338	581	"	*O*	374
140*b*	1924	*A*	201	241	1924	*M*	393	442*a*	"	*P*	783	584	"	*C*	777
141	1923	*R*	145	246	"	*C*	321	442*b*	"	*A*	306	585	1925	*O*	306
142	1924	*A*	319	249	1925	*S*	116	443	"	*R*	256	586	1924	*A*	251
143*a*	"	*A*	188	260	1924	*A*	455	448	"	*N*	114	588	1925	*O*	170
143*b*	1925	*L*	111	261	"	*C*	449	449	1923	*B*	163	589	"	*L*	39
145	1924	*N*	49	264	"	*C*	323	454	1924	*M*	693	591	1924	*N*	88
148	1923	*B*	194	269	"	*A*	451	456	"	*M*	677	592	1925	*O*	173
149	"	*C*	649	271	1923	*L*	40	459	"	*C*	49	593	1924	*C*	771
150	1925	*S*	127	273	1925	*N*	134	463	"	*B*	57	595	"	*A*	190
153	1924	*A*	185	275	1923	*A*	499	464	"	*O*	364	597	"	*O*	367
154*a*	"	*L*	529	276	1925	*N*	101	465	"	*R*	249	598	"	*A*	202
154*b*	1923	*R*	248	279	"	*C*	270	471	"	*C*	578	599	"	*M*	815
157*a*	1925	*C*	154	282	"	*N*	109	484	"	*O*	385	600	"	*A*	195
157*b*	1923	*L*	155	284	1924	*B*	219	489	"	*B*	361	602	1923	*P*	537
158	1924	*P*	789		1925	*B*	112	490	"	*A*	49	604	1924	*A*	220
162	1925	*C*	263	294	1924	*A*	850	491	"	*B*	369	608	"	*B*	321
163	1923	*R*	68	295	1923	*P*	218	493	"	*C*	693	609	"	*A*	197
164	"	*L*	155	296	1922	*B*	454	498	1925	*M*	207	612	"	*A*	211
167	1925	*C*	262	297	1925	*A*	32	501	1924	*C*	562	613*a*	"	*B*	332
168	"	*L*	119	298	1924	*P*	231	505	1925	*N*	115	613*b*	"	*A*	230
170	"	*N*	33	301	1922	*L*	358	508	1924	*A*	772	614	"	*B*	320
171	1924	*A*	413	303	1924	*O*	161	513	1925	*C*	29	615*a*	"	*A*	214
172	1923	*R*	135	305	"	*O*	314	518	1924	*P C*	44	615*b*	"	*A*	224
173	1924	*L*	62	306	"	*B*	335	520	1925	*O*	181	616	"	*B*	337
175	1925	*P*	112	309	1925	*S*	57	522	1924	*C*	481	618	"	*A*	203
176	1924	*A*	296	310	1924	*M*	350	525*a*	"	*A*	800	620	"	*P*	691
177	"	*A*	253	312	"	*M*	384	525*b*	"	*P C*	93	623	"	*M*	668
179	1923	*L*	43	314	"	*O*	64	527	"	*C*	1006	624	"	*L*	502
181	1924	*A*	441	315	"	*A*	664	529	"	*O*	335	626	"	*M*	795
184	1925	*P*	154	316	"	*O*	80	530	1924	*L*	498				
185	1924	*L*	453	317	"	*B*	333	533	1925	*O*	183				

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627	1924	*L*	481	742	1925	*O*	150	873	1925	*N*	130	956	1924	*O*	435
629	"	*A*	411	747	1924	*PC*	198	874	1924	*C*	400	959	"	*B*	432
631	"	*L*	482	750	"	*B*	364	878	1925	*N*	95	960	"	*R*	109
633	"	*P*	500	751	"	*C*	987	881	"	*S*	105	963	1925	*O*	152
637	1925	*L*	121	752	"	*PC*	34	888	"	*N*	36	964	1924	*L*	253
638	1924	*B*	116	754	"	*C*	595	890	1924	*O*	366	969	1925	*O*	135
640	"	*A*	492	758	1925	*A*	78	891	1925	*N*	78	970	1924	*R*	207
641	"	*C*	452	759	1923	*S*	38	894	"	*M*	64	971	1925	*O*	144
643	"	*N*	105	763	1924	*C*	731	897	"	*N*	123	972	1924	*B*	70
647	"	*O*	296	766	"	*N*	86	999	"	*O*	62	973	1925	*O*	138
648*b*	"	*O*	404	768	"	*C*	592	901	"	*N*	37	974	1924	*C*	95
649	"	*L*	582	771	1925	*M*	80	903	1924	*N*	121	975	1925	*O*	130
650	1925	*O*	108	776	1924	*B*	141	904	1925	*C*	268	976	"	*N*	147
651*a*	1924	*N*	87	779	1925	*M*	17	905	"	*O*	149	985*a*	"	*O*	109
651*b*	"	*O*	434	782	1924	*S*	25	906	1924	*C*	389	985*b*	1924	*R*	178
664	"	*N*	139	785	1925	*M*	39	908	"	*M*	799	986	1925	*O*	158
667	"	*C*	523	788	1924	*C*	687	909	"	*C*	392	992	1924	*A*	675
669	"	*P*	629	794	1925	*P*	152	911	1925	*O*	89	993	"	*C*	704
673	"	*B*	172	796	1924	*L*	734	912	1924	*C*	230	994	"	*P*	488
675	"	*C*	394	800	"	*C*	643	913	1925	*P*	279	999	1925	*C*	98
676	"	*P*	608	802	"	*O*	368	915	"	*C*	339	1001	"	*N*	52
679	"	*B*	294	803	"	*C*	705	917	1924	*O*	250	1004	"	*C*	65
680	"	*C*	420	808	1925	*O*	69	919	"	*C*	986	1006	"	*M*	57
684	"	*B*	169	810	1924	*C*	502	920	"	*M*	808	1008	1924	*C*	644
686	"	*L*	513	817	"	*M*	805	922	1925	*C*	149	1009	1925	*N*	160
702	"	*P*	487	820	"	*C*	618	926	1924	*B*	303	1013	"	*O*	154
705	"	*A*	438	823	1925	*P*	167	928	1925	*C*	186	1017	"	*C*	430
708	"	*P*	781	824	1924	*C*	809	930	1924	*R*	168	1018	1924	*B*	393
709	"	*C*	616	826	"	*L*	456	931	"	*C*	980	1019	1925	*N*	66
711	"	*A*	539	827	"	*C*	713	933	1925	*N*	142	1021	"	*M*	139
712	"	*C*	701	829	"	*C*	908	936	"	*C*	191	1024	1924	*S*	60
715	"	*A*	320	833	"	*M*	812	937	1924	*A*	565	1025	1925	*C*	77
716	1925	*N*	50	834	1925	*S*	144	939	"	*C*	848	1029	"	*A*	130
717*a*	1924	*A*	209	841	"	*M*	126	940*a*	1925	*O*	110	1029	"	*C*	164
717*b*	"	*L*	733	843	1924	*B*	99	940*b*	1924	*C*	231	1031	"	*M*	303
719*a*	"	*A*	666	844*a*	"	*M*	817	942	1925	*O*	130	1033	"	*O*	55
719*b*	"	*O*	399	844*b*	"	*B*	89	943	1924	*C*	714	1035	1924	*P*	769
720	"	*A*	78	846	"	*C*	789	945	"	*R*	179	1038	1925	*A*	131
721	"	*C*	733	847	"	*N*	250	947	"	*B*	347	1039	"	*N*	34
732	"	*M*	793	850	"	*C*	1024	948	"	*L*	454	1041	"	*A*	213
734	"	*C*	485	851	"	*A*	818	949*a*	"	*O*	295	1043	"	*C*	294
737	1925	*A*	67	853	"	*C*	868	949*b*	1925	*C*	238	1045	1924	*P*	755
738	1924	*C*	872	857	"	*R*	214	951*a*	1924	*O*	402	1048	"	*C*	1025
740*a*	1925	*L*	88	867	"	*C*	806	951*b*	"	*B*	334	1052	"	*B*	114
740*b*	1925	*O*	318	870	1925	*A*	51	953	"	*O*	411	1052	"	*P*	558
741	"	*A*	72	870*b*	1924	*C*	847	955	"	*L*	262	1056	"	*PC*	232

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1	1924	*A*	707	16	1925	*A*	788	27	1923	*B*	205	42	1924	*P*	767
2	1925	*N*	160	17	"	*M*	02	31	1925	*C*	272	45	1925	*N*	136
3	1924	*C*	1036	21	1925	*A*	71	33	"	*O*	65	49*a*	"	*M*	183
5	"	*A*	939	22	"	*C*	155	36	1924	*A*	569	49*b*	"	*O*	52
10	1925	*O*	56	25	1924	*A*	591	37	1925	*O*	50	50*a*	1924	*P*	563
14	1924	*M*	849	26	1925	*A*	141	39	1924	*R*	241	50*b*	1925	*C*	160

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
52	1924	B	365	167	1924	A	778	307	1925	A	54	425	1925	M	155
53	1925	O	167	169	1925	L	157	309	"	C	288	427	1924	R	275
54	1924	A	781	170	1924	A	777	312	1924	A	801	430	"	M	834
57	1925	M	367	172	"	A	765	313	"	A	621	432	1925	N	145
58a	"	O	227	173	1925	L	129	315	1925	C	356	434	"	M	270
58b	1924	B	308	174	1924	A	784	317	"	A	125	435	"	C	254
59	"	S	1	175	"	M	899	318	"	C	316	438	"	M	52
63	1923	L	603	177	1925	N	155	321	"	A	137	443	"	O	211
64	"	L	238	178	"	P	173	322	"	C	351	445	"	M	7
65	1924	A	804	180	"	A	120	324	"	A	69	450	1924	M	865
67	"	M	800	181	1924	P	758	326	"	A	65	452	1925	N	132
68	1922	A	316	182	1925	N	81	327	"	C	334	454	"	M	12
69	1923	C	585	183	"	M	225	328	1924	A	875	457	"	N	98
73a	1925	A	98	184	1924	A	818	330a	1925	C	269	461	"	M	114
73b	"	S	40	190	1925	N	90	330b	"	A	138	464	"	M	401
76	1923	C	427	196	"	A	135	332	"	A	123	465	"	M	1
77	"	N	225	198	1924	M	909	333	"	O	120	471	1924	R	295
78	1924	M	801	201	1925	N	183	340	1924	A	872	472	"	M	896
79	"	P	557	203a	1924	B	301	341	"	C	1051	473	"	R	291
80	"	A	752	203b	1925	L	165	344	1925	A	47	476	"	A	768
81	1923	S	25	204	"	P	228	345	1924	C	1070	478	"	R	307
89	1924	A	567	219	"	A	103	347	"	A	865	479	1923	L	621
90	1923	C	608	226	1924	PC	65	348	"	C	190	480a	"	P	297
91	"	L	645	234	1925	L	144	350	1925	A	59	480b	"	L	458
92	1924	O	382	235	"	C	235	351	1924	A	574	481	1924	M	854
94	"	C	837	238	1924	A	785	352	"	R	282	482	1925	N	189
96	"	L	611	240	1925	C	354	353	"	B	492	483	"	M	810
99	1925	C	194	243a	"	L	136	356	"	C	956	484	"	O	189
102	"	M	21	243b	1924	A	897	359	"	B	511	485	1924	M	893
104	1924	C	1071	250	"	R	284	361	1925	L	148	486	1925	L	113
105	1925	N	58	251	"	A	678	362	1924	B	484	487	"	M	184
107	1924	M	842	255	1925	C	276	364	"	A	766	488	1924	M	902
109	1925	C	1	257	"	A	73	365	"	B	485	489	1925	N	73
122	"	O	209	261	"	C	192	366	"	A	616	490	1924	M	855
123	1924	M	844	262	"	M	364	367	"	P	804	492	"	M	883
124	"	B	139	263	"	P	55	369	1925	C	26	495	1925	N	140
126	1925	N	125	266	1924	C	1018	372	1924	A	527	497	1924	M	906
128	"	N	108	272	"	R	289	374	1925	C	48	499	"	M	877
129	1924	L	609	274	1925	P	155	381	1924	R	278	502	"	P	258
131	"	C	893	277	"	L	168	382	1925	C	178	504	1925	M	127
134	1923	A	599	278	1924	C	63	385	"	A	119	505	1924	P	387
135	1924	O	369	279a	1925	L	142	386	1924	C	850	507	"	C	408
137	"	C	985	279b	"	O	200	391	"	M	818	510	"	P	438
139	"	A	101	280	"	L	137	392	"	C	1046	513	1923	A	460
141	1925	M	136	282	"	P	250	395	"	M	818	516a	"	N	139
142	"	N	74	283	"	M	245	396	"	C	907	516b	1924	A	892
145	1924	C	960	284	1924	P	764	399	"	M	736				
149	"	M	816	285	"	A	770	405	"	C	982	522	1923	L	467
151	1925	S	70	288	"	R	293	406	1925	O	114	526	1924	A	753
152a	1924	O	448	289	1925	A	63	411	1924	C	1047	533	"	B	174
152b	1925	S	75	290	"	C	267	414	"	M	825	536	1925	M	46
154a	1924	O	371	292a	1924	A	761	416	"	C	794	541	"	N	41
154b	1925	S	57	292b	"	C	953	418	"	R	274	545a	1924	O	425
156	1924	P	388	296	1925	A	100	419	"	C	1033	545b	"	C	18
163	"	C	816	297	1924	C	881	420	1925	M	235	573	1925	N	119
165	1925	P	183	306	1925	A	56	423	1924	R	279	574	"	L	16

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I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
577	1924	*B*	273	691	1925	*O*	190	791	1924	*B*	115	943	1925	*M*	351
582	"	*A*	526	702	1924	*R*	348	793	1925	*M*	318	945	1924	*M*	779
583	1925	*O*	127	703	"	*C*	1004	794	1924	*PC*	206	946	"	*PC*	213
584	1924	*M*	838	705	"	*A*	267	796	"	*B*	161	948	"	*M*	901
585	1925	*O*	189	707	"	*L*	727	802	"	*R*	319	949	1925	*C*	370
586	"	*N*	19	709	1923	*B*	262	803	1923	*P*	149	952	1924	*M*	860
588*a*	"	*L*	131	710	1924	*L*	729	804	1924	*PC*	221	953	1925	*C*	465
588*b*	"	*M*	230	712	"	*R*	320	809	1925	*M*	356	956	1924	*M*	904
592	1923	*A*	440	715	1925	*N*	172	810	"	*O*	239	958	1925	*C*	417
593	1924	*B*	231	717	"	*P*	322	812	1924	*R*	336	960	1924	*M*	780
594	"	*A*	915	718	"	*S*	184	813	1925	*F*	47	962	"	*PC*	247
596	1925	*L*	126	721*a*	1924	*R*	346	814	1924	*R*	351	964	1925	*C*	431
597	"	*M*	291	721*b*	"	*M*	918	815	1925	*N*	179	966	1924	*PC*	209
598	"	*L*	116	723	"	*R*	333	816	1924	*R*	360	970	1925	*C*	389
600	1924	*P*	773	727	1925	*N*	166	817	"	*PC*	60	973	1924	*R*	273
603	1925	*L*	65	733	"	*M*	135	821	1925	*R*	40	974	1925	*C*	452
604	"	*A*	66	734	"	*N*	186	822	"	*C*	469	977	1923	*B*	372
605	1924	*L*	156	736	1924	*A*	473	824	1924	*R*	329	984	1925	*P*	285
606	1923	*R*	242	737	1925	*M*	368	827*a*	1925	*M*	331	987	1923	*L*	299
609	1924	*L*	731	739	"	*S*	216	827*b*	"	*R*	33	988	1925	*P*	297
610	"	*R*	57	742	"	*O*	222	829*a*	"	*C*	395	990	"	*M*	378
614	1925	*L*	1	743	"	*M*	131	829*b*	1924	*R*	290	991	"	*C*	467
616	1923	*N*	91	744	"	*C*	414	830	1925	*C*	392	993	1924	*PC*	228
617	1924	*L*	744	746	1924	*C*	1064	832	"	*O*	243	998	1923	*S*	54
618	1923	*B*	17	747	1925	*O*	30	840	"	*C*	442				
622	1925	*L*	113	751	"	*M*	84	846	"	*M*	129	1001	1925	*C*	401
623	1924	*M*	907	753	"	*L*	237	848	1924	*C*	638	1006	"	*M*	374
626	1925	*L*	24	754	"	*S*	206	850	"	*M*	866	1008	"	*C*	204
627	1924	*A*	690	755	"	*N*	228	851	1925	*C*	470	1011	"	*A*	164
628	1922	*B*	84	760	"	*S*	190	852	1924	*B*	90	1013	"	*C*	383
638	1925	*C*	152	763	1924	*C*	338	861	1925	*S*	201	1014	"	*N*	216
641	1922	*B*	254	766	1925	*O*	90	864	"	*M*	150	1022	1924	*A*	398
643	1923	*A*	511	767*a*	1924	*C*	1035	865	1924	*R*	261	1025	1925	*M*	382
645	"	*N*	283	767*b*	1925	*O*	233	866	1923	*L*	591	1026	"	*A*	121
646	"	*A*	514	769	1924	*C*	828	867	1924	*B*	72	1028	"	*M*	316
649	1925	*C*	328	771	1923	*N*	282	879	1923	*PC*	217	1030	"	*A*	187
651	"	*A*	210	772	"	*A*	71	886	1925	*C*	116	1031	"	*N*	164
653	1924	*P*	679	776	"	*C*	394	926	1924	*M*	863	1032	"	*A*	17
658	"	*R*	349	779	1924	*PC*	216	928	1925	*M*	201	1035	"	*N*	59
659	"	*A*	715	785	1925	*M*	78	929	1924	*M*	782	1037	"	*A*	171
660	1925	*R*	4	787	1923	*R*	127	930	"	*C*	454	1038	"	*N*	190
663	"	*C*	274	788	1925	*M*	343	933	"	*M*	856	1041	"	*N*	175
665	1924	*R*	337	789*a*	1923	*R*	127	934	"	*C*	467	1044	"	*M*	88
683	1925	*C*	284	789*b*	1924	*PC*	221	942	"	*M*	867	1052	"	*N*	207
686	1924	*R*	283	790	1923	*A*	368					1056	"	*N*	204

83 Indian Cases = All India Reporter.

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1925	*A*	142	20	1924	*R*	30	32	1925	*A*	522	56	1925	*M*	321
3*a*	"	*N*	225	21	"	*A*	668	34	1924	*B*	460	59	"	*M*	67
3*b*	1924	*R*	24	22	1925	*N*	203	41	1925	*N*	199	70	1924	*N*	109
5	1925	*A*	1	23	"	*M*	61	45	1924	*B*	454	72	1925	*M*	60
8	"	*N*	164	24	1924	*A*	622	48	"	*P*	713	74	"	*M*	22
10	1924	*R*	73	26	"	*P*	603	49	"	*A*	123	81	"	*P*	310
17	"	*M*	829	27	1925	*A*	24	51	1925	*O*	262	84	"	*M*	112
19	"	*A*	89	30	1924	*B*	470	54	1924	*A*	170	86	"	*N*	240

83 Indian Cases = All India Reporter (*Contd.*)

I. C.	A.I.R.			I. C.	A.I.R.			I. C.	A.I.R.			I. C.	A.I.R.		
89	1925	*M*	233	253	1925	*N*	245	481*b*	1924	*C*	959	627	1924	*O*	248
90	"	*O*	219	256	1924	*R*	271	482	1925	*O*	288	628	"	*C*	614
91	"	*M*	58	257	1925	*N*	236	483	1923	*A*	479	630	1925	*O*	286
92	"	*O*	231	260	1924	*C*	427	484	1925	*O*	290	631	1924	*C*	611
94	1924	*M*	703	263	1925	*N*	201	485	1924	*C*	625	636	1925	*O*	284
98	1925	*L*	204	270	1924	*R*	267	490	"	*O*	373	638	"	*P*	99
101	1924	*P C*	75	273	1925	*C*	34	491	"	*C*	1031	650	1924	*A*	563
110	1925	*C*	67	288	1922	*A*	338	495	"	*C*	975	651	"	*P*	553
122	1924	*M*	903	290	1923	*P*	231	497	1923	*L*	172	654	"	*A*	684
124	"	*P*	761	297	1924	*A*	826	498	1924	*A*	453	657	"	*M*	760
127	1925	*M*	370	300	"	*C*	567	499	1923	*L*	662	658	"	*A*	718
128	"	*C*	83	308	1925	*L*	250	500	1924	*C*	698	659	1925	*O*	277
130	1924	*M*	897	312	"	*M*	30	503	"	*A*	566	661	1924	*C*	911
132	1925	*R*	111	319	1924	*C*	636	504	"	*C*	718	663	1925	*O*	281
133*a*	"	*A*	218	320	1925	*N*	233	508	1923	*L*	42	664	1924	*A*	667
133*b*	"	*M*	359	323	"	*A*	214	509	"	*A*	277	665	"	*P*	689
135	"	*S*	153	324	1924	*M*	716	522	"	*R*	41	668	"	*R*	115
138	"	*M*	365	329	"	*R*	201	523	"	*O*	167	673*a*	"	*O*	396
139	"	*M*	425	332	"	*L*	530	528	1924	*C*	776	673*b*	"	*P*	758
140	"	*M*	86	334	"	*R*	212	529	"	*C*	1010	677	"	*C*	639
142	"	*A*	206	336	"	*C*	880	531	"	*P C*	95	679	1925	*P*	48
144	1924	*C*	1069	337	1925	*S*	204	536	"	*M*	577	683	"	*O*	144
145	"	*B*	521	338	1924	*R*	331	538	1923	*L*	594	687	1924	*A*	624
147	1925	*A*	19	340	1925	*O*	228	539	1924	*S*	29				
151	1924	*C*	1056	342	1924	*B*	385	543*a*	1923	*L*	484	688	1925	*O*	294
155	"	*B*	495	343	1925	*M*	123	543*b*	1924	*S*	27	689	1924	*P*	797
162	1925	*N*	49	345	1923	*P*	228	546	"	*R*	297	692	"	*A*	763
163	"	*A*	26	346	1925	*C*	494	548*a*	"	*M*	602	693	"	*P*	787
165	1924	*M*	707	349	"	*M*	375	548*b*	"	*S*	23	695	"	*A*	568
167	1925	*A*	237	350	1924	*A*	265	550	"	*R*	323	696	1925	*L*	171
169	1924	*C*	660	353	"	*S*	75	556	1923	*C*	438	699	1924	*A*	533
170	1925	*PC*	89	360*a*	"	*C*	849	557	1924	*R*	309	701	1925	*P*	329
171	1923	*L*	462	368	"	*C*	629	563	"	*O*	326	702*a*	1924	*M*	615
172	1925	*N*	129	370	1925	*B*	44	566	"	*R*	314	702*b*	"	*S*	33
174	1924	*M*	662	376	1924	*C*	598	568	"	*C*	875	705	"	*A*	701
180	"	*L*	495	379	"	*B*	515	569	"	*R*	269	708	"	*S*	61
182	"	*L*	505	380	"	*P C*	200	572	"	*P*	633	711	"	*A*	676
188	1925	*A*	189	382	"	*O*	390	576	"	*R*	352	712	1923	*L*	493
190	1924	*L*	531	384	"	*C*	1005	577	1925	*P*	187	714	1924	*A*	670
192	1925	*P*	319	385	"	*P*	454	580	1924	*C*	545	718	"	*O*	433
193	"	*O*	168	390	"	*A*	400	589	"	*O*	334	719	"	*A*	762
196	1924	*M*	550	403	"	*A*	341	591	"	*C*	780	721	1923	*L*	488
202	1925	*A*	30	413	"	*P*	465	593	"	*R*	317	723	1924	*N*	243
203	1924	*P*	669	417	1923	*A*	20	597	"	*C*	631	726	1923	*L*	10
204	"	*A*	795	418	1924	*P C*	126	599	"	*P*	506	727	"	*L*	663
205	"	*P*	402	424	"	*C*	645	601	1923	*A*	30	730	1924	*A*	528
220	"	*C*	830	426	"	*R*	298	602	1924	*C*	649	730*b*	1925	*P*	330
227	1925	*A*	211	430	"	*C*	589	603	1925	*P*	189	736	1924	*A*	664
229	1924	*C*	792	433	"	*R*	302	606	1924	*C*	722	737	"	*A*	706
231	1925	*A*	246	438	"	*C*	633	610	"	*O*	315	738	"	*N*	427
233	1924	*C*	744	440	"	*R*	308	611	"	*C*	651	740	"	*A*	522
239	1925	*N*	211	442	"	*C*	574	616	"	*B*	457	741	"	*P*	560
245	"	*A*	50	446	"	*C*	913	618	"	*A*	575	745	1923	*A*	202
246	"	*N*	225	478	"	*P*	234	622	"	*B*	514	747	1924	*P*	67
249	"	*A*	16	479	"	*N*	96	623	"	*P*	451	751	1923	*L*	259
251	1924	*A*	476	481*a*	1925	*O*	298	625	"	*C*	634	752	1925	*N*	249

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I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
754	1924	*A*	740	850	1924	*O*	337	911	1924	*C*	1034	997	1924	*A*	209
757	"	*C*	240	853	"	*M*	366	913	"	*M*	509	999	"	*M*	670
766	"	*A*	704	854	"	*O*	302	920	"	*P*	670	1003	"	*M*	862
768	1923	*L*	491	856	1923	*B*	305	923	"	*A*	495	1004	"	*A*	214
769	1925	*M*	228	869	1924	*O*	384	931	1925	*C*	197	1005	"	*M*	873
771	1923	*A*	260	870	1925	*S*	25	932	1924	*B*	429	1006	1925	*B*	26
772	1924	*P*	524	871	"	*P*	30	934	"	*C*	796	1007	1924	*M*	895
773	1923	*L*	452	873	1924	*C*	854	939	"	*O*	329	1007	"	*B*	510
774	"	*S*	33	875	"	*A*	843	941	"	*C*	964	1009	"	*M*	913
776	"	*L*	8	876	1925	*C*	478	946	1923	*N*	144	1017	"	*L*	541
778	1924	*O*	413	877	1924	*P*	559	948	1924	*C*	991	1019	"	*O*	423
780	"	*A*	175	878	"	*A*	747	951	"	*P*	624	1022	"	*M*	650
782*a*	"	*B*	512	880	"	*A*	854	955	"	*M*	635	1028	"	*A*	698
782*b*	"	*A*	625	881	1925	*S*	188	958	"	*C*	814	1031	"	*N*	246
807	1923	*L*	475	883*a*	"	*O*	305	960	"	*M*	689	1033	1925	*A*	6
809	1924	*B*	513	883*b*	1924	*S*	120	963	"	*L*	556	1035	1924	*A*	808
810	1923	*L*	471	885	"	*S*	71	965	"	*M*	576	1040	"	*C*	1008
812	1924	*P*	721	892	"	*A*	776	967	"	*A*	686	1042	"	*L*	716
829	1925	*O*	39	893	1925	*S*	21	969	"	*A*	849	1044	1925	*O*	94
832	1924	*A*	297	894	1924	*R*	373	970	"	*C*	940	1047	1924	*L*	713
833	"	*O*	428	898	"	*C*	805	985	"	*M*	571	1052	"	*A*	798
838	"	*A*	708	904	"	*A*	193	993	"	*A*	205	1053	1925	*L*	132
840	"	*O*	353	905	"	*C*	889	995	"	*B*	450	1054	"	*O*	200
848	"	*A*	700	910	"	*A*	212					1055	1924	*O*	381

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I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1925	*L*	163	89	1925	*L*	29	170	1924	*R*	370	257	1923	*L*	16
2	1924	*A*	923	91	"	*C*	140	171	1925	*L*	35	258	1924	*A*	509
4	1925	*C*	197	98	"	*O*	20	172	1924	*R*	350	259	"	*L*	425
5	1924	*A*	876	102	"	*C*	108	173	1925	*O*	304	262	"	*A*	928
6	"	*N*	284	107	1924	*M*	754	174	"	*L*	25	263	1925	*O*	303
8	"	*A*	880	113	1923	*L*	350	175	1924	*R*	363	264	1924	*A*	750
9	"	*C*	871	115	1924	*A*	737	178	1925	*P*	259	265	"	*M*	889
13	"	*A*	309	116	"	*O*	422	199*a*	"	*R*	37	267	1925	*P C*	113
14	"	*C*	818	117	"	*A*	572	199*b*	1924	*N*	411	269	1924	*A*	857
24	1923	*L*	428	118	1925	*M*	233	200	"	*M*	615	270	"	*R*	361
26	1924	*A*	877	119	1924	*C*	786	201	"	*R*	378	272	"	*P*	781
28	"	*C*	1012	122	"	*M*	648	202	1925	*N*	131	274	"	*R*	356
31	"	*C*	668	124	1925	*C*	94	203	1924	*P*	802	276	"	*M*	840
49	1925	*O*	78	128	1924	*M*	791	204	"	*C*	710	278	"	*C*	1054
61	"	*L*	15	130	"	*P*	780	207	1925	*A*	115	279	"	*R*	367
62*b*	1924	*C*	826	131	"	*M*	880	208	1924	*P*	735	281	"	*M*	839
64	"	*A*	676	134	1925	*M*	42	227	1925	*O*	173				
65	1925	*C*	75	137	1923	*S*	42	231	1924	*M*	819	282	1925	*S*	175
67	"	*L*	31	145	1925	*C*	106	237	1925	*O*	307	284*a*	1924	*A*	825
68	"	*C*	23	146	1924	*M*	850	238	1923	*L*	444	284*b*	"	*R*	377
71	1924	*B*	132	147	1925	*C*	114	239	1925	*C*	115	286	"	*P*	807
74*a*	"	*A*	854	148	1924	*M*	600	241	1924	*P*	597	287	1925	*R*	63
74*b*	"	*B*	227	150	1925	*O*	308	245	"	*R*	371	289	1924	*A*	703
75	"	*A*	718	151	"	*P*	137	247	1925	*L*	22	291	1925	*R*	43
77	"	*R*	365	152	"	*O*	301	249*a*	1924	*R*	352	293	"	*P*	57
79	"	*C*	998	154	1924	*C*	864	249*b*	"	*M*	837	295	"	*R*	49
84	"	*A*	538	158	"	*A*	481	250	"	*B*	489	301	"	*M*	76
86	"	*C*	1015	168	1925	*L*	32	254	"	*B*	486	302	"	*R*	55

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
305	192[illegible]	[illegible]	241	434a	1925	A	251	538	1925	A	31[illegible]	683	1924	R	164
314	1924	O	442	439b	"	R	28	539	1925	O	215	684	1923	B	233
320	1925	P	36	441	"	P	329	543	"	C	391	685a	1924	C	1036
321	1923	L	438	444	1924	C	1040	545	"	R	101	685b	"	S	140
322	1924	P	704	446a	1925	L	298	546a	"	L	228	689	1925	C	223
324	"	P	703	446b	"	C	579	546b	"	R	10[illegible]	691	1924	M	789
325a	1925	C	480	449	"	C	576	547	1924	M	768	693a	1925	L	267
325b	1924	M	898	450	924	R	379	548a	1925	R	111	693b	"	C	61
326	"	R	369	451	1925	C	161	548b	1924	A	511	696	1923	F C	62
328	1925	O	306	454	"	O	311	551a	1925	R	135	698	1924	M	559
331	"	R	47	457	"	C	172	551b	1923	N	156	700	1925	C	201
332	"	P	33	458	"	P	191	552	1924	L	581	701	1924	A	456
334	"	P	51	462	"	L	225	554	"	C	497	702	"	A	535
340	"	C	479	463	"	R	198	560	"	A	564	703	"	C	1039
341	"	P	34	464	"	L	85	561	"	P C	233	705	"	C	983
345	1924	C	996	465	"	R	85	565	1923	L	604	706	1925	A	239
346	"	P	665	467	1924	C	1050	567	1924	P C	238	708	"	C	581
348	1925	R	114	468	1925	R	102	576	"	P	633	711a	"	O	110
349	"	R	42	470	"	O	313	580	1925	N	33	711b	"	A	226
350	"	P	193	471a	1924	C	1055	581	1923	C	451	712	"	C	406
351	"	L	289	471b	1925	N	60	583	1924	L	557	714	"	A	230
352	1924	R	382	472	"	O	310	585	1923	A	356	718	"	L	238
353	1925	B	1	473	"	R	26	586	1925	P	216	719	"	A	218
360	1924	A	790	475	1924	C	1065	599	1924	A	579	721	1923	P C	98
361	19[illegible]	P	185	477	1925	L	89	610	"	L	613	724	1925	C	57
363		B	105	478	"	C	346	612	1925	M	227	726	"	L	261
369	"	R	26	483	"	R	118	613	1924	M	484	729	"	O	104
371	"	P	129	484	"	L	83	616	"	M	442	730	"	C	199
372	1924	C	751	486a	"	R	113	620	1925	P	179	732	"	C	224
373	1925	R	7	486b	"	L	229	622	1924	M	469	733	"	L	264
374	"	B	9	487	"	R	84	624	"	A	612	735	"	C	336
377	1923	O	175	488	1924	P	719	625	"	M	776	737	1922	P C	371
378	1925	B	22	490	1925	O	227	626	"	M	544	739	1925	A	241
382	1923	L	146	490[illegible]	"	C	239	629	"	M	547	741	"	C	212
383	1925	P	306	501	"	O	185	631	"	A	834	742	"	O	102
385	"	R	8	505	"	M	37	639a	"	A	460	743	"	C	202
386	"	P	168	507	"	L	206	639b	1923	N	286	744	"	O	111
391	"	R	30	508	1922	B	354	640	1924	A	457	746	"	A	236
394	"	O	272	510	1925	L	222	641	1923	L	601	747	"	C	102
395	"	R	13	511	"	O	258	643	"	B	183	749	1924	A	328
396	"	R	118	513	1924	M	900	646	1924	L	559	786	1925	A	215
397	"	B	12	514	"	R	381	647	1923	L	153	788	1924	M	619
403	1924	C	1044	515	1925	O	266	649	1925	C	85	790	1925	A	221
405	"	P	616	517	"	R	119	652	1923	B	261	792	"	P	155
415	1925	R	117	518	1923	L	402	653	1924	L	654	794	"	A	172
416	"	B	34	519	1925	R	147	654	"	C	1029	796	1924	B	290
420	1924	C	1067	521a	"	A	252	657	1925	C	193	799	"	M	626
421	"	B	524	521b	"	R	94	658	1923	N	201	808	"	B	193
425	"	C	1059	522	1924	A	464	665	1924	M	470	817	"	C	753
429	"	P	776	522b	1925	R	108	667	"	O	426	822	1925	A	184
433	1925	R	12	524	"	L	75	669	"	A	508	824	"	R	155
434	"	C	578	525	1923	C	345	670	1923	N	73	842	1924	M	863
435	"	R	113	532	1924	O	309	672	1924	S	137	846	1925	C	431
436	"	L	595	533	1923	R	117	674	1925	C	218	849	"	C	580
437	"	R	39	535	"	A	574	676	"	L	297	850	1924	M	640
438	"	L	297	536	"	P	236	677	"	P	64				

84 Indian Cases = All India Reporter (*Concld.*)

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
854	1925	*B*	241	912*b*	1925	*M*	292	956	1925	*R*	22	1004	1925	*R*	137
859	1925	*A*	62	917	"	*L*	287	960	"	*L*	223	1005	"	*O*	315
861	1924	*L*	654	918	"	*R*	80	961	"	*R*	87	1007	"	*R*	132
862	1923	*N*	336	921	"	*M*	257	962	1924	*M*	861	1008	1923	*A*	33
863*a*	1925	*L*	279	922	"	*C*	416	964	1925	*R*	38	1009	1925	*R*	143
863*b*	1924	*R*	211	923	"	*L*	239	965	"	*M*	229	1011	"	*O*	93
864	1925	*C*	411	924	"	*R*	58	966	"	*R*	34	1012	"	*R*	83
865	"	*L*	284	926	"	*L*	248	968*a*	1924	*M*	90	1013	1924	*P*	529
866	"	*L*	272	927	"	*L*	63	968*b*	1925	*R*	30	1014	1925	*C*	220
868	"	*M*	403	929	"	*C*	384	970	1924	*M*	859	1017	1924	*A*	723
876	1923	*C*	601	933	"	*R*	153	971	1925	*R*	65	1018	1925	*C*	54
878	1924	*B*	239	935	"	*P C*	59	973	"	*M*	260	102	"	*R*	128
880	1925	*C*	395	937	"	*L*	42	975	1924	*M*	778	1022	1924	*C*	1068
883	"	*P C*	18	938	1924	*B*	246	977	1925	*R*	15	1023	1925	*R*	1
891	1924	*M*	911	939	1925	*R*	112	983	"	*C*	207	1026	"	*M*	185
892	1925	*P C*	27	940	1924	*M*	851	984	"	*R*	140	1027	"	*O*	315
894	"	*R*	104	941	1925	*C*	404	987	"	*R*	61	1028	1924	*P*	36
896	"	*M*	257	942*a*	"	*L*	244	989	"	*C*	208	1029	1925	*M*	418
897	"	*M*	152	942*b*	"	*O*	251	992	"	*R*	95	1031	"	*A*	146
899	"	*P C*	29	944	"	*O*	314	993	"	*P*	125	1041	"	*C*	14
901	"	*L*	55	945	"	*M*	261	995	"	*M*	358	1049	"	*R*	133
902	"	*M*	254	946	"	*L*	246	996	"	*R*	115	1050	"	*L*	289
904	"	*L*	52	947	1924	*B*	357	998	"	*R*	135	1051	1924	*M*	895
905	"	*M*	194	949	1925	*M*	215	999	"	*C*	203	1052	1925	*L*	44
909*a*	"	*L*	212	952	"	*L*	61	1000	1924	*A*	865	1053	1924	*A*	215
909*b*	"	*R*	105	953	1924	*B*	295	1001	1923	*P*	417	1054	1925	*L*	103
912*a*	"	*L*	281												

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1924, LAHORE SECTION with corresponding references of other REPORTS, JOURNALS or PERIODICALS.

N.B.—Column No. 1 *denotes pages of the* ALL INDIA REPORTER, 1924 LAHORE.
Column No. 2 *denotes corresponding references of other* REPORTS JOURNALS *or* PERIODICALS.

1924 Lahore=Other Journals.

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	72	*I C*	411	26	69	*I C*	765	37	4	*I C*	569				
	6	*L L J*	1	27	4	*L*	44	39	5	*L L J*	198				
12	67	*I C*	577		5	*L L J*	257		71	*I C*	783				
	23	*Cr. L J*	417		73	*I C*	927	40	4	*L*	90				
	6	*L L J*	115	28	5	*L L J*	217		71	*I C*	495				
17	4	*L*	382		74	*I C*	688	41	4	*L*	122				
	77	*I C*	425	33	5	*L L J*	187		5	*L L J*	246				
	25	*Cr L J*	377		74	*I C*	682		74	*I C*	451				
21	4	*L*	76	35	5	*L L J*	266	43	4	*L*	140				
	5	*L L J*	238		74	*I C*	489		5	*L L J*	345				
	72	*I C*	765	36	5	*L L J*	269		73	*I C*	655				
25	5	*L L J*	178		74	*I C*	497	44	4	*L*	200				
	69	*I C*	721	37	4	*L*	102		5	*L L J*	236				
26	43	*P L R*	1922		5	*L L J*	253		74	*I C*	484				

1924 Lahore=Other Journals

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
45	4	L	72	30	4	L	120	112	5	L L J	310
	74	I C	146		5	L L J	522		72	I C	385
	5	L L J	482		74	I C	433	115	4	L	354
47	5	L L J	228		24	Cr L J	769		6	L L J	67
	71	I C	52	31	5	L L J	271		76	I C	605
	24	Cr L J	4		71	I C	998	116	4	L	297
48	4	L	164		24	Cr L J	278		76	I C	535
	5	L L J	406	32	4	L	185	123	4	L	271
	73	I C	442		75	I C	520	S B	76	I C	385
49	5	L L J	99		6	L L J	44		25	Cr L J	161
	71	I C	837	33	5	L L J	251		6	L L J	491
52	5	L L J	234		72	I C	91	127	5	L L J	381
	74	I C	473		24	P W R	1923		73	I C	370
53	4	L	109	84	4	L	61	128	5	L L J	81
	74	I C	600		1	P W R Cr	1923	129	5	L L J	394
	5	L L J	569		81	I C	337		76	I C	445
54	4	L	165		25	Cr L J	801	131	4	L	295
	73	I C	106	89	4	L	158		5	L L J	480
55	4	L	1		73	I C	813		73	I C	645
	73	I C	696		24	Cr L J	701	132	5	L LJ	279
	24	Cr L J	664	90	5	L L J	407		76	I C	529
58	4	L	133		76	I C	398	136	5	L L J	289
	73	I C	613		25	Cr L J	174	137	4	L	336
	80	I C	765	91	4	L	66		5	L L J	496
59	5	L L J	124		74	I C	79		78	I C	266
61	5	L L J	121		24	Cr L J	751	141	4	L	208
62	5	L L J	40	93	5	L L J	203		77	I C	333
	81	I C	173		69	I C	495	142	4	L	182
	25	Cr L J	685	97	5	L L J	487		6	L L J	86
65	4	L	367		79	I C	572		75	I C	456
	6	L L J	25	99	4	L	12	143	4	L	187
	77	I C	409		73	I C	700		5	L L J	296
68	79	I C	448		24	Cr L J	668		75	I C	528
70	40	P L R	1922	101	4	L	58	144	4	L	198
	69	I C	718		71	I C	596		75	I C	555
71	73	I C	33		24	Cr L J	180	145	4	L	233
72	4	L	7	102	4	L	282		6	L L J	97
	71	I C	77		5	L L J	404		75	I C	57
	24	Cr L J	29		73	I C	988	146	4	L	334
73	4	L	10	103	4	L	356		5	L L J	469
	5	L L J	412		6	L L J	82	147	4	L	256
	3	P W R Cr	1923		74	I C	294		5	L L J	509
	73	I C	699	104	4	L	376		73	I C	785
	24	Cr L J	667		75	I C	980	148	4	L	239
74	50	P L R	1922		6	L L J	103		77	I C	338
	69	I C	827		25	Cr L J	68	149	5	L L J	366
75	4	L	49	107	4	L	364		72	I C	480
	3	P W R Cr	1923		77	I C	398	151	4	L	327
	73	I C	937	109	4	L	373		5	L L J	462
	24	Cr L J	713		6	L L J	59		76	I C	91
76	4	L	38		77	I C	433	154	69	I C	578
	73	I C	702		25	Cr L J	385	155	73	I C	665
	24	Cr L J	670	110	5	L L J	377	156	73	I C	892
78	5	L L J	272		77	I C	606		6	L L J	349
	71	I C	700						82	I C	605
	24	Cr L J	236		25	Cr L J	430	157	69	I C	401

1924 Lahore=Other Journals (*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
159	69	*I C*	648	.15	24	*Cr L J*	371	.55	81	*I C*	964
160	69	*I C*	460	216	72	*I C*	513	257(1)	5	*L L J*	520
161	4	*L*	176		24	*Cr L J*	401	257(2)	4	*L*	448
	73	*I C*	658	218	72	*I C*	533		25	*Cr L J*	93
162	4	*L*	179		24	*Cr L J*	421		76	*I C*	29
	75	*I C*	542	221	72	*I C*	484	258	4	*L*	359
	24	*Cr L J*	958	222	73	*I C*	648		25	*Cr L J*	125
163	73	*I C*	1013	223 (1)	71	*I C*	792		76	*I C*	189
166	5	*L L J*	389		24	*Cr L J*	248	260	5	*L L J*	541
	76	*I C*	501	223 (2)	5	*L L J*	546		80	*I C*	494
167	5	*L L J*	375		80	*I C*	503	261	4	*L*	460
	73	*I C*	272	224	72	*I C*	900		25	*Cr L J*	84
	24	*Cr L J*	576	225	4	*L*	445		76	*I C*	20
168	5	*L L J*	417		77	*I C*	869	262	4	*L*	462
	25	*Cr L J*	173	226	73	*I C*	928		25	*Cr L J*	1131
	76	*I C*	397	227	72	*I C*	520		81	*I C*	955
169	4	*L*	428		24	*Cr L J*	408	263(1)	5	*L L J*	449
	79	*I C*	208	228	72	*I C*	527		76	*I C*	147
170	5	*L L J*	543		24	*Cr L J*	415	263(2)	69	*I C*	552
	80	*I C*	494	230	73	*I C*	364	265	69	*I C*	331
172	5	*L L J*	548	231	73	*I C*	820	269	69	*I C*	354
	73	*I C*	911	232	73	*I C*	308	272	69	*I C*	665
173	71	*I C*	814	233 (1)	8	*PWRCr*	1923	273	71	*I C*	801
175	5	*L L J*	446		72	*I C*	381	275	69	*I C*	528
	73	*I C*	881		24	*Cr L J*	381	276	69	*I C*	427
176	72	*I C*	575	233 (2)	73	*I C*	34	278(1)	5	*L L J*	511
177	69	*I C*	491	234	73	*I C*	695		73	*I C*	1
181	4	*L*	408		24	*Cr L J*	663	278(2)	71	*I C*	827
	79	*I C*	201	235	73	*I C*	808	279	69	*I C*	618
187	73	*I C*	583		24	*Cr L J*	696	281(1)	69	*I C*	713
	6	*L L J*	460	238 (1)	73	*I C*	338	281(2)	70	*I C*	349
188 (1)	4	*L*	390		24	*Cr L J*	594	285	69	*I C*	255
	75	*I C*	1028	238 (2)	5	*L L J*	574	286(1)	69	*I C*	379
188 (2)	5	*L L J*	505		73	*I C*	939	286(2)	69	*I C*	859
	73	*I C*	896		24	*Cr L J*	715	289	69	*I C*	538
189	71	*I C*	813	239	4	*L*	423	292	69	*I C*	398
190	69	*I C*	54		79	*I C*	194	293	69	*I C*	671
191	69	*I C*	467	241	5	*L L J*	524	294	69	*I C*	543
192 (1)	4	*L*	432		73	*I C*	932	296	69	*I C*	365
	79	*I C*	185		24	*Cr L J*	708				
192 (2)	26	*P W R*	1923	243	73	*I C*	239	297(1)	69	*I C*	729
	72	*I C*	305	244	73	*I C*	716	297(2)	69	*I C*	526
194	71	*I C*	783	245	73	*I C*	915	298	69	*I C*	554
195	73	*I C*	216	246	73	*I C*	220	300	69	*I C*	705
196 (1)	69	*I C*	418	247	5	*L L J*	429	301	71	*I C*	885
196 (2)	74	*I C*	653		73	*I C*	521	302	5	*L L J*	539
198	72	*I C*	777		24	*Cr L J*	633		73	*I C*	903
200	4	*L*	467	248	73	*I C*	177	303	18	*P W R*	1923
	79	*I C*	260	249 (1)	73	*I C*	642		71	*I C*	568
210	27	*P W R*	1923	249 (2)	73	*I C*	860	304	69	*I C*	239
	72	*I C*	316	251	5	*L L J*	459	306	69	*I C*	772
211	73	*I C*	353		77	*I C*	585	310	69	*I C*	638
213 (1)	72	*I C*	591	252	74	*I C*	534	311	71	*I C*	879
213 (2)	73	*I C*	273		24	*Cr L J*	790		24	*Cr L J*	271
215	9	*PWRCr*	1923	253	4	*L*	451	312	73	*I C*	897
	72	*I C*	371		25	*Cr L J*	1140	313	21	*P W R*	1923

1924 Lahore=Other Journals (*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
313	71	*I C*	572	385	69	*I C*	281	444	80	*I C*	998
314	73	*I C*	125	386	71	*I C*	841	448	5	*L*	54
315	71	*I C*	618	387	69	*I C*	406		78	*I C*	460
316	73	*I C*	387	389	71	*I C*	805	449	5	*L*	20
319	72	*I C*	772	392	73	*I C*	503		81	*I C*	351
321	71	*I C*	201		24	*Cr L J*	615		25	*Cr L J*	815
324	69	*I C*	501	393	71	*I C*	775	450	5	*L*	67
325	69	*I C*	196	394	71	*I C*	823		25	*Cr L J*	1050
328	71	*I C*	826	395	71	*I C*	828		81	*I C*	826
329	5	*L L J*	398	396	71	*I C*	822	451	5	*L*	16
	73	*I C*	461	397	71	*I C*	830		81	*I C*	547
330	74	*I C*	444	398	72	*I C*	392		25	*Cr L J*	931
	24	*Cr L J*	780	400	71	*I C*	160	452	5	*L*	34
331	69	*I C*	403	401	71	*I C*	736		79	*I C*	743
333	69	*I C*	191	402	71	*I C*	820	453	5	*L*	56
335(1)	69	*I C*	520	404	71	*I C*	862		81	*I C*	185
335(2)	69	*I C*	521	405	71	*I C*	817		25	*Cr L J*	697
335(3)	71	*I C*	893	408	69	*I C*	658	454	5	*L*	36
337	72	*I C*	1032	409	24	*Cr L J*	405		25	*Cr L J*	1124
	6	*L L J*	446		72	*I C*	517		81	*I C*	948
339	72	*I C*	424	411	72	*I C*	621	455	6	*L L J*	145
342	72	*I C*	477		24	*Cr L J*	461		78	*I C*	404
344	69	*I C*	470	412	71	*I C*	824		5	*L*	268
347	72	*I C*	977	413	71	*I C*	593	457	5	*L*	134
348	72	*I C*	670		24	*Cr L J*	177		6	*L L J*	35
349	71	*I C*	38	415	69	*I C*	449		78	*I C*	74
350	69	*I C*	506	418	71	*I C*	722	459	6	*L L J*	155
351	71	*I C*	797	420	73	*I C*	269		80	*I C*	324
	24	*Cr L J*	253		24	*Cr L J*	573	461	6	*L L J*	192
352	69	*I C*	558	421	69	*I C*	361		80	*I C*	694
353	69	*I C*	631	423	73	*I C*	457	462	6	*L L J*	183
354	71	*I C*	896	424	74	*I C*	17		80	*I C*	741
355	69	*I C*	445					464	6	*L L J*	93
356	69	*I C*	448	425	5	*L*	288		80	*I C*	522
357	69	*I C*	462	**F B**	6	*L L J*	558	465	6	*L L J*	127
359	73	*I C*	891		84	*I C*	259		80	*I C*	329
360	73	*I C*	766					466	6	*L L J*	187
361	4	*L*	442	427	22	*P W R*	1923		80	*I C*	696
F B	75	*I C*	908		77	*I C*	588	468	6	*L L J*	151
362	5	*L L J*	384	428	14	*P W R*	1923		80	*I C*	321
	76	*I C*	496		71	*I C*	46	469	6	*L L J*	45
364	69	*I C*	577	429	5	*L*	70		80	*I C*	525
365	4	*L*	434		80	*I C*	690	470	6	*L L J*	204
	75	*I C*	938	431	5	*L*	80		80	*I C*	705
367	13	*P W R*	1923		80	*I C*	960	471	6	*L L J*	137
	71	*I C*	45	432	5	*L*	59		78	*I C*	350
368	5	*L L J*	341		79	*I C*	120	473	5	*L*	260
	76	*I C*	10	435	5	*L*	27		6	*L L J*	180
370	69	*I C*	573		79	*I C*	740		78	*I C*	417
374	72	*I C*	433	437	5	*L*	11	474	6	*L L J*	197
377	73	*I C*	764		81	*I C*	544		78	*I C*	570
379	73	*I C*	211		25	*Cr L J*	928	475	73	*I C*	923
380	69	*I C*	650	439	5	*L*	75	476	44	*P L R*	1922
381	69	*I C*	414		80	*I C*	953		70	*I C*	250
382	69	*I C*	415	440	5	*L*	1	479	6	*L L J*	84
384	69	*I C*	516	444	5	*L*	84		80	*I C*	519

1924 Lahore=Other Journals (*Contd.*)

A.I.R.	Other Joarnals			A.I.R.	Other Journals			A.I.R.	Other Journals		
480	6	*L L J*	174	539	78	*I C*	346	591	77	*I C*	817
	78	*I C*	161	540	76	*I C*	157	592	75	*I C*	784
481	6	*L L J*	166	541	5	*L*	263	593	75	*I C*	849
	81	*I C*	627		83	*I C*	1017	594	6	*L L J*	237
	25	*Cr L J*	979	543	76	*I C*	172		79	*I C*	428
482	6	*L L J*	170		6	*L L J*	454	595	5	*L*	239
	81	*I C*	631	544	75	*I C*	927		81	*I C*	117
	25	*Cr L J*	983		6	*L L J*	564		25	*Cr L J*	629
484	6	*L L J*	194	545	5	*L*	218	599	75	*I C*	1055
	78	*I C*	617		78	*I C*	453	600	6	*L L J*	265
486	6	*L L J*	142	548	5	*L*	227		5	*L*	308
	80	*I C*	316		79	*I C*	74	602	76	*I C*	174
487	6	*L L J*	153	552	75	*I C*	779	603	75	*I C*	1020
	78	*I C*	408	553	75	*I C*	995	604	75	*I C*	1039
488	6	*L L J*	176	555	6	*L L J*	268	605	76	*I C*	31
489	6	*L L J*	160	556	5	*L*	274		25	*Cr L J*	95
490	6	*L L J*	200		83	*I C*	963	606	76	*I C*	134
	80	*I C*	700	557	5	*L*	312	608	76	*I C*	254
492	6	*L L J*	130		6	*L L J*	588	609	5	*L*	324
	78	*I C*	152		84	*I C*	583		25	*Cr L J*	1201
493	5	*L*	105	559	5	*L*	301		82	*I C*	129
494	5	*L*	114		26	*Cr L J*	342	611	5	*L*	317
495	5	*L*	109		84	*I C*	646		82	*I C*	96
	83	*I C*	180	561	75	*I C*	934	613	84	*I C*	610
498	5	*L*	140	562	6	*L L J*	221	615	75	*I C*	844
	6	*L L J*	208		79	*I C*	81	616	77	*I C*	823
	81	*I C*	530	564	6	*L L J*	227		25	*Cr L J*	471
	25	*Cr L J*	914		80	*I C*	506		6	*L L J*	572
500	6	*L L J*	133	565	76	*I C*	604	617	76	*I C*	18
	80	*I C*	332	566	76	*I C*	201		25	*Cr L J*	82
502	6	*L L J*	162	567	75	*I C*	101	619	75	*I C*	737
	81	*I C*	624	568	25	*Cr L J*	121	621	76	*I C*	198
	25	*Cr L J*	976					622	76	*I C*	227
504	76	*I C*	1		76	*I C*	185		25	*Cr L J*	131
505	5	*L*	117	569	25	*Cr L J*	119	623	77	*I C*	809
	83	*I C*	182		76	*I C*	183		25	*Cr L J*	457
511	75	*I C*	896	570	6	*L L J*	219		6	*L L J*	571
513	5	*L*	147		79	*I C*	451	624	76	*I C*	180
F B	81	*I C*	686	571	5	*L*	329		25	*Cr L J*	116
529	6	*L L J*	206	F B	6	*L L J*	240	627	76	*I C*	23
	81	*I C*	154		80	*I C*	366		25	*Cr L J*	87
	25	*Cr L J*	666	581	5	*L*	305	628	75	*I C*	608
530	5	*L*	137		26	*Cr L J*	328	629	76	*I C*	285
	83	*I C*	332		84	*I C*	552	630	76	*I C*	25
531	5	*L*	129	582	5	*L*	257		25	*Cr L J*	89
	83	*I C*	190		81	*I C*	649	631	75	*I C*	615
532	76	*I C*	256	583	75	*I C*	858	632	76	*I C*	186
533	6	*L L J*	182						25	*Cr L J*	122
	80	*I C*	735	584	5	*L*	237	633	75	*I C*	428
534	76	*I C*	150		81	*I C*	568	634	75	*I C*	870
536	6	*L L J*	205		6	*L L J*	546	635	76	*I C*	144
	80	*I C*	649	585	25	*Cr L J*	435	636	75	*I C*	818
537	75	*I C*	855		77	*I C*	723	638	6	*L L J*	234
538	6	*L L J*	216	588	6	*L L J*	213		80	*I C*	530
F B	5	*L*	356	589	75	*I C*	747	639	75	*I C*	1040
	80	*I C*	534	591	25	*Cr L J*	465	640	6	*L L J*	230

1924 Lahore=Other Journals (*Concld.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
640	79	*I C*	461	670	25	*Cr L J*	415	707	75	*I C*	1043
641	76	*I C*	35		77	*I C*	495	709	78	*I C*	87
643	75	*I C*	1034	671	75	*I C*	1001	713	5	*L*	509
644	76	*I C*	176	672	25	*Cr L J*	91		6	*L L J*	286
645	75	*I C*	824		76	*I C*	27		83	*I C*	1047
646	6	*L L J*	224	673	75	*I C*	892	716	6	*L L J*	295
	79	*I C*	442	674	76	*I C*	16		83	*I C*	1042
647	75	*I C*	866	675(1)	78	*I C*	123	718(1)	6	*L L J*	318
649	75	*I C*	745	675(2)	25	*Cr L J*	209	718(2)	6	*L L J*	298
650	75	*I C*	1027		76	*I C*	641	719	6	*L L J*	311
651	75	*I C*	848	676	75	*I C*	1029	720	6	*L L J*	271
652	76	*I C*	259	677	75	*I C*	913	722	6	*L L J*	320
654 (1)	6	*L L J*	317	678	25	*Cr L J*	78	724(1)	6	*L L J*	306
	84	*I C*	861		75	*I C*	990	724(2)	78	*I C*	561
654 (2)	6	*L L J*	323	680(1)	25	*Cr L J*	544	725	79	*I C*	67
	26	*Cr L J*	349		77	*I C*	1008	727	6	*L L J*	370
	84	*I C*	653	680(2)	25	*Cr L J*	4		25	*Cr L J*	1347
656	75	*I C*	1056		75	*I C*	692		82	*I C*	707
657(1)	78	*I C*	443	681	78	*I C*	285	729(1)	6	*L L J*	419
657(2)	76	*I C*	759	682	6	*L L J*	567	729(2)	6	*L L J*	375
659	76	*I C*	40		78	*I C*	159		25	*Cr L J*	1350
660	25	*Cr L J*	113	684	78	*I C*	163		82	*I C*	710
	76	*I C*	177	685	6	*L L J*	313	731	6	*L L J*	340
662(1)	78	*I C*	991		78	*I C*	148		82	*I C*	609
662(2)	76	*I C*	139	686	75	*I C*	861	732	6	*L L J*	422
663	25	*Cr L J*	410	688	75	*I C*	945	733	6	*L L J*	575
	77	*I C*	490	689	75	*I C*	674		25	*Cr L J*	1005
666	76	*I C*	14	690	75	*I C*	885		81	*I C*	717
667(1)	25	*Cr L J*	120	692	75	*I C*	903	734	25	*Cr L J*	1020
	76	*I C*	184	695	76	*I C*	206		81	*I C*	796
667(2)	25	*Cr L J*	43	696	76	*I C*	272	738	10	*P W R*	1923
	75	*I C*	731	698	78	*I C*	932		79	*I C*	687
668	75	*I C*	928	699	79	*I C*	8	742	6	*L L J*	424
669	25	*Cr L J*	74	700	75	*I C*	910	744	6	*L L J*	358
	75	*I C*	986	702	75	*I C*	1048		82	*I C*	617

THE

ALL INDIA REPORTER

1924

LAHORE HIGH COURT

✱✱ 1924 LAHORE I

ABDUL RAOOF AND CAMPBELL, JJ.

Abdul Shakur, Proprietor, Delhi House Lahore—Plaintiff—Appellant.

v.

Messrs Lipton and Company, Tea Merchants Calcutta and another—Defendants—Respondents.

F. A. No. 1867 of 1917, D/–27th February, 1923, from the decree of the Senior Sub. J., Lahore, D/– 18th April, 1917.

Malicious Prosecution—Both absence of reasonable and probable cause and malice must be proved—proof of the former alone not sufficient. Burden on plaintiff—Anger-and haste contra indicate malice

To succeed in an action for malicious prosecution the plaintiff must allege and establish both (a) absence of reasonable and probable cause and (b) malice, and must fail altogether if he fails to establish both. Reasonable and probable cause means an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. The malice necessary to be established is not, even malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact; *malus animus* indicating that the party was actuated either by spite or ill will towards any individual or by indirect or improper motives though these may be wholly unconnected with any uncharitable feeling towards anybody.

[P 5 C 1]

In order to show the absence of reasonable and probable cause, there are minor questions which it is necessary to determine, the burden of proving each of those minor questions lies upon the plaintiffs, just asmuch as the burden of proving the whole does. "The test" as to the burden or onus of proof whichever term is used, is simply this; to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the Tribunal will have to say that, if the case stops there it must be decided in a particular manner

P 6 C 1]

If there was an honest belief in the plaintiff's guilt neither anger nor hastiness on the part of the defendant would evidence malice, and anger so far from being a wrong or indirect motive is one of the motives on which the law relies to secure the prosecution of offenders, while hastiness in the defendant's conclusion as to the plaintiff's guilt, although it might account for his coming to a wrong conclusion, does not show the presence of any indirect motive.

[12 C 1]

Abdul Qadir, M. Saleem and Badruddin Kureshi—for Appellant.

Tek Chand, Mehr Chand Mahajan—for Respondents.

Judgment.—This is a first appeal by Abdul Shakur whose suit for damages for malicious prosecution against Lipton and Company, Calcutta, has been dismissed by the Subordinate Judge, Lahore.

The appellant is a general merchant of Lahore, and, up to the 31st December 1914, was under agreement with Liptons' not to sell their tea below certain rates. From the 1st January 1915 he commenced to undersell the other local merchants, who remained bound by the agreement. The result was protests on the part of the other merchants and correspondence between Liptons' and their Lahore Agent, a man named Lajpat Ram, about the best means of pacifying

them. This correspondence shows that Liptons' wished at the same time to raise the prices of their various brands of tea, and that the Lahore merchants in February 1915 accepted an enhancement of two annas per pound tin of the yellow and blue label brand and one anna per tin of the red label brand, bringing the rates at which Liptons' teas were to be sold in Lahore upto Re. 1-4-0, Re. 1-2-0 and 0-14-0 per tin. Meanwhile, a price list issued by the appellant Abdul Shakur on 1st February advertised Liptons' yellow label tea at 0-15-0 per tin, blue label at 0-13-0 per tin and red label at Re. 0-10-0 per tin. As a counter stroke Liptons' advertised by hand-bills, posters and in the press a warning to the public that certain merchants in Lahore were holding old stocks of tea which they were trying to foist on the consumers at reduced rates, and inviting purchasers to insist upon being suplied with tins labelled "Packed in 1915." A considerable number of special labels were sent from Calcutta by Liptons' to Lajpat Ram for the purpose of being affixed to tins which had been received by retail vendors in 1915 and had left the Calcutta warehouse before the system of special labelling had been started there. Simultaneously, according to Mr. Newby, witness, for the defendants in this case, who was Liptons' Calcutta Manager at the time, Lajpat Ram was instructed to invite the Lahore shopkeepers to return the remainder of their 1914 stocks to Calcutta, and to receive fresh tea in exchange. Whether these instructions were actually given or not is a point in dispute, and no letter conveying them has been forthcoming, but it has been proved that tea tinned in Calcutta as far back as March 1914 was labelled in a Lahore shop as packed in 1915.

The next thing that happened was, that tins of Liptons' tea were exposed for sale by Abdul Shakur in his shop labelled :—This was despatched by Messrs, Lipons' Limited, Calcutta, on 22nd December 1914 and received here on 4th January 1915. Guaranteed good. If not good return with the pelative cash memo, and the price raid will be returned."

Lajpat Ram reported this to Liptons and informed them that Abdul Shakur was so labelling tea which he had received from Calcutta in 1914. Liprons' were indignant, expressed their intention of taking legal proceedings against Abdul Shakur, and directed Lajpat Ram to secure as many of Abdul Shakur's labelled tins as possible, and send them down to Calcutta for examination.

Lajpat Ram obtained and sent some tins, the exact number of which has not been elicited. Liptons' consulted their Solicitors in Calcutta, who communicated with Mr. Broadway, Advocate, in Lahore. Lajpat Ram was instructed to see Mr. Broadway and to place at his disposal all his information on the matter. As a result, a complaint was drawn up by Mr. Broadway, charging Abdul Shakur with offences, under Ss. 487, and 488, Indian Penal Code, in that he had affixed the labels described above to tins of tea supplied to him before 22nd December and had sold goods in receptacles bearing false marks. The complaint was presented in Court on the 9th April 1915 by Mr. S. H. Andrews an employee of Liptons', who had been sent up from Calcutta for the purpose and was accompanied by six tins of tea bearing Abdul Shakur's labels, which Mr. Andrews swore in his examination as complainant, had been despatched from the Calcutta Warehouse, four on the 7th October 1914, and two on the 11th December 1914.

It is here necessary to describe the system by which Liptons' employees professed to be able to locate the date of despacth of any tin of tea sent out of their Calcutta Warehouse. Every label encircling the four sides of a square tin is or should be stamped with three perforated and inconspicuous letters, the first of which denotes the week of the month, the second the month and the third the year. This Code is stated to be a secret one, known only to a limited number of persons and to be changed frequently. The Code for 1914 has been revealed in the proceedings of this case, and is as follows: (I. Week) M = Ist Week, N = 2nd week O = 3rd week, P = 4th week, Q = 5th week. The

first week commences on the first of the month irrespective of the day of the week, the second week on the 8th and so on. (2. Months) U-September, V. October W. November X.December. (3. Year) U. 1914. M.X.U. means 1st week December 1914 Q.V.U. means 5th week October. According to Messrs. Newby and Andrews and other witnesses in the employ of Liptons', the tea to be despatched in compliance with an order from an up-country station is freshly tinned and packed on the day on which the order is received. The required quantity is discharged through tubes from the blending rooms upstairs into machines in the basement. The tea is weighed and run into tins by machinery. The tins are closed by hand. The requisite number of labels is stamped with the appropriate Code letters in another machine. The labels are stuck on in yet another machine. The tins are then hand-wrapped in paper and immediately packed in boxes and the boxes are removed to the Railway Station on the same day or the next day. No stock of filled tins or packed boxes is kept for what are termed Railway orders, and thus the firm is able to say with confidence that every tin in a consignment despatched to Lahore, *e. g.*, on the 22nd December 1914, has been filled on that or the preceding day and that the label of each tin will be marked O. X. U. The reason for the system has been stated to be that the Company finds it useful in dealing with complaints to know precisely when a tin of tea has been filled, and this indeed is obvious.

To return to the complaint of Mr. Andrews, which was dealt with by Mr. O' Neil Shaw, Magistrate of the First Class summons was issued to Abdul Shakur, and on the 12th April Mr. Andrews and Counsel for the prosecution and defence were deputed by the Magistrate to visit Abdul Shakur's shop and to bring thence to Court any tin of labelled tea that they might find. They found exposed for sale a certain quantity of Liptons tins which did not bear the offending labels, and 12 labelled tins were produced by Abdul Shakur. On five of these the Code marks were so indistinct that Mr. Andrews could not read them. Of the other seven, five were stated by Mr. Andrews to "belong to the consignment dated 7th Obtober 1914" and the other two "to the consignment of the 11th December 1914." This evidence, by the way, was not strictly accurate. Five of the seven tins are before us, and one of those stated to belong to the consignment of 7th October is marked N. V. U, which means the second week of October 1914, while of the two December tins the first letter on one is very indistinct, and is as likely to be M, first week, as N. second week.

On 25th May 1915 the Magistrate framed a charge against Abdul Shakur under sections 487 and 488, Indian Penal Code, and on the 8th June 1915, the date fixed for the second cross-examination of the witnesses for the prosecution, Abdul Shakur brought to Court ten cases of tea (each case containing 60 one-lb. tins) and said that these were what remained unpacked in his show room out of 25 cases sent to him by Liptons' from Calcutta on 22nd December 1914. Mr. Andrews, under cross-examination, was invited to pick out any cases that appeared to him not to have been tampered with, to open them and to see what was in them. He declined to do so. He admitted that the cases were Liptons' cases and bore their invoice mark. The Magistrate, Mr. O'Neil Shaw, then selected two out of the ten cases and had them opened. He stated later in his judgment, and also as a witness in the present suit, that he was convinced that these two cases had not been opened since they left Calcutta. Mr. Andrews was unable to point to anything about the boxes to indicate that they had been opened previously, but he declared that he was not satisfied that they had not been tampered with. The result of the test was that "most of the tins" in the first case (the figures are not given) were found to be marked O. X. U. (3rd week December 1914) and O. W. U. 3rd week of November 1914) and the marks on five could not be deciphered. In the second case there were three tins with no letters on them, eleven tins

with indistinct letters, three tins marked N. X. U. (2nd week December 1914), three marked O. W. U. (3rd week November 1914), one marked M. X U. (1st week December 1914) and the remaining thirty-nine marked O. X. U. (3rd week December 1914). Thereafter, Abdul Shakur produced as a defence witness, Mr. J. N. Marshall, a former employee of Liptons' at Calcutta, and then travelling agent for Brook Bond and Company, who gave a different description of the packing system at Liptons' to that stated by Mr. Andrews, and said that, after filling and labelling, the tins were stocked in compartments and that, when orders came boxes were packed from these compartments where tins might remain for days or for months. Eventually, on the 27th July 1915, the Magistrate delivered judgment acquitting Abdul Shakur.

On the 28th January 1916 Abdul Shakur brought the present action against Mr. Andrews and Liptons' and Company claiming Rs. 17,000 damages for malicious prosecution. The principal evidence led for the plaintiff consisted of proof that he had paid Rs. 2,100 as Counsel's fees in the criminal case, statements of witnesses to the effect that his health had suffered, and that his reputation had been damaged, statements by other shop-keepers in Lahore whose 1914 tea had been labelled "packed in 1915" by or at the instance of Lajpat Ram, statements by himself and his servants that the labels put on by him correctly described the tins to which they had been affixed, a statement by Mr. Marshall which repeated the description given by the same witness in the criminal trial of Liptons' packing system, a number of documents mostly obtained from Mr. Linch, a defence witness, accountant in Liptons' Calcutta Office, and several tins of tea which had been produced in the criminal case. The chief witnesses for the defendants were Mr. Andrews and other members of Liptons' Calcutta staff, who were examined on commission, namely, Mr. Newby, the ex-manager, who admittedly was responsible for the criminal proceedings taken, Babu Ashutosh Kumar, the despatch clerk, Mr. Wagstaff, the Warehouse Superintendent, Mr. Stewart, the present Manager, and Mr. Linch, the Accountant. Lajpat Ram has not appeared in these proceedings as a witness for either party and his connection with Liptons' is said to have terminated soon after the criminal trial.

The Subordinate Judge, as stated already, dismissed the suit. His categorical findings were ; (*a*) the plaintiff has failed to prove that he had not labelled as despatched by Liptons on 22nd December 1914 and received by him on 4th January 1915 other tea which he had received previously in 1914; (*b*) the tea labelled by him was all of one uniform quality; (*c*) the fact elicited did not establish an offence under S. 487, Indian Penal Code, against the plaintiff; (*d*) the defendants had reasonable and probable cause for believing that the plaintiff had committed an offence; (*e*) the defendants' complaint was not malicious (*f*) if the plaintiff had been entitled to damages both Mr. Andrews and Liptons and Company would have been liable for those damages and a reasonable and proper amount would have been Rs. 5,000.

The plaintiff has appealed to this Court for a decree for Rs. 6,000 damages.

We deem it desirable to state at the outset our view of the Law applicable to the case. The correctness of the Trial Court's finding that the plaintiff-appellant in fact, was not guilty of the offences atributed to him in the complaint has not been contested by the respondents. This leaves the appellant with the obligation of satisfying us that the prosecution was instituted against him without any reasonable and probable cause and with malice. The most notable pronouncement on the questions of what constitutes reasonable and probable cause, and what constituted malice, is that delivered in 1878 by Mr. Justice Hawkins in *Hicks* v. *Faulkner* (1). It has been adopted and applied repeatedly in subsequent decisions both in India and in England, and its correctness is nowhere

(1) [1882] 8 Q.B.D. 167—51 L.J.,Q.B. 268—30 W.R. 545.

disputed in any of the authorities which have been cited before us. After making it clear that to succeed in an action for malicious prosecution the plaintiff must allege and establish both (*a*) absence of reasonable and probable cause and (*b*) malice, and must fail altogether if he fails to establish both. Mr. Justice Hawkins proceeded to define reasonable and probable cause as follows:—

> " .. .. an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of the state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Later on he defined the malice necessary to be established as " ... ... not, even malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact; *malus animus* indicating that the party was actuated either by spite or ill-will towards individual or by indirect or improper motives though these may be wholly unconnected with any uncharitable feeling towards any body.

We have no difficulty in holding that the law is expressed accurately and comprehensively in the above passages. The explanation given in the same judgment of the respective functions of Judge and Jury in applying these rules does not concern us in the present case.

The appeal has been argued before us at considerable length by Mr. Abdul Qadir for the appellant, and by Mr. Tek Chand for the respondents and we have been referred to every detail of a somewhat voluminous record. Certain facts are clear to us. The person responsible for the prosecution of the plaintiff was Mr. Newby the then manager of Liptons' at Calcutta. He was led to take up the question of instituting legal proceedings by report received from Lajpat Ram. The full correspondence between Lajpat Ram and Liptons' Calcutta Office has not been produced, but the letters which have been filed can be read as indicating malice in the sense defined above on the part of Lajpat Ram against Abdul Shakur. The prosecution, however, was in no way the result of the malice of Lajpat Ram. What Mr. Newby acted upon were the four tins of tea, which are admitted to have been purchased at the plaintiff's shop by emissaries of Lajpat Ram, which were labelled 'despatched from Calcutta 22nd December 1914 and received in Lahore 4th January 1915,' and which were stamped with Liptons' secret Code letters for the 1st week of October 1914. Before taking action Mr. Newby consulted his Solicitors and he arranged for the complaint to be drawn up by one of the leading Advocates of Lahore. His motive was in no sense personal spite against the plaintiff, but was a determination to stop the sale by the latter of tea marked with 1914 Code letters as tea received in Lahore in January 1915. His object was to protect what he considered to be the interest of his firm in Lahore, and relied for success upon the secret letter Code system.

The questions then which arise for determination are, firstly, whether the Code system was, in fact, not infallible; secondly, if it is was not infallible whether Mr. Newby did not honestly believe, on reasonable grounds, such as would appeal to an ordinarily prudent man, that the system was at least capable of rendering it impossible for the tea tinned at the beginning of October to be sent to Lahore on the 22nd December, and, thirdly, if there was no such honest belief, whether Mr. Newby can be held to have been actuated by indirect or improper motives, if he launched a prosecution relying upon the system, solely with an eye to the business advantage of his firm with no honest desire to bring to justice a man whom he believed to have broken the law and without heed to the personal consequences entailed upon the individual concerned.

In all these questions the burden of proof is on the plaintiff-appellant. This is made clear in the discussion

by the Court of Appeal in *Abrath* v. *North Eastern Railway Co.* (2) in which it was pointed out that, if in order to show the absence of reasonable and probable cause, there are minor questions which it is necessary to determine the burden of proving each of those minor questions lies upon the plaintiffs, just as much as the burden of proving the whole does. "The test", it was explained by Brown, L.J., "as to the burden or onus of proof, whichever term is used, is simply this; to ask oneself which party will be successful if no evidence is given or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on the parties from moment to moment may reach points at which the Tribunal will have to say that, if the case stops there it must be decided in a particular manner". If no more evidence has been given by the plaintiff in the present case than that Liptons' Code system was not infallible, he would not be entitled to a finding that there was absence of reasonable and probable cause. He had to go further and to prove that they did not take reasonable care to inform themselves of the facts and that they did not honestly believe in the case which they placed before the Magistrate. Having done this and established that the defendants acted without reasonable and probable cause, he had to go further still in order to obtain a decree, and to prove also [to borrow the words used by Cave, J. in his summing up to the Jury in *Abrath* v. *North Eastern Railway Co* (2)] that the defendants in what they did were actuated by malice. that is to say, were actuated by some motive other than an honest desire to bring a man, whom they believed to have offended against the criminal law, to justice.

The plaintiff has succeeded in proving that the defendants do not work according to a system which enables them to say positively the date within a few days on which any tin of their tea was filled, packed and despatched from their Calcutta Warehouse Several instances of tins being sent off without any Code letters on them or with letters which cannot be read have been proved. These show that if there is supervision of the packing operations, which are described as being carried out by coolies, that supervision is not effective. It has been admitted by the defendant's witnesses that in the same room in which cases for "Railway orders" are packed there are shelves on which is kept a stock of 2,000 or 5,000 filled tins for compliance with local orders or miscellaneous orders (*i. e.*, orders for boxes of mixed kinds of tea or of tea and other articles such as jam, coffee etc.). It is true that the witnesses say that no tin is allowed to remain on these shelves for more than a week after being filled. but the evidence given does not satisfy us that adequate precautions to this end are prescribed. The plaintiff has proved, further, that his consignments from Liptons' in the last three months 1914 were four and were despatched on 30th September, 7th October, 12th December and 22nd December. A tin found in his shop on 12th April 1915 was code marked 2nd week October 1914, and this, if received by him direct from Liptons' (and there is nothing to indicate the contrary) must have been packed in the consignment of 12th December.

Again, there is Mr. O'Neil Shaw's evidence that two boxes which showed no signs of having been opened since they were first packed contained tins marked 3rd week November 1914 and 3rd week December 1914. It was elicited, too, from a book produced by Ashutosh Kumar, Liptons' despatch clerk, that 95 cases were despatched on 3rd January 1917 in fulfilment of 43 orders which had been received on various dates from 16th December 1916 to 1st January 1917. This fact contradicts the declarations of this same witness and of other witnesses for the defendant that tea ordered is tinned, packed and despatched on the day of arrival of the order.

Finally, there is the evidence of Mr. Marshall. The lower Court considered him unworthy of belief as a

(2) [1883] 52 L.J.Q.B. 620—49 L.T. 518—32 W.R. 50.

discontented former employee of Liptons', but the state of discontent imputed to him is scarcely made on the record. It is certainly impossible to reconcile his description of the method of packing adopted in Liptons' Warehouse with that given by Liptons' present employees and by Mr. Newby. Mr. Marshall had left Liptons before the events now under discussion occurred, but the other witnesses say that the system was the same in his time as it was in 1914 and 1915, and Mr. Marshall declares that he visited Liptons' Warehouse in May 1915 and found things being done then exactly as they had been done when he was employed. We can find nothing on the record to suggest any reason why Mr. Marshall should perjure himself on behalf of Abdul Shakur. He belongs now to what may be a rival firm, but we cannot suppose that he would be encouraged by his employers to obtain custom for them by giving false evidence in Courts of Justice on behalf of persons likely to be lucrative clients. It has been urged for the defendants that in comparison with Mr. Marshall their principal witness Mr. Newby is thoroughly disinterested since he has severed his connection with Liptons', but there is an obvious retort that Mr. Newby, who appears still to be connected with the tea industry, would not relish being known in business circles as the man who costs Rs. 17,000 in damages. It is fair to say at this stage that we have been favourably impressed by the record of Mr. Newby's evidence to which we shall return. Our immediate concern is with what Mr. Marshall says.

The packing procedure described by him is up to a certain stage more methodical *prima facie* than that stated by Liptons' witnesses, which appears to us, if rigidly adhered to, to involve machinery and lobourers alternately working at high pressure and standing idle perhaps for a whole day. According to Mr. Marshall tins are taken from the labelling machine to the shelves where they are stacked by colours, and the packers draw their supplies from the shelves. Packed cases are stocked in the same room, also by colours, and, when an order comes, the required numbers of cases are taken out and sent to the Railway Station. This may be taken out of the shelves and packed on the day on which they are placed there or they may stay on the shelves for weeks or months. Packed cases may remain a month or two before being removed.

The version of Liptons' employees has been narrated already. They have explained that Mr. Marshall himself admits that tea deteriorates from the moment of tinning and that the deterioration may be noticeable after six months to the consumer and they say that for this reason tea is not tinned until orders arrive.

The only method of testing these two divergent stories is by the result of Mr. O'Neil Shaw's examination of two cases, and this indicates that neither account is strictly accurate. The bulk of the tins in both cases had been filled on the day of despatch or the day before and this fact does not corroborate Mr. Marshall. On the other hand, the presence of November filled tins contradicts the other version and the truth seems to be that, although efforts are made to send out newly tinned tea, there are other previously packed tins lying about in the packing room, and there is no effective arrangement for keeping these from getting mixed up with the freshly filled tins. Mr. Marshall says that the Despatch clerk checks the colours of the tins packed, but that there is no check of the Code mark, and here he seems to be right. When he says that the system is such that tins filled months before and boxes packed months before are knowingly allowed to remain in the Warehouse before being sent out he is probably wrong. His own statement and the other evidence had made quite clear the advantage which tea merchants gain by placing tea in the hands of consumers at the earliest possible moment after packing, and a successful business, such as Liptons' has been shown to be, must be presumed to work towards that object.

We come now to the second point, the absence of reasonable and probable cause. We think that Mr. Newby

did believe honestly when he placed the matter in the hands of his Solicitors that the system of filling, lebelling packing and despatching was capable of rendering it impossible for a tin filled at the beginning of October to be contained in a case despatched at the end of October. Mr. Newby was very frank and very patient throughout what seems to us to have been an unnecessarily long cross-examination. He says that he did hold that belief and there is no reason for doubting his word. But was his belief based on reasonable grounds? We think not. He was manager of the warehouse and it was his duty to know everything that went on there. He has committed himself to the positive assertion that not only would it be impossible for tins packed in October to be despatched in December, but that it would also be impossible for tins packed in the 1st week of December to be despatched by Railway in the 3rd week of December, and that it would be impossible for one case to contain tins of different dates. In the light of the proof given to the contrary these statements can only mean that Mr. Newby did not take reasonable care to inform himself of the true facts. He was unable, when challenged in cross-examination on the 24th February 1917 to swear positively that he made full enquiry regarding the truth of the allegations in paragraph 5 of the oomplaint filed on the 9th April 1915. Those allegations were that Abdul Shakur has affixed his labels, "despatched on 22nd December 1914 and received 4th January 1915" to tins supplied to him on antecedent dates and received in 1914. The answer given to the question is, of course, additional proof of Mr. Newby's good faith and anxiety to speak nothing but the truth, but the plaintiff is entitled to claim the benefit to his case of the character of the answer. Another damaging admission was elicited in the same cross-examination. The question was "Have you ever got back tins from customers at Lahore, which according to you are old, before or after the criminal case?" The answer was, "Most likely; you can quite understand that with millions of tins going out from Liptons' scarcely a week passes without our receiving some complaint regarding tea which may have become contaminated. I cannot remember any instance in Lahore." There were, then, complaints, which it seems to us should have put Mr. Newby on his guard against absolute faith in his system, and we think that a prudent man should have made a thorough enquiry into what was actually being done in the packing room before making up his mind definitely that the October marked tins purchased from Abdul Shakur's shop by Lajpat Ram's agent could not possibly have been included in the consignment of the 22nd December.

It is true that Mr. Newby took legal advice before instituting his complaint and that Lajpat Ram was instructed to "place the whole case openly" before Mr. Broadway (letter dated 9th March 1915 Exhibit P. R. 17 page 34, printed record). But the information laid before the Solicitors and Mr. Broadway as facts has not been disclosed and herein lies a material distinction between the present case and the well-known Privy Council case *Corea* v. *Peiris* (3) which has been cited by the defendants' learned Advocate. In *Corea* v. *Peiris* (3) the respondent obtained a decision in his favour that he had acted with reasonable and probable cause on proof that he had believed the story told to him by old trusted servants, that he had consulted his legal advisers at every step and that he had taken action in defence of his title to his property in the *bona fide* belief that the appellant has trespassed on his land and forcibly removed his goods. Both the legal advisers, however, whom Mr. Peiris consulted entered the witness-box and described in detail what had been placed before them, and the information given by the old and trusted servants was not of such a nature that Mr. Peiris could have verified it by personal observation. There are other distinguishing features which need be dwelt upon, notably the antecedents of the plaintiff. In the present case

(3) [1909] A.C. 549—79 L.J.P. C. 25—100 L. T. 790—25 T.L.R. 631

Mr. Newby may have made special enquiries from his Warehouse Staff and may have been told the same story as the witnesses have told in Court but there is no proof that he did so, and, if it be assumed that he must have done so, he was not compelled to rely upon the assurances given by his subordinates. There were direct tests which he could apply himself; for instance, he could have gleaned a certain number of packed boxes and scrutinized the Code markes of the contents. As for what he told his Solicitors, we can only presume from the contents of the complaint subsequently put into Court that he must have told them that the Code mark system was absolutely watertight. He thought that it was, but he did not take reasonable steps to verify his belief, and the system was not watertight. Therefore, the defendants did not have reasonable and probable cause for the prosecution. The lower Court went wrong in thinking it sufficient proof of reasonable and probable cause that the defendants stated in their complaint nothing beyond they believed to be the absolute truth.

The third and the most important point is the question of malice, for it is not enough for the plaintiff to prove absence of reasonable and probable cause. It has been made clear, as we have stated already, that the main object which the defendants desired to attain by the prosecution was to protect their own business interests. This does not mean that they did not believe the plaintiff to have offended against the law and that they did not honestly desire to bring him to justice. Mr. Newby has sworn that his motive was to prevent the plaintiff from selling tea with a false description and that he had no indirect motive such as to induce the plaintiff to renew his old agreement. The expressions of indignation at Abdul Shakur's conduct contained in certain letters to Lajpat Ram, the talk of bringing "the most damaging action against Shakur," (letter of 9th March 1915 Exhibit P. R. 17) the assertions that "we mean business" and that "we are going to stop this false dealing at any cost" (letter of 8th March Exhibit Z. 5) are in no way inconsistent with this position, which was perfectly legitimate. There is, however, an argument in favour of malice having been established which has been pressed strenuously and which is based upon the proceedings of Lajpat Ram in connection with the labelling of the stock in other Lahore shops as packed in 1915 and alluded to at the beginning of our judgment.

The only account of these proceedings is contained in incomplete fragments of correspondence between Liptons' and Lajpat Ram which the plaintiff succeeded in getting out of the defendants. The full correspondence has not been produced, and the defendant's Counsel in the commission proceedings at Calcutta said that he could produce nothing more, but presumably the missing letters are or were in the defendant's power and possession. On the other hand, Lajpat Ram himself would have been the most material witness on the point, and there is nothing to show that the plaintiff on whom the burden of proving malice lay, made any attempt to place this man in the witness-box. The record shows that Lajpat Ram was at times in Court during the trial of the suit.

It has been proved, as we have stated, that tea packed in 1914 was labelled in Lahore shops as packed in 1915. Of this there is no doubt. The tins with the labels and the 1914 Code marks are before us in Court and they have been identified by the persons from whose shops they were obtained. The suggestion is that Lajpat Ram was authorised and encouraged by the Head Office to label tea falsely, that in any case the Head Office sent Lajpat Ram 4,000 labels with a free hand and knew that he was likely to put the labels on old 1914 tea and that the firm took no steps to prevent him from doing this. It is contended that Lajpat Ram was the firm's agent, that it must be responsible for his action. That the firm while professing to protect the public by prosecuting Abdul Shakur, was at the very moment perpetrating a fraud on the public of the same character as that imputed to Abdul

Shakur by supplying labels for the misdescription of tea in the shops of other traders and that such conduct is conclusive proof of malice.

Now, Mr. Newby has sworn that his instructions to Lajpat Ram were to withdraw all the 1914 packed tea from the Lahore shops when the special 1915 labels were issued. Mr. Gregory, Counsel for the defendants in the Calcutta proceedings, was asked to produce the letter in which these instructions were conveyed but was unable to do so. Nevertheless, there are letters by Lajpat Ram on the record which hav been admitted in evidence without objection and which corroborate what Mr. Newby says. On 28th January 1915 (Exhibit P. R. 32, page 45 of the printed record) Lajpat Ram wrote in reply to a letter from Liptons' of 21st January 1915. "The names of merchants are being printed in tickets. A list of stocks of 1914 held by merchants is being prepared. I will ticket only those tins which were received by merchants in 1915 and will not give chance to Shakur to bring a fresh trouble- The instructions conveyed in your letter are very clear and require no modification." Again, acknowledging another letter of 1st February 1915 Lajpat Ram wrote (Exhibit P. R. 30, page 44 of the printed record). "The 1914 stock in possession of our customers wiil be taken possession of by Saturday next, but the merchants want similar quantities of tea in exchange." There is certainly no proof that any 1914 tea was actully returned to Calcutta by any shopkeeper in Lahore, and there is on the other hand, proof that 1914 tea was labelled in certain shops as packed in 1915; but Lajpat Ram is not shown to have known the Code and letter from Liptons' (Exhibit P. R. 17 dated the 9th March 1915, page 34 of the printed record) proves that they believed that he did not know. Lajpat Ram would thus have had to depend upon the word of the shopkeepers for the dates of their consignments.

The learned Counsel for the plaintiff points to the evidence of one of these shop-keepers, Firoz Din, and to a letter from Liptons' to Lajpat Ram (Exhibit P. R. 26 dated the 22nd February 1915) as showing that Liptons' encouraged or connived at false labelling. Firoz Din stated "in 1915 an agent of Liptons' came to me and told me to keep my tins ready and he would come again and label them. He came again and affixed the labels. I think their colour was red. The labels were special labels of 1915. The tea in the tins was old tea, that is to say that the tea had come before 1915, some 7,8 or 9 months previously." The passage in the letter runs "Messrs. Bakhsh Elahi and Company," (a firm of agents in Calcutta) "were instructed to let us have full particulars of all Lahore orders but they have not apparently done so in the case of Mohammad Din-Firoz Din's order, and we trust you will see the tins ticketted" Liptons', however, (and perhaps Lajpat Ram too), are exonerated by the terms of Lajpat Ram's letter to which this letter is a reply. Lajpat Ram wrote on 18th February 1915 (Exhibit Z 16 page 51 printed record) "Messrs. Mohammad Din-Feroz Din, the China House, have received 16 cases of tea in January last through Bakhsh Elahi and Company, but without tickets. I will ticket the tins in a day or two. But I would like to request you to tell Bakhsh Elahi and Company that they should in future instruct their packers to specially label the consignments intended for Lahore."

The evidence of other shop-keepers produced as witnesses by the plaintiff on the subject of this labelling was as follows .—

Kanshi Nath, from whose shop two tins with 1914 Code marks and 1915 labels were procured, stated, that Lajpat Ram supplied him with the labels, that 90 or 100 labels were pasted on by Lajpat Ram himself, that the tea had been received in November 1914, and that when labelled it was falsely described. In cross-examination he admitted that he could read the labels and understood what they stated; that he made no objection to the false description being put on, and that he did not tell any purchaser that the label was false. This man has stultified himself.

Sitaram stated that Lajpat Ram labelled 200 or 250 tins in his shop, that he had a stock of tea in December and received a fresh consignment in January, that the labels were put on in April when the tea was two or three months old, that he did not know whether the old tins or the new tins were labelled and that he did not assent to nor would have allowed a false label being affixed.

Mohan Lal said that Lajpat Ram labelled 120 tins in his shop all of which had been ordered in December 1914 and had been received on 4th January 1915, and that "Lajpat Ram told me that the old tea should not be sold and that traders should see that the tins bear the label of 1915." A tin labelled 1915 was procured from this witness's shop which is Code marked 3rd week December 1914.

In our opinion the plaintiff has not proved either that the Company instructed Lajpat Ram to label old tea in Lahore shops as packed in 1915 or that Lajpat Ram himself knowingly did so label old tea. Lajpat Ram may have been careless, in fact he was, for he sent his sons out to label in certain shops and he issued labels to the shopkeepers themselves, but the defendants, in spite of the fact that they have not produced the full correspondence, have satisfied us that their instructions to him were not to label 1914 tea.

It has been remarked already that some of Lajpat Ram's letters contain indications of personal spite against Abdul Shakur and some of the imformation coveyed by him to Liptons' was inaccurate. But the prosecution had nothing to do either with Lajpat Ram's spite or with false informtion sent by him. It was solely due to true information given by Lajpat Ram that tea tins bearing the Code mark of 1st week October 1914 had been labelled by Abdul Shakur as despatched from Calcutta on 22nd December 1914. We do not think that concrete malice on the part of the defendants in the matter of Abdul Shakur's prosecution can be evolved out of the mere carelessness and supineness of their agent Lajpat Ram in his dealing with Liptons' 1915 labels.

Mr. Andrews stated in his first examination as complainant that tea packed in 1914 is of different quality to that packed in 1915. This has been fastened upon by the plaintiff's Counsel as an indication of malice in the light of subsequent proof that Liptons' successfully maintain a continuously uniform quality; and it is suggested that the statement was made falsely in order to induce the Magistrate to issue process. We think, however, that the reference was to the deterioration of tea from the date of tinning as to which all the witnesses connected with the tea industry are agreed.

Next we have been referred to a passage in *Rai Jung Bahadur* v. *Rai Gulor Sahoy* (4) where the learned Judges agreed with the Court below that, ordinarily, the absence of a reasonable and probable cause in instituting a proceeding which terminates in favour of the plaintiff would give rise to the inference of malice. This proposition was considered in *Shama Bibi* v. *Chairman of Baranagore Municipality* (5) to have been expressed too broadly. We can readily imagine instances where such an inference might arise but the correct law applicable to the present case, in our opinion, is to be found in *Brown* v. *Hawkes* (6). There the Jury held firstly, that the defendant did not take reasonable care to inform himself of the true facts of the case (as we have held here); secondly, that the defendant honestly believed in the full charge which he laid before the Magistrates (also as we have held) and thirdly, that the defendant was actuated by malice and indirect motives in the proceedings taken against the plaintiff. On these findings the judgment was entered for the plaintiff. The Court of Appeal allowed the defendant's appeal, holding that, although the absence of reasonable and probable cause is some evidence from which malice may be inferred the Jury, by their finding as to the

(4) [1897] 1 C.W.N. 537.
(5) [1910] 12 C.L.J. 410—6 I.C. 675.
(6) [1891] 2 Q.B. 718—61 L.J., Q.B 151—65 L.T. 108—55 J.P. 823.

honest belief of the defendant: had negatived any inference which depended solely on such evidence, and that, in the absence of any other evidence of indirect motive, the finding of the Jury that the defendant was actuated by malice could not be supported. It was pointed out by Cave, J, (whose judgment ultimately was affirmed) in discussing the evidence that if there was an honest belief in the plaintiff's guilt neither anger nor hastiness on the part of the defendant would evidence malice, and that anger so far from being a wrong or indirect motive, is one of the motives on which the law relies to secure the prosecution of offenders, while hastiness in the defendant's conclusion as to the plaintiff's guilt, although it might account for his coming to a wrong conclusion, does not show the presence of any indirect motive.

Lastly, we have been asked to accept as proof of malice the fact that Mr. Andrews did not at two stages after the commencement of proceedings withdraw from the prosecution of Abdul Shakur. The first stage was on 12th April when the search of Abdul Shakur's shop produced twelve labelled tins only, of which five exhibited no distinct Code mark, the other seven being marked with dates previous to the 3rd week in December. The second stage was when Mr. O'Neil Shaw opened the two boxes with the result already described. There is no force in this argument. The 12th April was a long time after Abdul Shakur first commenced to under-cut the rates of the other shop keepers and it would have been quite reasonable to suppose that by that date he had succeeded in selling nearly all his 1914 stock. At the time when Mr. O'Neil Shaw opened the boxes Mr. Andrew declared that he was not satisfied that either box had not been opened before, and he could not know what view the Magistrate was likely to take until the judgment had been delivered. The record shows that he made no incautious or intemperate statement imputing trickery to Abdul Shakur. He did not assert that the boxes had been tampered with, nor did he say that they must have been tampered with. He said in his cross-examination. "I am not satisfied that the case has not been opened before," and in re-examination, "I can't account for tins bearing different marks getting into one case. It is impossible for tins bearing different Code letters for the month to be despatched in one case". He appears to have assisted the Court readily in interpreting the Code marks on the unpacked tins, and there is no indication that he attempted to prevaricate or to withhold any information which might help the accused.

We hold, therefore, that while the plaintiff has proved that the defendants instituted proceedings against him without taking reasonable care to inform themselves of the true facts, nevertneless he has not succeeded in establishing that they were actuated by malice, and his appeal, therefore, must be dismissed. Since, however, the appellant has succeeded partially, and on an important point, in a case of much difficulty, we direct that parties bear their own costs.

Appeal dismissed.

✱ 1924 LAHORE 12

ABDUL QADIR, J.

Kunj Lal—Convict—Appellant.

v.

Emperor—Respondent.

Cr. A. No. 246 of 1922, D/- 1st May, 1922, from an order of the Mag. First class, with enhanced powers under section 30, Criminal P. C., Lahore, D/-10th March 1922.

Evidence Act S. 91—Dying declaration—Proof

Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under section 32 of the Evidence Act, and that statement is not a document made by the Magistrate but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made. [P. 15 C. 1]

Mool Chand—for Appellant.

Niaz Ali—for Respondent.

Judgment.—This judgment will dispose of two connected appeals and one criminal revision. Two persons, namely, Salig Ram and Kunj Lal, have been convicted under section 304, Part II, Indian Penal Code, for having caused the death of Jowinda Mal, and have been sentenced to five years' rigorous imprisonment each. They have both appealed to this Court, while Durga Das, complainant, has filed a petition for enhancement of their sentences on the ground that the offence committed by them was one falling under section 302, Indian Penal Code. I have heard Pandit Sheo Narain on behalf of Salig Ram, appellant, Mr. Mool Chand for Kunj Lal, appellant, and Mr. Dhanraj Shah in the revision petition.

The facts of the case are given at length in the judgment of the Trial Court and are briefly as follow :— Kunj Lal is the son of Jowinda Mal, deceased, from his first wife. The relations between father and son were strained, because Jowinda Mal had children from his second wife, whom he favoured, and was displeased with Kunj Lal, whose mother had died about 14 years ago. He did not allow Kunj Lal to share the business of cloth merchants which he was carrying on jointly with his brothers. On the 20th December 1921, Jowinda Mal was going home from his shop about 7 p. m. when he was assaulted and beaten with *dangs* in Bhadarkali Lane, inside Lahore City. He was removed to his house, which was not far from the place where he was assaulted, and the next day at 1 p. m. a report was made to the Police by Durga Das, brother of the deceased, in which it was stated that Jowinda Mal had been beaten by Kunj Lal and by one other who was a friend of the latter. The injuries of the deceased were examined by Lieutenant Clarke, Assistant Surgeon, who detailed them in a certificate which he gave to the relations of the deceased, and which was produced before the Police at the time of the report. It showed that the deceased had altogether six injuries on his person, three of which were on the head and three on the other parts of the body, all caused by some blunt weapon. One of the injuries on the head was described as serious, and probably led to Jowinda Mal's death five or six days later. The Police started investigation on the very day when the report was made and the Sub-Inspector, Mr. Muhammad Asghar, (P. W. No. 8), recorded the statement of the deceased with regard to his injuries, in which Jowinda Mal stated that he had been assaulted by four or five persons including Kunj Lal and Salig Ram, but that he had not identified the other men, who seemed to be Muhammadans. After taking down this statement, the Sub-Inspector thought that the condition of the deceased was precarious and he asked a Magistrate, M. Abdur Rahim, (P. W. No. 3) to come and take down the statement of Jowinda Mal, regarding his assailants. The Magistrate came and questioned the deceased and took down his statement, which was practically the same as had already been made to the Sub-Inspector. In the first report Hari Chand and Fakir Chand had been mentioned as witnesses of the occurence and in the two statements which Jowinda Mal made to the Sub-Inspector and the Magistrate, respectively, he mentioned the name of Fakir Chand only, though it was said that others also had seen the occurence. It is unfortunante, however, that Hari Chand was not produced as a witness in Court and Fakir Chand who had been cited and was present was given up. One Muhammad Bakhsh was produced who did not profess to have seen anything and only stated that he had seen Jowinda Mal lying injured. The only man who professed to be an eye-witness in Court was Jiwan Lal (P. W. No. 4). He deposed that he had seen Kunj Lal and Salig Ram and three other men, whom he did not identify and who seemed to be Muhammadans, beat Jowinda Mal with sticks. Durga Das was also examined as P. W. No. 1 and stated that the information given by him in his report was obtained by him from the deceased, who told him about 9 p. m. on the same evening on which he was injured and soon after the assault, hat the had been

beaten by Kunj Lal and Salig Ram and others. He added that at the time of making the report he forgot to mention the name of Salig Ram and also to say that there were other assailants besides the two. The statements as regards his injuries, made by Jowinda Mal to the Sub-Inspector and M. Abdur Rahim have been proved by the production of both these witnesses and with the exception of the statement of Jiwan Mal, constitute the main evidence for the prosecution in this case.

It is contended by the learned Counsel for Salig Ram, appellant, that there is no evidence worth the name against his client. He argues that the evidence of Jiwan Lal should not be relied upon because he does not appear to be a genuine eye witness. He is not only not mentioned in the first report as a man who saw anything, but even the two statements which have been treated as dying declarations do not make any mention of him though it is shown by the statement recorded by M. Abdur Rahim that Jiwan Lal was present when the deceased was describing the incident. After having thus criticised Jiwan Mal, Mr. Sheo Narain proceeds to attack the dying declarations so far as their effect against his client is concerned. He says that the weight that ordinarily attaches to such statements is not present in this case, because there is nothing to show that the deceased thought that he was dying, beyond the apprehension which the Sub-Inspector entertained at the time he got the statement of the deceased recorded by the Magistrate. He also urges that it should be presumed from the first report, which was made after considerable delay, that till the time that the report was made the name of Salig Ram was not given out by the deceased, who mentioned it only at the time of making his statement to the Sub-Inspector and repeated the same to M. Abdur Rahim and this, he says, must have been due to some erroneous impression. He suggests that Jiwan Mal, who has had some litigation with the father of Salig Ram, and is on bad terms with the latter, might have put the notion into the mind of the deseased that the friend of Kunj Lal, about whose identity he was not clear, was Salig Ram, and if under these circumstances, Jowinda Mal named Salig Ram much importance should not be attached to his naming him, because it may be due only to accepting the suggestion made to him and not because he had really identified Salig Ram. He, therefore, argues that his client is entitled to acquittal because, on the facts referred to above, a substantial doubt in his favour is created even if the dying declarations are believed to be correct and are given effect to, though he adds that they are not dying declarations properly speaking.

Mr. Mool Chand on behalf of Kunj Lal, says that if the evidence of Jiwan Mal is eliminated, as it is doubtful that he had seen anything, then the statements of the deceased are the only things remaining against the appellants. He points out that the statements of the deceased were according to the prosecution witnesses, made on several occasions. Firstly, those made by him during the night to Durga Das and other people as to who his assailants were; secondly, the account of the occurrence given by him to the Sub-Inspector, and, thirdly, a similar account given by him to M. Abdur Rahim, Magistrate.

With regard to the earliest statement, Mr. Mool Chand says that the prosecution have produced none of the other persons who saw the deceased on the evening in question and have contented themselves only with the testimony of Durga Das on the point. He says that Durga Das should not be regarded as independent and reliable, that he is not independent because he may be interested in depriving his nephew Kunj Lal, of the share of the property of the deceased, and that he is not reliable because he exaggerates his statements in Court and improves on what his brother had told him. He has given a good deal beyond the information he gave in the first report and made the addition of the name of Salig Ram when giving his evidence in Court.

As regards the statements made by the deceased to the Sub Inspector and the Magistrate and recorded by each one of them Mr. Mool Chand raises a technical objection against them. He says that these statements should have been proved by questioning the witness to whom they were made as to what the deceased told them, and should not have been proved by simply showing them their recorded statements and proving them as if they were documents which could be proved as such under section 91 of the Evidence. Act In this connection he refers to *King Emperor v. Mathura Thakur* (1) in which the following observations were made by Taylor, J.:—

"Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under section 32 of the Evidence Act, and that statement is not the document made by the Magistrate but the verbal statement made by the deceased person."

"The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made."

He also refers to *Empress v. Samiruddin* (2) in which also the principle referred to above was recognised as sound. He further refers to *Gouridas Nmaasudra* v. *Emperor* (3) which is a ruling similar to the two already men tioned. He, therefore, argues that these dying declarations should be excluded from consideration and his client should be acquitted. He argues, in the alternative that even if the dying declarations are treated as evidence, they should not be believed, because the time when the deceased was assaulted was a dark December evening, which was also cloudy, and, therefore, it is probable that the deceased, on being suddenly assaulted, could not identify his assailants and the name of Kunj Lal probably was introduced because suspicion fell on him. He says that on a former occasion, when fire had been set to the shop which Jowinda Mal and his brothers and their father owned, suspicion had fallen, though wrongly, on Kunj Lal and, therefore, there is nothing strange in his being suspected again. He also urges that the deceased not having had any scruples about adding to his story as time elapsed made himself further unworthy of credit.

Mr. Niaz Ali replying to the above arguments on behalf of the Crown says the dying declarations are worthy of belief and that the technical objections raised against them by Mr. Mool Chand should not result in their exclusion. He argues that it is shown clearly by the evidence on the record, both of medical men as well as of laymen, that the deceased was capable of speaking after the first shock of his injuries was over and continued to be so He mentioned his assailants to his brother, then to the Sub-Inspector and then to the Magistrate. All the three witnesses have been produced in Court and examined to prove those statements and if there is any defect in the form in which the depositions of the two witnesses last referred to have been recorded, that should not take away from the effect of that testimony. He points out that in the case reported as *Gouridas Namasudra* v. *Emperor* (3) what happened was that an attempt was made to treat a dying declaration as proved, simply by the production of the magisterial record of it, without producing the Magistrate as a witness. It was held by the Calcutta High Court that the record was not proved by him and that in that case the recorded statement was rightly held to be not proved, but such is not the case here. Here the Magistrate as well as the Sub-Inspector have been duly put into the witness box. He cites *Ghazi* v. *Emperor* (4) which was a case in which a statement of a dying man recorded in Hospital by a Magistrate was brought on the record without the Magistrate having been summoned to

(1) [1901] 6 C. W. N. 72.
(2) [1882] 8 Cal. 211—10 C. L. R. 11.
(3) [1909] 36 Cal. 659-13 C. W. N. 680-10 Cr. L. J. 186-2 I. C. 841.
(4) 17 P. R. 1911 Cr—48 P. W. R. 1911 Cr-13 Cr. L. J. 225-14 I. C. 417.

prove it and it was pointed out by the learned Judges of the Chief Court that it should have been proved by taking the statement of the Magistrate. He goes on to argue that as to the credibility of these statements there should be no doubt, because it does not stand to reason that the deceased could have failed to indentify his own son, even if it was dark at the time and it is also unlikely that he would falsely name his own son in such a serious case in spite of relations between him and the son being strained. As regards Salig Ram, he says that he was the man described in the first report as a friend of Kunj Lal, and it is possible that the memory of Durga Das failed him at the time of making the report so far as the name of this appellant was concerned.

After carefully considering the arguments addressed to me on both sides, I am of opinion that the appeal of Kunj Lal must be rejected and that of Salig Ram must be accepted. I share the doubts expressed on behalf of the appellants as to the genuineness of Jiwan Mal as an eye-witness and do not, therefore, attach any weight to his evidence in this case, but I regard the statements made by the deceased as to his principal assailant, namely his son Kunj Lal, first of all to his brother Durga Das, then to the Sub-Inspector, and then to the Magistrate, as quite credible and entitled to every weight. The statement made to Durga Das about Kunj Lal is proved by Durga Das in Court. I hold that probably the only name mentioned by the deceased at first was that of Kunj Lal and that is the reason why that is the only name which was mentioned in the first report. I do not think it likely that Durga Das would have forgotten the name of Salig Ram if it had been given to him. It is true that Durga Das in Court states that the deceased had mentioned both Kunj Lal and Salig Ram from the very outset, but I am not prepared to believe that part of his story, because it is contradicted by the first report made by him. I have no doubt that he is telling the truth so far as Kunj Lal is concerned, There is, therefore, this piece of evidence against Kunj Lal to which no such technical objections can be raised as have been raised against the two recorded statements, proved by the evidence of the Sub-Inspector and the Magistrate. As to these, I think, Mr. Mool Chand's criticism is valuable and I wish to take this occasion of drawing the attention of the learned Magistrate to the rule laid down in *King Emporor* v. *Mathura Thakar* (1) as to the manner in which statements purporting to be dying declarations should be recorded. But in view of the fact that in the case before me the two witnesses to whom the statements were made by the deceased have been produced in Court and were available for cross-examination, I do not see that the defect in the form in which those statements were taken down destroys their value to such an extent as to make it necessary to exclude them from consideration. There is no reasonable doubt left in my mind as to the truth of the dying declarations of the deceased so far as Kunj Lal is concerned and I dismiss Kunj Lal's appeal.

As regards Salig Ram, I am not prepared to say that the deceased told a deliberate lie when he named Salig Ram before the Sub Inspector and the Magistrate- It is quite possible that owing to the serious injury that he had received to his brain the name of the other man escaped his memory and at the time of giving inrtructions to his brother he could not tell anything more than that Kunj Lal was accompanied by a friend of his. He may have recollected the name at the time the Sub-Inspector arrived. It is quite possible that Salig Ram may have been the companion of Kunj Lal referred to in the first report, but it is conceivable that the deceased may have readily accepted a suggestion coming from a man like Jiwan Mal, who is admittedly hostile to Salig Ram and may have given this name owing to the suggestion thus received. Thus a doubt in favour of Salig Ram is created which is strengthened by the absence of his name from the first report, and also by the absence of motive on his part to join the assault. It is also significant and may be mentioned for whatever it is worth, that I find, on

reference to the Police diaries, that the earliest statement of Jiwan Mal contained no mention of Salig Ram but simply gave the name of Kunj Lal Tnis lends colour to the theory that the addition of the name of Salig Ram and the statement that two or three other men took part in the affair are developments of the case. which cannot be easily treated as reliable. Therefore, I acquit Salig Ram, giving him the benefit of the doubt.

Coming to the petition of enhancement I do not think much need be said on the point after the view of the case I have taken above. It may be mentioned that the plea urged on behalf of the complainant-petitioner was that the assault was made with the intention of committing murder and, therefore, deserved the punishment provided for that offence but the circumstances of the case do not lead to that conclusion. I have seen the plan on the record, which shows that there are other lanes leading to the house of the deceased and there is nothing to show that any assailant of his could have known which of those he would pass through on his way home on that particular evening. Moreover, I have no doubt that there were not more than two men concerned in the assault, as shown by the first report. The mentioning of four or five persons was an exaggeration and after-thought simply to increase the gravity of the offence. The real facts as to how the assault was committed or what preceded the assault cannot be possibly known. Moreover, the nature of the injuries shows that only one of the injuries on the head was really serious and the man survived that injury for over six days. It is also conceivable that with better and more careful treatment he might possibly have got better, becaue it is in evidence that the relations of the deceased were directed by Lieutenant Clarke to take him to the Hospital for treatment, but they refrained from doing so and he was kept all the time at home. Presumably, he had better chances of recovery by going to the Hospital than by remaining at his house. In such circumstances, I think the Court below was justified in framing a charge under section 304, Part II, Indian Penal Code, and there is no sufficient cause for an enhancement of the sentence. The petition for enhancement is, therefore, rejected.

One appeal allowed.
Another appeal & petition rejected.

✱ 1924 LAHORE 17

FFORDE, J.

John Thomas Lyme—Convict—Appellant.

v.

he Crown—Respondent

Criminal App. No. 417 of 1923, D/- 19th June, 1923, from the order of the Dt. Mag. Bannu, D/-26th March, 1923.

Criminal P. C., S. 537—Witnesses not examined but only their previous statements merely read over to them—Illegality not curable.

On the 12th March, 1933, the prisoner was brought before the District Magistrate upon a charge under S. 376, Penal Code. After seven witnesses for the prosecution had been examined the public prosecutor closed the case for the Crown, the cross-examination of these witnesses having been reserved. The case was then adjourned to the 14th when the prisoner claimed as an European British subject to be tried by a jury under the provisions of S. 451 of the Cr. P. Code and the proceedings were accordingly stayed to enable proper steps to be taken in compliance with the section. On 23nd the witnesses were duly examined by the prosecution and cross-examined by counsel for the defence. As regards the remaining i. e.- previous seven witnesses for the Crown the, course adopted was as follows. When each witness came into the box the recorded statement of the evidence given by him at the first hearing was read out to him. A few further questions were then put to the witness and he was tendered for cross-examination; some witnesses were not even sworn.

Held: that this method of presenting the evidence for the prosecution is irregular, and not only irregular but entirely illegal, and the defect is not curable by S. 537. [P. 18, C. 2]

(2) *Criminal P. C., S. 304—Verdict given—Fresh evidence after verdict—Fresh verdict void.*

All the evidence on both sides must be concluded before the case can be submitted to the jury. There is no power in a Judge to present a case to a jury subject to conditions, and once a verdict is delivered there is no power in the trial Court or in the jury to reconsider that verdict except under the provisions of S. 304.

]P. 20 C. 2]

Where after a trial had been concluded and verdict given a new trial had been held on further evidence and a fresh verdict given.

Held: that it is immaterial that the second verdict happened to be the same as the first. The second verdict upon which judgment has been given and sentence pronounced is a nullity and the judgmen t

based upon it is, therefore, made without jurisdiction and is void. [P. 21, C. 1]

Shamair Chand and Sagar Chand—for Appellant.

Dalip Singh—for the Crown.

Judgment.—The appellant has been tried by the District Magistrate of Bannu, sitting with a jury of three persons, on a charge of rape. He has been found guilty of an attempt to commit the offence and has been sentenced to a term of six months' rigorous imprisonment.

A number of grounds of appeal have been put forward but the principal ground relied upon by Mr. Shamair Chand counsel for the appellant, is that the manner in which the trial was conducted was illegal in certain material particulars.

The facts relevant to the determination of the questions which have been raised on this contention are as follows:—

On the 12th March, 1923, the prisoner was brought before the District Magistrate upon a charge under S. 376, Indian Penal Code. After seven witnesses for the prosecution had been examined the public prosecutor closed the case for the crown, the cross-examination of these witnesses having been reserved. The case was then adjourned to the 14th when the prisoner claimed as an European British subject to be tried by a jury under the provisions of S. 451 of the Code of Criminal Procedure and the proceedings were accordingly stayed to enable the proper steps to be taken in compliance with the section.

On the 17th of March the prisoner was again brought before the Magistrate, when he was formally charged and the trial fixed for the 22nd. On the 22nd the Jury were duly ballotted for and the names of three persons, one Indian and two Europeans, were returned. These names were read out to the prisoner at the bar who was asked to challenge them. He, however, accepted them without challenge and the trial commenced.

Two witnesses were then duly examined by the prosecution and cross-examined by counsel for the defence, namely, Mt. Mir Gulla, the person against whom the offence in question was alleged to have been committed, and Bishan Das Sub-Inspector of Police. So far as these two witnesses were concerned it is not suggested that there was anything illegal or irregular in the mode in which their evidence was presented. As regards the remaining witnesses for the crown, however, the course adopted was as follows:—

When each witness came into the box the recorded statement of the evidence given by him at the first hearing was read out to him. A few further questions were then put to the witness and he was tendered for cross-examination. In the case of Khan Sahib Akbar Ali Khan, prosecution witness No. 3, the following note appears on the record:—"This witness is called and the above statement made by him in this Court on 12th March 1923 is read out to the Jury and the statement transferred to the file." It does not appear from the record that this particular witness was even sworn.

With regard to the next witness Shai Mast (P. W 4) the note on the record is as follows:—"22nd March 1923, Shai Mast Khan recalled:—'I have heard the above statement made at the first hearing on the 12th March 1923 read over to me It is correct and I adhere to it". Again it does not appear from the record that this witness was sworn though I assume that this formality at least was observed in every case. The evidence of the next witness (P. W. 5) is recorded as being on solemn affirmation. He also says that he has heard his statement made in the Court on the 12th March 1923 read out and that it is correct and he adheres to it. The remaining three witnesses for the prosecution are dealt with in similar fashion.

Now, it is quite obvious that this method of presenting the evidence for the prosecution is irregular, and not only irregular but entirely illegal. It is a wholly unauthorized variation from the ordinary and proper procedure. It is argued by counsel for the crown that this departure from the ordinary procedure is an irregularity

covered by S. 537 of the Code of Criminal Procedure which enacts that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII on an appeal or revision on account, *inter alia* of any error, omission or irregularity in the proceedings before or during trial, unless such error has in fact occasioned a failure of justice. I entirely disagree with this view as to the scope of that section. I have already expressed my views on this section in the case of *Allu* v. *Crown* (1) and I need not repeat them here. The procedure being illegal it is not material to determine whether or not it has occasioned a failure of justice. In many cases where the authorised mode of trying a criminal offence has been departed from it is impossible to say whether it has or has not occasioned a failure of justice. It is otherwise when the irregularity is one of form and not of substance. A mere slip or oversight in the manner in which evidence is recorded, for instance, can rarely prejudice the person who is being tried. But a substantial departure from authorised procedure in the mode in which the evidence of witnesses is presented to Jury may very seriously affect the prisoner's chances. Had the proper course been adopted in presenting the evidence for the prosecution the Jury would have had an opportunity of gauging the value of the testimony of each individual witnesses by his general demeanour. A witness may show a suspicious hesitancy in answering certain questions put by counsel for the prosecution, or he may show an equally suspicious excess of zeal. Both Judge and Jury are undoubtedly influenced to a considerable extent by the manner in which a witness gives his evidence-in-chief, and, moreover, the demeanour of a witness during the examination-in-chief may be of the greatest help to counsel for the defence in his cross-examination.

In this context I cannot do better than quote the words of Sir John Coleridge in delivering the judgment of the Privy Council in the *Attorney General of New South Wales* v. *Henry Louis Bertrand* (2) where one of the matters to be determined was the propriety or otherwise of the very procedure now under discussion. "Those of their Lordships who have been used, on motions for new trials, to hear the Judge's notes of the evidence read, probably know well by experience how difficult it is to sustain the attention, or collect the value of particular parts when that evidence is long; and one cannot but feel how much more this difficulty must press upon twelve men of the ordinary rank, intelligence and experience of common jurymen. But this is far from all. The most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witness in presence of prisoners, Judge and Jury is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubt, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the Judge properly take on him to supply any of these defects who indeed will not necessarily be the same on both trials; it is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied when given openly and orally, by the ear and eye of those who receive it." In that case there had been two trials, and at the second trial the Chief Justice, who was trying the case, at the request of the prisoner and also of his counsel and with the consent of the counsel for the Crown, read over to certain of the witnesses the evidence which they had given at the first trial, and then permitted counsel for the prosecution and counsel for the defence to put such further questions to the witnesses as they might think fit; the witnesses of course being sworn in the usual manner. This procedure, which

(1) Cr. A. No. 238 of 1923.

(2) [1867] 4 Moo. P. C. (n. s.) 460—36 L. J., P. C. 51—L. R. 1 P. C. 520—16 L. T. 752—16 W. R. 9—10 Cox. C. C. 618.

was much the same as was adopted in the present case, was strongly disapproved of by their Lordships of the Privy Council. It is true that the prisoner's application for a new trial was not granted, but that was on the ground that there could be no new trial in a case of felony. That case was decided in 1867 when there was no appeal in such cases, the decision, therefore, is only of value for the general principles enunciated in the judgment.

A further illegality in the mode of trying the present case, which is relied upon by counsel for the appellant as vitiating the trial, is the manner in which the case was presented to the jury.

After a certain number of witnesses for the defence had been examined, the foreman of the jury asked if the defence could not cut down the number of witnesses they had summoned. The defence, therefore, agreed to dispense with all further witnesses save one.

The learned Magistrate, thereupon, apparently with the desire to conclude the trial that day, proceeded to charge the jury upon the case as it stood. He explains in his judgment that he took the foreman's intervention as an indication that the jury had decided to acquit, and he further states that he warned them that it might be necessary to summon the remaining witnesses for the defence. By this, he explains, he meant that if they had the intention of convicting the accused they must first hear the remaining witness, but if on the other hand they had made up their minds to acquit they need not bother about the further defence evidence. These mental reservations of the learned Magistrate were however not understood by the jury who apparently did not possess sufficient telepathic powers to read what was in his mind. It may be remarked that in the official report of the charge to the jury there is no indication of any reservation. After counsel on both sides had addressed the jury the learned Magistrate proceeded to charge them, commencing his address in these terms:—"On the facts before you I am going to ask you to determine two issues." The proper issues are then set out and towards the end of the charge appears the statement, "Now, gentlemen, you have heard the evidence on both sides I will not now detain you longer. The evidence has been well dealt with by counsel on both sides. I need only remind you in conclusion of your oath as jurors to deal fairly and impartially between the Crown and the prisoner at the bar." Nowhere on the record, save in the judgment itself and in a subsequent note of the Magistrate does it appear that the case for both sides was not concluded when the jury were asked to return their verdict. The jury having then considered their verdict found the prisoner not guilty on the first issue and guilty on the second.

On being faced with this verdict the Magistrate ordered that the evidence of the remaining witness be taken on the following day. On the following day, however, not only was the evidence of this witness taken but two more witnesses for the defence were examined. A further address to the jury was then delivered by the Court and they were asked to reconsider their verdict in the light of this additional evidence. The jury then brought in the same verdict as before. Upon this verdict sentence was subsequently passed.

Now it is obvious that the course here adopted was in direct contravention of the express provisions of the Code of Criminal Procedure. All the evidence on both sides must be concluded before the case can be submitted to the jury. There is no power in a Judge to present a case to a jury subject to conditions, and once a verdict is delivered there is no power in the trial Court or in the jury to reconsider that verdict except under the provisions of S. 304 of the Code of Criminal Procedure which provides that where a wrong verdict is delivered by accident or mistake, the jury may amend it before or immediately after it is recorded. With this exception the jury is *functus officio* as soon as its verdict is announced to the Court. What has been done in this case is that after a trial had been concluded and verdict given, a new trial has been held on further evidence

ACC. NO

and a fresh verdict given. It is immaterial that the second verdict happened to be to the same effect as the first. The second verdict upon which judgment has been given and sentence pronounced is a nullity and the judgment based upon it is, therefore, made without jurisdiction and is void. For this reason alone the finding and sentence must be set aside.

In view of the conclusions I have come to, it is unnecessary to examine the remaining grounds upon which this trial is sought to be impeached.

For the reason I have given I accept the appeal, and setting aside the conviction and sentence of the Court below I direct that a new trial be held.

Retrial ordered.

✱ 1924 LAHORE 21

MARTINEAU AND CAMPBELL, JJ.

Khota Ram—Plaintiff—Appellant.

v.

Nawaz and others—Defendants—Respondents.

F. A. No. 128 of 1918, D/- 29th June 1922 from the Senior Sub.J., Mianwali, D/- 8th October 1917.

(a) *Civil P. C., O. 2 R. 2—Previous suit by mortgagee for possession—Second suit for maintenance of possession or in the alternative for interest not barred.*

The mortgagors, applied for redemption to the Collector and obtained a decision that the mortgage could be redeemed on payment to the mortgagee, of Rs. 570. The mortgagee then sued for a declaration that there was a further charge on the land mortgaged of Rs. 5,015, and there cauld be no redemption without payment of this amount. There was a prayer in the alternative for possession if it be found that he (the mortgagee) was not in possession but the fact of the mortgagee's possession was later on conceded. In 1902 the mortgagee had sued for possession on the ground that the interest for that year had not been paid, as he was entitled to do so under the terms of the mortgage, but he further stated that previous instalments had not been paid in full. He was given a decree for possession and the Court expressly refused interest remarking that the plaintiff could seek his proper remedy in respect of anything outstanding. He then obtained possession on the 3rd April 1901. On the question arising as to whether the plaintiff (mortgagee) was barred from bringing a second suit for recovery of interest under order II, rule 2.

Held: that he was not, because (1) the suit was not one for the recovery of interest. (2) He is to all intents and purposes a defendant resisting the claim of the mortgagors to turn him out of possession on payment of a comparatively small sum and he was been forced to become a plaintiff in a declaratory suit by the action of the Revenue Officer under Punjab Act II of 1913.

Held: further that a mortgagee is not debarred under order II, rule 2 from suing for possession of the mortgaged property, on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of a mortgagor's failure to pay interest at the stipulated time, by the fact that on the occurrence of a previous default he sued only for interest and not for possession 1 Lah. 457 F. B. Foll. 4 P. R. 1914 Dist.

[P 23 Cs 1 & 2]

(b) *Contract Act, S. 74—25 P. C. compound interest not penal.*

Courts as a general rule are bound to give effect to what the parties are proved to have agreed to, even if lapse of time and accumulation of interest may have swelled the principal sum enormously beyond its original figure.

Where no specific undue influence on the part of the mortgagee was pleaded by the defendants but there was a general plea of undue influence and no evidence was produced.

Held: that 25 P. C. compound interest was not penal. [P 24 C 1]

Tek Chand—for Appellant.

Jagan Nath—for Respondents.

Campbell, J.—This first appeal is the result of a suit under section 12, Punjab Act II of 1913. The mortgagors, in a certain transaction to be described presently, applied for redemption to the Collector and obtained a decision that the mortgage could be redeemed on payment to the mortgagee Khota Ram, of Rs. 570. Khota Ram has sued for a declaration that there is a further charge on the land mortgaged of Rs. 5,015 and that there can be no redemption without payment of this amount. There was a prayer in the alternative for possession if it be found that he (the mortgagee) is not in possession, but the fact of the mortgagee's possession is now conceded.

The mortgage was entered into on the 26th July 1895 by registered deed for an area of 214 *kanals 7 marlas*. The mortgage price was Rs. 560, and the conditions were that the mortgagors should remain in possession and should pay interest yearly in the form of a certain quantity of grain; on default of any year's interest the mortgagee was to be empowered to take possession and thenceforth payment of interest should cease. The term of mortgage was four years

after which the mortgagors were to redeem on payment of the mortgage-money in the month of *Har*. Then follow in the deed two sentences which are important. The first is this ;—

"Compound interest shall be charged on the unpaid amount of interest at 25 per cent. per annum, and the same shall be paid by the mortgagors to the mortgagee along with the aforesaid mortgage-money."

The other is the following which comes a little lower down :—

"The aforesaid mortgaged lands and the persons of the mortgagors shall both be liable for payment of this debt."

On the 27th June 1898 a further advance of Rs. 10 was made to Charagh, one of the mortgagors, by Khota Ram and a document was drawn up reciting that interest was payable on this amount at Rs. 1-9-0 per cent. per mensem, that principal and interest were payable on demand, that the debt should be considered as an additional charge on the lands mortgaged, that if those lands were redeemed, payment of the said principal and interest would be made along with the mortgage money due under the previous deed, and that other lands and the person of the debtor would be liable for the debt.

In 1902 the mortgagee, Khota Ram, sued for possession on the ground that the interest for that year had not been paid, but he further stated that previous instalments had not been paid in full. He was given a decree for possession and the Court expressly refused to go into the question of what was due for arrears of interest remarking that the plaintiff could seek his proper remedy in respect of anything outstanding. A concession was given to the mortgagors that should they pay the 1902 and 1903 instalments in *Jeth*, *Sambat* 1960 (May 1903) possession should not be delivered to the plaintiff. No payments, however, were made and Khota Ram obtained possession on the 3rd April 1904. He now asks for a declaration that the value of unpaid grain instalments with compound interest at 25 per cent. up to the date of suit should be declared to be included in the mortgage charge. The calculation is set forth in the plaint, and shows that the balance of grain due for each year from *Sambats* 1953 to 1961 has been taken in local weight measures of *paths*, *choths*, and *topas*. Compound interest at 25 per cent up to the date of suit has been calculated on each balance in terms of weight of grain. The total weight of grain due has thus been ascertained and a fixed rate of Rs. 3-8-8 per maund has been applied with the result of a sum of Rs. 4,981-4-0.

The mortgagors have been credited with small payments in each of the five years—1953 to 1957—but with nothing thereafter. Rs. 33-12-0 interest on the second advance of Rs. 10 brings the total up to Rs. 5,015.

Of the seven issues framed by the lower Court the first three relating to limitation, valuation of the suit and the possession of the plaintiff need not be considered since these are not questions now in dispute. The remaining four were as follows :—

1. Is the suit barred under Order II, rule 2, Civil Procedure Code ?
2. Is the rate of interest penal or excessive and not enforceable ?
3. Have the defendants paid interest ?
4. To what relief is the plaintiff entitled.

The lower Court held on No. 1 that when the plaintiff sued for possession as mortgagee in 1902 he could have recovered the interest then due at the same time and should have done so. Quoting *Kudan Mal* v. *Allah Dad Khan* (1), *Chhabil Das* v. *Massu* (2). and *Alia Khan* v. *Kanshiram* (3), the learned Subordinate Judge found that the plaintiff was barred from bringing a second suit for recovery of interest under Order II, rule 2. On issue No. 2 the lower Court recorded a brief decision that the rate of interest was unconscionable, and that no debtor

(1) [1910] 19 P.R. 1910—36 P.W.R 1910—167 P.L.R. 1910—5 I.C. 821.
(2) [1913] 4 P.R. 1914—243 P L.R. 1913—145 P.W.R. 1913—207 P. W.R. 1913—19 I.C. 981.
(3) [1913] 25 P.W.R. 1913—45 P.R. 1913—145 P.L.R. 1913—17 I.C. 677.

with his eyes open could agree to it. There was no specific finding on the other issues, and the suit was dismissed. The plaintiff has appealed.

In our opinion both the above findings by the learned Subordinate Judge are wrong. An obvious commentary on the first is that the plaintiff is not bringing a suit for the recovery of interest. He is to all intents and purposes a defendant resisting the claim of the mortgagors to turn him out of possession on payment of a comparatively small sum. He has been forced to become a plaintiff in a declaratory suit by the action of the Revenue Officer under Punjab Act II of 1913, but what he says is that he wants to remain in possession of the land, and that if he is evicted he must be paid a certain sum.

We have heard a lengthy argument from Mr. Jagan Nath for the respondents in support of the lower Court's finding on this issue. He has contended that all the annual defaults from the date of the mortgage up to the date of the suit in 1902 constituted one cause of action, and that the plaintiff, having an inherent right to sue for interest not paid at that time, omitted, when he sued merely for possession, to sue for all the reliefs to which he was entitled. In support of the argument as to the inherent right to sue for interest, counsel has quoted *Chhabil Das* v *Massu* (2). In that case, as in the present, the mortgage bond provided that interest was to be paid to the mortgagee every year, and that in default the mortgagee should have the right to take possession of the land. In 1897 the mortgagee sued the mortgagors and obtained a decree for the value of produce then due, but did not claim possession. In his subsequent suit for possession the Chief Court held that the fact that the mortgage deed did not specifically give the mortgagee the right to sue for produce on default did not take away his inherent right to do so; that he should have sued for possession at the same time, and that an admission by the mortgagors of payment of produce between the dates of the decree and that of the second suit did not create a new cause of action. In the first place, it will be seen that this ruling was delivered on different facts, and in the second it appears to be contrary to what was laid down in the Full Bench ruling in *Parmeshri Das* v. *Fakiria* (4), although it was not expressly mentioned or overruled there. The Full Beench decision was that a mortgage is not debarred under Order II, rule 2, from suing for possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of mortgagor's failure to pay interest at the stipulated time, by the fact that on the occurrence of a previous default he sued only for interest and not for possession.

This was the ruling in a case where there was a distinct provision in the mortgage deed enabling the mortgagee to sue for interest on default as well as for possession. Here and in *Chhabil Das* v. *Massu* (2) there was no such express condition; but the learned Judges who delivered *Chhabil Das* v. *Massu* (2) read such a condition into the deed in the guise of an inherent right. In any event the fact that the first suit was for interest and not for possession clearly distinguishes the present case from *Chhabil Das* v. *Massu* (2). The cause of action for the 1902 case was the default of payment of interest for that year. The present suit is not one for payment of interest. It is a declaratory suit, and the cause of action lies in the steps taken by the mortgagors to put an end to the mortgagee's possession. A direct authority for the view that the previous suit has no effect upon the present is *Kiman* v. *Sultani Mal* (5) where it was held that when a mortgagee sued for possession on default of payment of interest, he was entitled to a decree for possession *simpliciter*, and that the

(4) [1920] 1 Lah. 457 (F. B.)
(5) [1912] 82 P.W.R. 1912—148 P.L.R. 1912—66 P.R. 1912—13 I.C. 559.

matter of the amount of the lien should be left to be decided on redemption. In this connection the other two rulings quoted by the lower Court *Kudan Mal* v. *Allah Dad Khan* (1) and *Alia Khan* v. *Kanshi Ram* (3) are not in point.

Coming to the second of the four issues detailed above the effect of the Privy Council rulings *Aziz Khan* v. *Duni Chand* (6) and *Balla Mal* v. *Ahad Shah* (7) is that Courts as a general rule are bound to give effect to what the parties are proved to have agreed to, even if lapse of time and accumulation of interest may have swelled the principal sum enormously beyond its original figure. The Lower Court has not considered those rulings, and in the present case no specific undue influence on the part of the mortgagee was pleaded by the defendants. There was a general plea of undue influence only and no evidence of any sort of undue influence was produced. It has been argued further before us that the interest is not a charge on the mortgaged land, but it is expressly made so by the sentences in the deed quoted above, and *Alia Khan* v. *Kanshi Ram* (3), which is cited, is distinguishable, since the terms of the deed in that case were quite different. High as the rate of 25 *per cent* compound interest may be we can find no reason for holding that the mortgagee is not entitled to it.

Counsel for the respondent mortgagors admits that the *onus* was on the defendants to prove that more had been paid to the mortgagee in respect of interest than what has been allowed for in the plaint, and that no evidence has been produced on the question by his clients. He has suggested that it was difficult for them to prove anything after 20 years, and that the mortgagee had special knowledge, but we do not see why the knowledge of the creditor should be presumed to be more special than that of the debtor.

In regard to the last issue another lengthy argument has been addressed to us to the effect that the plaintiff-mortgagee is not entitled to any arrears of interest on account of his acquiescence in non-payment which should be presumed from the fact that he did not sue to take possession earlier. This is a point which was never raised in the pleadings in the lower Court at all and in any case there is no force in it. The law of limitation allowed the mortgagee to sue for interest within 12 years of the first default and 12 years had not elapsed when he took possession. There can be no presumption that he gave up his claim to receive arrears of interest at redemption. The rulings quoted to support this proposition of the appellants need not be discussed since they are not applicable. They are *Mahadaji* v. *Joti* (8) *Balwantrao* v. *Narhar Gangaram* (9) *Jhunku Singh* v. *Chhotkan Singh* (10) *Partab Bahadur Singh* v. *Gajadhar Baksh Singh* (11) and *Khuda Bakhsh* v. *Alim-un nissa* (12) The three latter are cases of the mortgagees accepting a diminished security and remaining apparently satisfied with it for some years. and all the cases deal with mortgages which were usufructuary from their commencement.

The second point raised in connection with this issue is that the amounts of the second bond with the interest due on it cannot be a charge on the land. Again this was not pleaded in the lower Court, and the principal sum of Rs. 10 has been paid by the mortgagors as

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(6) [1918] 101 P.R. 1918--23 C.W.N. 130--165 P.W.R. 1918—48 I.C. 933 (P. C.)

(7) [1918] 124 P.R. 1918—180 P.W.R. 1918--21 Bom. L.R. 558--16 A.L.J. 905--29 C.L.J. 165--23 C.W.N. 233--35 M.L.J. 614--25 M.L.T. 55--48 I.C. 1 (P. C.)

(8) [1892] 17 Bom. 425.

(9) [1919] 54 I.C. 814.

(10) [1909] 32 All. 325-6 A.L.J. 247—2 I.C. 221.

(11) [1902] 24 All. 521— 29 I.A. 148--7 C.W.N. 97--4 Bom. L.R. 845--8 Sar. 310 (P.C.)

(12) [1904] 27 All. 313--(1904) A.W.N. 273—1 A.L.J. 715.

part of the redemption money fixed by the Revenue officer. In our opinion according to the terms of the bond the parties intended it to be a charge on the land and the case is similar to that reported as *Parabh Dial* v. *Kharku* (13) where the money due on a similar bond was made so chargeable.

Finally, it remains to be decided what amount of interest the mortgagee should receive. His claim to Rs. 33-12-0 simple interest on Rs. 10 up to the date of application for redemption is, in our opinion, correct. For the rest he has refrained from claiming interest after the date on which he took possession but has claimed compound interest on what was in arrear on the date of his taking possession up to the date of the application for redemption. It seems to us, however, after a careful consideration of the terms of the mortgage deed that it was not the intention of the parties that compound interest should be charged after possession had been taken. Interest and compound interest both were to be paid in kind, and could only be paid so long as the mortgagors had the land which yielded the kind. When the land was taken from them they ceased to have the means of paying either interest or compound interest. Therefore in our opinion calculation of compound interest must cease on the 3rd April 1904, when the mortgagee got possession.

In any case we should not think it right to allow the plaintiff to value his interest in kind at the market rate of 1916, when he brought his suit. We proceed to indicate the lines on which the redemption money due to the mortgagee should be calculated, and it is necessary to remand the case to the lower Court for further evidence to be taken in order to enable us to pronounce a final order.

The quantity of grain outstanding for each year from 1953 to 1961 *Sambat* is accepted as stated in paragraph 3 of the plaint. The market rate for each year is to be ascertained and the balance of grain for each year reduced to money according to that market rate. On each of the sums so ascertained compound interest at 25 *per cent* will be calculated from the date of default to the 3rd April 1904. To the resultant, figures are to be added (1) Rs. 33, price of chaff on which no compound interest is claimed, and (2) Rs. 33-12-0, the interest on the additional charge of Rs. 10. The total will be declared to be the sum on payment of which together with the principal Rs. 570 the land can be redeemed by the mortgagor-defendants. and the plaintiff will receive his proportionate costs in both Courts.

We refer the appeal to the lower Court under Order XLI, rule 25 for trial of the following issues and return of evidence and findings thereon within three months :—

(1) What was the market rate for white wheat first quality on the date of each default from *Sambat* 1953 to *Sambat* 1961 ?

(2) What is the total value at those rates of the wheat due to the plaintiff on 3rd April 1904 calculated as directed by us above ?

Appeal accepted,

Case remanded.

(13) [1890] 2 P.R. 1890.

1924 LAHORE 25

LE ROSSIGNOL AND MARTINEAU, JJ.

Sandhi, (*minor*,) *through Prem Singh*, —Defendant—Appellant.

v.

Budha Singh and others—Plaintiffs—Respondents.

S. A. No. 468 of 1918, D/28th March, 1922 from the Dt. J., Amritsar, D/-6th October 1921.

Custom (Punjab)—Gift—Joint gift to daughter and son-in-law by widow.

Even if a gift in favour of a daughter were justified by custom it by no means follows that a gift to a daughter and her husband jointly would be valid. A gift by the widow of her husband's non-ancestral property in favour of her daughter and her son-in-law jointly is not justified by custom. [P. 26, C. 2]

Badr-ud-din Kureshi-for Appellant.

Dev Raj Sawhney—for Respondents.

Judgment.—Defendant No. 1, *Mussammat* Jio, in 1916, made a gift of the land of her husband which she was enjoying on a life-tenure, in favour of her daughter, *Mussammat* Thakari, and Sandhi, her son-in-law, jointly, and the present appeal arises out of a suit brought by her husband's collaterals for a declaration that the gift aforesaid shall not affect their reversionary rights.

The first Court found that the land was not ancestral and the gift was invalid, inasmuch as even if a gift of the whole land in favour of the daughter alone were valid by custom, there was no justification in custom for a gift to the daughter and to her husband jointly, and the first Court, on these grounds, decreed for the plaintiffs. The defendants appealed to the learned District Judge, who concurred with the First Court in dismissing the suit but, not content with holding that there was no justification in custom for a gift by a widow in favour of her daughter and her son-in-law jointly, he proceeded to discuss the custom dealing with a daughter's right of succession to non-ancestral property and came to a finding that even as regards non-ancestral property a daughter is postponed to her father's agnates.

The defendants have come up to this Court in second appeal and the same points are discussed before us. It is obvious that even if a gift in favour of a daughter were justified by custom it by no means follows that a gift to a daughter and her husband jointly would be valid, for in the case of a gift to a daughter by a widow nothing more is involved than the acceleration of the daughter's suceession if she be held to be the heir to her father's property. Such an acceleration of succession in favour of the daughter cannot have any effect prejudicial to the collaterals so that presumably if the daughter dies without issue before succession opens out in the normal course the gift to her would have no effect upon the rights of the reversioners. If, however, a gift in such circumstances to a son-in-law were valid it could not be referred to a mere acceleration of the succession.

In these circumstances, it is sufficient for us to hold that a gift by a widow of her husband's non-ancestral property in favour of her daughter and her son-in-law jointly is not justified by custom.

On the further question whether the daughters among the parties to this suit succeed to the non-ancestral property of their father we refuse to express any opinion inasmuch as the decision being unnecessary for the disposal of this case would not in any circumstances be *res judicata*. Accordingly we intentionally leave that question undecided and maintain the decree of the Court below on the sole ground that a joint gift to a daughter and the son-in-law is not justified by custom.

We dismiss the appeal. No costs in this Court.

Appeal dismissed.

1924 LAHORE 26

LE ROSSIGNOL AND HARRISON, JJ.

Ram Ratan and others—Plaintiffs—Appellants.

v

The Firm Hursukh Roy-Chhog Mal and others—Defendants—Respondents.

F. A. No. 2279 of 1918, D/-11th April, 1922, from the decree of the Senior Sub. J., Gujrat, D/-28th June 1918.

Civil P. C., S. 11—Suit to open a decree—Pleas, that could be raised in previous suit, are barred.

The plaintiffs were four sons and two grandsons of certain members of a joint Hindu family who were sued as the managers of a joint Hindu family business and against whom a decree *ex parte* was given by the High Court of Bombay. The plaintiffs admitted that they were members of the joint Hindu family and were, therefore, partners in the business carried on by the same. They sued to set aside the attachment in execution of a part of the property of the firm, which, they said, belonged jointly to them and to the remaining members of the family, and they alleged that,

inasmuch as the agreement on which the plaintiff firm sued and obtained a decree in Bombay was a wagering agreement and contrary to public policy, they were not bound by it.

Held, the suit was barred by *res judicata*.

Obiter. Had the minor plaintiffs come forward and stated that their guardians did not consult their interests and were guilty of culpable negligence in not defending the case properly the position would have been different so far as they were concerned. [P. 27, C. 2]

Hargopal, for G. C. Narang—for Appellants.

Tirath Ram—for Respondents.

Judgment.—The plaintiffs in this case are four sons and two grandsons of certain members of a joint Hindu family who were sued as the managers of a joint Hindu family business and against whom a decree *ex parte* was given by the High Court of Bombay. The plaintiffs admit that they are members of the joint Hindu family and are, therefore, partners in the business carried on by the same. Their cause of action is the attachment, in execution, of a part of the property of the firm, which they say belongs jointly to them and to remaining members of the family, and they allege that, inasmuch as the agreement on which the plaintiff firm sued and obtained a decree in Bombay was a wagering agreement and contrary to public policy they are not bound by it. The suit has been dismissed on the finding that they have failed to prove their allegation, and they appeal urging that they were not given sufficient opportunity to produce their evidence. The respondent firm replies that the suit does not lie and that the matter is *res judicata* inasmuch as the present plaintiffs were defendants in the original case *qua* members of the firm which was sued as such. This is the first question to be decided and it appears to us that inasmuch as the present plaintiffs were defendants in the original suit in the sense that they were members of the firm, the matter is *res judicata* if the plea now taken could have been taken by their respective fathers and grandfathers whose names were shown in the plaint. Had the plea been of such a kind as could not be pleaded by the fathers and grandfathers, it is possible that the suit might lie. This, however, is not the allegation. The grounds on which the decree is impugned are that the whole transaction between the plaintiff and the defendant firm was of the nature of a wagering agreement and can, therefore, be set aside. by the members of the family who were not actually served, on a separate suit being brought. We are of opinion that this is not so and that inasmuch as the defendants in the original suit were served and could have raised the same plea as the plaintiffs now raise, the matter is *res judicata* and cannot now be agitated. Had the minor plaintiffs come forward and stated that their guardians did not consult their interests and were guilty of culpable negligence in not defending the case properly, the position would have been different so far as they are concerned but this again is not the position which has been taken up. In the plaint no relief has been asked for against the father and grand-fathers but merely a declaration that the property now attached is not liable to attachment and sale on account of the nature of the transaction which gave rise to the suit. We find that the matter being *res judicata*, the question of whether the plaintiffs had or had not sufficient opportunity for producing evidence in the present suit does not arise at all.

We dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 27

LE ROSSIGNOL AND ZAFAR ALI, JJ.

Nanak Chand—Defendant-Appellant

v.

Muhammad Zahur-ul-din (Plaintiff) *and Sarab Dayal*—Defendant—Respondents.

S. A. No. 2664 of 1918 D/-16th November 1922 from the D. J., Ludhiana, D/-24th June 1918.

Registration Act, S. 17 (1) (d) and 2 (7)—Receipt embodying terms of a lease must be registered.

The plaintiff came into Court on the strength of a document by which he alleged that

defendant No. 1 on the 8th May 1917, acknowledged receipt of Rs. 25 as earnest money and agreed to lease plaintiff some land for five years on an annual rental of Rs. 180. The terms of the lease, its duration, the annual rent and the date on which possession was to be given were set forth in detail in the document, which was clearly an agreement to lease.

Held: that in view of S. 2 (7) and S. 17 (1) (d) the document must be registered. [P. 28, C. 2]

Fakir Chand—for Appellant.

Umar Baksh—for Respondents.

Le Rossignol, J.—The plaintiff came into Court on the strength of a document by which he alleged that Sarb Dial, defendant No. 1, on the 8th May 1917, acknowledged receipt of Rs. 25 as earnest money and agreed to lease to plaintiff 2 *bighas* 14 *biswas* of land for five years on an annual rental of Rs. 180. He alleged that defendant No. 1, instead of executing a formal lease in his favour, had leased the land to defendant No. 2 and had given him possession. He further alleged that defendant No. 2 had full knowledge of the agreement with plaintiff and he prayed for possession of the land and for an order to compel defendant No. 1 to execute a lease in accordance with the terms of the agreement. He asked in the alternative for damages of Rs. 1,000 against defendant No. 1.

The first Court found that both defendants had joined in a fraud on the plaintiff and decreed him possession for five years, and the District Judge on appeal confirmed the decree holding that it was unnecessary that a formal lease in plaintiff's favour should be executed.

In second appeal it is urged that the document on which the plaintiff's claim is based is not merely a receipt for earnest money but is an agreement to lease, that it is inadmissible in evidence to prove the contract and it should have been registered and that consequently no oral evidence in support of the contract is admissible. In our opinion the contention for the appellant must prevail. In his plaint the plaintiff refers to the document as embodying the agreement between himself and defendant No. 1, and it is obvious that it is more than a mere receipt. The terms of the lease, its duration, the annual rent and the date on which possession is to be given, are set forth in detail in this document, and there can be no doubt that it is an agreement to lease. Now, under S. 2 (7) of the Registration Act a lease includes an agreement to lease. In this respect an agreement to lease must be discriminated from an agreement to sell, and under S. 17 (1) (*d*) of the same Act all leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, must be registered. The lease in question, reserving as it does an annual rent of Rs. 180, does not belong to a class of leases which may be exempted by the Local Government under the proviso to S. 17 (1) (*d*) of the Registration Act.

In this view the plaintiff's suit is unsupported by any evidence and must be dismissed. We accordingly accept the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

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ABDUL RAOOF AND MOTI SAGAR, JJ.

Uttam Singh—Defendant—Appellant.

v

Mt. Ratan Devi and two others, representatives of Anant Ram deceased—Plaintiffs—Respondents.

F. A. No. 3603 of 1918, D/- 21st December 1929 from the Sub. J., 1st class, Amritsar, D/-28th October 1918.

(*a*) *Registration Act, Ss. 77—Question of validity irrelevant.*

In a suit under S. 77 the Court is only concerned with the genuineness and execution of a decument. Question relating to its validity are not legitimately within its scope. [P. 30, C. 1]

(*b*) *Registration Aat., S. 72 and 73—Mere non-appearance of executant not necessarily a denial Petition under S. 73 or appeal under S. 72—Mistake due to doubt condoned.*

The question whether the non-appearance of a party to admit execution is equivalent to a denial of execution is a doubtful question on which opinions may differ. The Calcutta and the Bombay High Courts have consistently held that a wilful refusal or neglect to attend and admit execution is equivalent to a denial of execution within the meaning of the Registration Act, but it is difficult to understand how a sub-Registrar is to distinguish between

cases of wilful non-appearance and cases other than those of wilful non-appearance, *e.g.*, a mere failure to appear due to an accident or to any other legitimate cause, or to some unforeseen circumstances. If in these doubtful circumstances the petition writer makes a mistake in quoting the wrong section, or even if he mistakes the remedy which is open to the applicant under the law, the mistake is *bona-fide* mistake and should be condoned by allowing the petitioner to amend his petition. [P. 30, C. 2 & P. 31, C. 1]

(c) *Registration Act, S. 73—Unverified petition, valid—Civil P. C., O. 6 R. 15.*

Where the only defect in the petition was that it was not verified as required by sub-clause (2) of section 73 but in all other respects it was perfectly valid and a good application under S. 73.

Held: that the mere fact that it was headed as an appeal or that an erroneous section of the statute was mentioned therein would not be sufficient to take it away from the category of an application if it was in fact and in law an application under S. 73, and the Registrar could not very well refuse to entertain it merely because it purported to be under S. 72 if the latter section had obviously no application, and that the erroneous mention of section in the application did not vitiate it in any way whatever. 34 C. 1037 Foll. The provision as to verification of plaints given in O. 6 R. 15 of the C. P. C. are almost identical in terms with Sub. Clause (2) of section 73 of the Registration Act. If a plaint with defective verification or with no vericafition at all is filed in Court it can always be amended and the defect remedied, the reason being that the defect is one merely of form and not one of substance. Even where the defect was never remedied and the application was never verified, the character of the application would in no way be affected by this neglect on the part of the plaintiff. At the most it could be said that the application made under S. 73 was bad and refused because it was not properly verified, but the application would still be an application under S. 73. [P. 33 C. 1]

Sheo Narayan, Tek Chand and Nand Lal—for Appellant.

Fakir Chand and Badri Das—for Respondents.

Moti Sagar, J.—This was a suit to enforce registration of a sale-deed under S. 77 of the Indian Registration Act. The facts are briefly these. On the 21st March 1917 the defendant sold two houses in the City of Amritsar to the plaintiff for a sum of Rs. 7,000. A sale-deed was duly executed signed and delivered to the plaintiff. Out of the sale price fixed, a sum of Rs. 3,700 was paid to the defendant in advance on the day the sale-deed was completed, and as to the balance of Rs. 3,300 it was stipulated that it would be paid before the Sub-Registrar on the day the deed was registered. The plaintiff's allegation is that he repeatedly called upon the defendant to get registration of the sale-deed effected, and to receive the balance of the sale price, but he failed to do so. On the 23rd April 1917 the plaintiff lodged the sale-deed with the Sub-Registrar of Amritsar, and took out a summons under S. 36 of the Registration Act ordering the defendant to appear and admit execution on the 30th May 1917. The summons was duly served, but he neglected to appear. Thereupon the Sub-Registrar refused to register the document and returned it to the plaintiff with an endorsement "Registration refused." The plaintiff thereupon moved the Registrar on the 7th June 1917 by an application which was couched in the following words:—

"Anant Ram,—*Appellant.*

versus

Uttam Singh,—*Respondent.*

Miscellaneous appeal from the order of the Sub-Registrar, Amritsar, dated the 30th May, 1917, refusing registration of the sale-deed, executed by the respondent in favour of the applicant for Rs. 7,000 in respect of house situate at Amritsar.

GROUNDS.

On the 21st March 1917, the respondent executed a deed of sale for Rs. 7,000 in respect of a house, situate at Amritsar in favour of the Appellant and completed the same. He after signing the deed in Persian and English characters in the presence of witnesses, and after perusing the contents of the deed made it over to the appellant vendee for getting it registered. Out of the sale money he received Rs. 3,700 and the remaining Rs. 3,300 was to be paid before the Sub-Registrar. The appellant under S. 36 of the Registration Act filed an application in the office of the Sub-Registrar for authoritative registration. But the respondent did not put in appearance in spite of his having been personally served with summons. Therefore, the Sub-Registrar refused registration. Hence an application under Ss. 72 and 73 of the Registration Act is made with the prayer that the applicant's appeal

may be accepted and the sale deed ordered to be registered. The appellant is prepared to pay the remaining sale money. The sale-deed is herewith attached in original.

Dated the 7th June 1917.

Petition of—

(Sd.) *ANANTRAM*, Appellant."

The application was in writing and was duly signed by the applicant and was accompanied by a copy of the reasons recorded under S. 71 of the Registration Act. It was made within 30 days from the date of the refusal of the Sub-Registrar to register the document and was presumably presented in person by the petitioner in the office of the Registrar. The only defect in the application was that it was not verified by the petitioner in the manner required by law for the verification of the plaints. Otherwise it fully complied with the requirements laid down in S. 73 of the Act. The Registrar treated this application as an appeal under S. 72, and after service of notice on the defendant, the executant of the deed, dismissed it on the 13th August 1917 on the ground that registration had been refused because of denial of execution and that consequently an appeal under S. 72 of the Registration Act was not competent. The present suit was then instituted by the plaintiff on the 27th of August 1917. The main contention of the defendant was that the suit was not maintainable in as much as the plaintiff had failed to perform the preliminaries of procedure and conditions essential to entitle him to the remedies and reliefs provided for in S. 77. Other pleas on the merits were also raised but it is now conceded that in a suit under S. 77 the Court is only concerned with the genuineness and execution of a document and that questions relating to its validity are not legitimately within its scope. On the question of the maintainability of the suit the Senior Subordinate Judge found in the affirmative and decreed the plaintiff's suit. Against this judgment and decree the defendant has appealed to this Court through *Pandit* Sheo Narain, and we have listened to lengthy arguments by counsel on both sides.

The contentions of the learned counsel for the appellant are twofold. Firstly, it is contended that the provisions of S. 73 are imperative and that they must be strictly complied with before a party could sue under S. 77 of the Indian Registration Act. It is urged that where the plaintiff ought to have applied under S. 73, but mistaking his remedy preferred an appeal to the Registrar under S. 72, it is the same as if he did not go at all before the Registrar. The second contention of the learned counsel is that the failure on the part of the executant to appear and admit is equivalent to denial of execution and that a refusal to register under such circumstances does not entitle a party to appeal under S. 72 of the Act, but his proper remedy is to move the Registrar only by a petition under S. 73.

Mr. Badri Das on the other hand contends that the provisions of S. 73 were fully complied with in this case, that the non-appearance of a party to admit execution does not necessarily lead to the inference that execution is denied, that in the present case it was doubtful if registration was refused on the ground of denial of execution and that consequently the petition-writer who drafted the petition adopted the best possible course open to him under the circumstances, *viz.*, to mention both the Ss. 72 and 73 in the petition and to leave it to the Registrar to decide which of the two sections was applicable. It is further contended that the refusal to register by the Registrar was in any case under S. 76 and that this refusal entitles the plaintiff to sue under S. 77 of the Act.

The question whether the non-appearance of a party to admit execution is equivalent to a denial of execution is a doubtful question on which opinions may differ. The Calcutta and the Bombay High Courts have consistently held that a wilful refusal or neglect to attend and admit execution is equivalent to a denial of execution within the meaning of the Registration Act, but with all respect to the learned Judges who have

adopted this view we are unable to understand how a Sub-Registrar is to distinguish between cases of wilful non-appearance and cases other than those of wilful non-appearance. A Sub-Registrar is precluded from conducting any enquiry upon this point and according to these very authorities must refuse to register the document if the executant has failed to put in appearance. We do not see any valid reason why a mere failure to appear which may be due to an accident or to any other legitimate cause should be held to be wilful, and if the registration is refused, the refusal to register be held to be due to a denial of execution. Take for instance the case of a person who after duly executing a document hands it over to the person in whose favour it is executed. The latter presents the document to the Sub-Registrar for registration and takes out a summons for the executant of the deed to attend and admit execution on a particular date. On the date fixed the executant fully intending to attend and admit execution starts from his house but happens to meet with an accident on the way and fails to appear before the Sub-Registrar, who refused to register the document. The refusal to register in this case is clearly due to the non-appearance of the executant, but can it be said that the non-appearance in this case is wilful, and that the refusal to register proceeds on the ground of denial of execution ? The executant never denied execution, he was in fact always prepared to admit execution, and it was only owing to some unforeseen circumstances that he was prevented from putting in appearance. We very much doubt if in these circumstances the non-appearance could be said to be equivalent to a denial of execution. At all events the question is not free from doubt, and there is force in the argument of Mr. Badri Das that if in these circumstances the petition-writer who drew up the petition for the plaintiff made a mistake in quoting the wrong section, or even if he mistook the remedy which was open to the applicant under the law, the mistake was a *bona fide* mistake and should have been condoned by allowing the petitioner to amend his petition. It is, however, unnecessary to discuss this point any further, as we are clearly of opinion that the appeal must fail on the ground that the plaintiff has substantially complied with all the requirements of law as required by S. 73, and that he is entitled to maintain this suit under S. 77, even if the refusal to register was due to denial of execution, and even if an appeal under S. 72 was not competent.

As already pointed out, the only defect in the petition was that it was not verified as required by Sub-clause (2) of S. 73 of the Registration Act. In all other respects it was a perfectly valid and a good application under S. 73. The mere fact that it was headed as an appeal or that an erroneous section of the statute was mentioned therein would not be sufficient to take it away from the category of an application if it was in fact and in law an application under S. 73, and the Registrar could not very well refuse to entertain it merely because it purported to be under S. 72 which obviously had no application. In *Tribeni Sahu* v. *Bhagwat Bux* (1), Mr. Justice Woodroffe observed : "It is not to be supposed that a Court in the administration of Justice will refuse an application, which on the merits it ought to grant and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section." These remarks apply with full force to the facts of the present case, and we are clearly of opinion that the erroneous mention of the section in the application did not vitiate it in any way whatever. *Pandit* Sheo Narain, however, strenuously argues that the defect as to want of verification was fatal to the proceedings, and cites a large number of authorities in support of the proposition that the provisions of the Registration Act are mandatory in their nature and must be strictly observed. We have examined all these authorities, and are of opinion that they have no application to the

(1) [1907] 34 Cal. 1037—6 C.L.J. 298—11 C. W. N. 1030 (F.B.)

present case. All the authorities cited relate to cases where the question was whether a document had or had not been validly presented for registration before the registering officer. It was held in these cases that the provisions of Ss. 32 and 33 of the Act were imperative and that the Courts were not to allow the imperative provisions of the Registration Act to be defeated when it was proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed in the Act to present it. This was perfectly correct as the object of Ss. 32 and 33 is clearly to make it difficult for persons to commit frauds by means of registration under the Act. No such question arises in the present case. Here the defect is merely one of form and not one of substance, and it has been repeatedly held that regard must be had to the substance rather than to the form of the proceedings. In *Bechun Sahu* v. *Syed Ali Rasul* (2) Mookerjee and Beachcroft, JJ. held in somewhat similar circumstances that it would be strange" if meaningless adherence to technicalities were allowed to impede and possibly to defeat the ends of justice; legal procedure was plainly not intended for such a purpose." In *Bisheshar Nath* v. *Emperor* (3) it was laid down by Walsh, J. that Order VI, Rule 14 of the Code of Civil Procedure which requires a pleading to be signed by a party is a matter of procedure only, and that it is the business of the Court to see that the provision is carried out. The provisions as to verification of plaints given in Order VI, Rule 15 of the Civil Procedure Code are almost indentical in terms with Sub-Clause (2) of S. 73 of the Registration Act. It is beyond doubt that if a plaint with defective verification or with no verification at all is filed in Court it can always be amended and the defect remedied, the reason being that the defect is one merely of form and not one of substance. It is, however, argued that in the present case the defect was never remedied and the application was never verified. Even so, we do not think that the character of the application would in any way be affected by this neglect on the part of the plaintiff. At the most it could be said that the application made under S. 73 was bad and refused because it was not properly verified, but the application would still be an application under S. 73, and the dismissal by the Registrar though apparently made under S. 72 would be in substance an order under S. 76. In our opinion the contention is wholly untenable and we hold that all the substantial requirements of S. 73 were complied with and the dismissal by the Registrar being one under S. 76, the suit under S. 77 was fully competent.

As to the question of the genuineness and the due execution of the deed we entirely concur with the fiinding of the Court below that it was duly executed and delivered by the defendant to the plaintiff.

Lastly it is contended that the suit was a declaratory one and that more than Rs. 80 should not have been allowed as pleader's fees. We do not see any force in this contention. The suit was clearly not one of a declaratory nature but one in which consequential relief was prayed for and granted. In our opinion the pleader's fees have been rightly assessed and we overrule the objection.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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(2) [1912] 16 I. C. 614.
(3) [1918] 40 All. 147—16 A.L.J. 64—19 Cr. L. J. 865—44 I.C. 28.

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ABDUL RAOOF AND CAMPBELL, JJ.

Debi Prasad and others—Plaintiffs-Appellants.

v.

Mt. Bhago and others—Defendants—Respondents.

F. A. No. 1080 of 1915, D/-7th March 1923, from the Sub. J., 1st Class, Delhi, D/-6th January 1915.

(a) Civil P. C. O., 22 R. 4—Decree against dead person is a nullity—Retrial ordered.

It is illegal for the Court to continue to hear a suit against a dead person, whose death has been brought to its notice and pass a decree against that person. [P 34 C 1, 2]

(b) Civil P. C. O. 41 R. 23—Preliminary point—Decree passed against dead person.

Where the death of one defendant was brought to the notice of the Court, but the Court continued the suit and passed a decree without legal representative.

Held that the lower Court must be taken to have disposed of the case on a preliminary point. Remand under O. 41, R. 23 ordered. [P 34 C 2]

Bhagat and Jagan Nath—for Appellants.

Sardha Ram, with Manohar Lal, Balwant Rai and M. C. Mahajan—for Respondents.

Campbell, J.—The following three pedigree tables [vide next page] are necessary for the understanding of the matter in controversy in this appeal.

Umro Singh (pedigree 1) was the owner of considerable property which was held by his widow *Musammat* Ram Devi until her death in December 1903. Three sets of claimants to the succession then appeared, (1) the descendants of Umrao Singh's sister *Musammat* Uttam Devi, (2) Ram Saran Das and Kaka Mal, who alleged that Saudagar Mal's great-grandfather and Telu Mal's great-grandfather had been brothers, and (3) Debi Parshad and his sons who also claimed to be descended from a brother of Saudagar Mal's great-great-grandfather. On the 19th January 1904 these rivals entered into an agreement which was signed (1) by Bashesher Nath for himself and as the guardian of his three sons and by Shankar Nath for himself and as guardian of Bhola Nath (2) by Ram Saen Das and Kaka Mal (3) by Debi Parshad for himself and as guardian of Sri Ram, and by Kashi Parshad and Joti Parshad. The parties agreed that each set of claimants should be owner of one-third of Umrao Singh's property, that a succession certificate or letters of administration should be taken out jointly or by one of the three parties, and that all should combine to resist any other claimant.

Four years of litigation about letters of administration ensued, and letters of administration eventually were granted to Basheshwar Nath alone on the 11th January 1908, the order being upheld by the Chief Court on 12th February 1909.

On the 8th March 1909 Debi Parshad and his sons sued for possession of one-third of the property by partition on the basis of the agreement of 19th January 1904. They obtained a preliminary decree on 21st March 1910 against which Basheshar Nath and other defendants appealed unsuccessfully. A final decree was passed on 6th January 1915 dividing the property and the present appeal is by the plaintiffs, Debi Parshad and his sons, against that final decree.

There is a cross-appeal by Basheshar Nath, Shankar Nath and Bhola Nath, No. 1323 of 1915, which will also be disposed of by this judgment as well as cross-objections filed (*a*) by *Mussammat* Bhago, the sole surviving representative of Ram Saran Das and Panna Lal and Saling Ram claiming to be representatives of Kaka Mal, and (*b*) by Phulli, son of Basheshar Nath.

It is necessary to set aside the decree of the lower Court on a preliminary point and to send the case back for edecision. The appeal against the preliminary decree was dismissed on 6th June 1912. Kaka Mal defendant died on 27th April 1914. Debi Parshad Plaintiff applied to the trial Court on 16th June 1914 for an order that he himself was the legal representative of Kaka Mal on that date and on 16th August 1914 the Court recorded directions that the defendants should reply to this application but no written replies are on the record and no order was passed

(1) SAUDAGAR MAL

Umrao Singh, died about 1864. = *Mussammat* Ram Devi died 12-12-03.

Mussamat Kanwal Devi, d. s. p. 1893.

Mussamat Sundar Devi.

Banarsi Das. Kashi Nath.

(adopted) Basheshar Nath.

Suraj Bhan. Arjan. Phulli.

Basheshar Nath, adopted by Banarsi Das. Shankar Nath. Bhola Nath.

(2) CHUHAR MAL.

Telu Mal. Dittu Mal.

Ram Saran Das—*Mussammat* Rakhi. Kaka Mal. Daughter.

Mussammat Bhago. *Mussammat* Rajo. Salig Ram. Panna Lal.

(3) DEBI PARSHAD.

Kashi Parshad. Joti Parshad. Sri Ram.

on it. Kaka Mal continued to be shown as a defendant and the final decree was passed against him and the other defendants.

In Civil Appeal No. 1323 Mr. Manohar Lal, Advocate applied on 7th June 1921 on behalf of Kaka Mal's sister's sons. Panna Lal and Salig Ram, that they should be made respondents as Kaka Mal's legal representatives. The application was granted subject to all just exceptions and objection is now taken in *Mussammat* Bhago's cross-objections, to which Panna Lal and Salig Ram have also subscribed, to the lower Court's failure to implead the legal representatives of Kaka Mal. This objection must be sustained, for it was obviously illegal for the Court below to continue to hear the suit against a dead person, whose death had been brought to its notice and to pass a decree against that person.

Accordingly we set aside the decree of the lower Court and remand the case for redecision after disposal of the application of 16th June 1916 and after the impleading as defendants of those persons whom the Court finds to be the legal representatives of Kaka Mal. The lower Court must be taken to have disposed of the case on a preliminary point and the remand, therefore, will be under Order 41, rule 23. The stamp on both appeals will be refunded and costs will be costs in the cause.

Decree set aside ; Case remanded.

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SCOTT-SMITH AND BRASHER, JJ.

Ujagar Singh and others—Plaintiffs-Appellants.

v.

Sucha Singh and others—Defendants-Respondents.

Criminal App. No. 947 of 1917, D/- 18th July 1922 from the Senior Sub. J, Gujranwala, D/- 8th December, 1916

Specific Relief Act, S. 42—Compromise by a proprietor governed by customary law — Good faith—Declaratory suit by the heirs challenging compromise lies.

The heirs of a proprietor governed by customary law have a right to challenge a compromise entered into by him on the ground that it was not entered into in good faith. [P. 35 C.2]

Where a proprietor entered into a compromise believing that there was no chance of succeeding in the suit

Held, the compromise was made in good faith. [P. 36 C. 1]

B. P. Khosla—for Appellants.

Nand Lal—for Respondents.

Scott-Smith, J.—This first appeal was heard along with Civil Appeal No. 735 of 1917 and we shall have occasion to refer to the printed paper book in that case which we call Paper Book "B," the Paper Book in the present case being marked as "A." The pedigree table of the parties is given on page 89 of paper book "B." Plaintiffs are the sons of Arjan Singh and defendants are the descendants of Gulab Singh. Gulab Singh was originally entitled to ⅓rd share of the joint land belonging to the descendants of Jamiat Singh. In 1863 Gulab Singh's heirs sued and got a decree for their ⅓rd share conditional on payment of Rs. 415 (see page 69 of the paper book "B.") This money was never paid. In 1882 Gulab Singh's descendants again sued for their father's share, but the suit was dismissed, it being held that the decision in the 1863 case barred a fresh suit and that the defendants had held adverse possession since 1863. In 1897 Gulab Singh's descendants sued Arjan Singh and Surjan Singh for one-half of their father's share of the land *i. e.* for ⅙th of the whole property, saying that they had already got possession of ⅙th. Their suit failed. On the 21st of January 1909 Arjan Singh sued the defendants for possession of ⅙th share of the property *i. e.*, for half of Gulab Singh's original share. The defendants plead long possession. Arjan Sing said that they had taken forcible possession subsequent to the previous suit *i. e.*, the 1897 suit. He said that they used to pay a share of the produce, that they paid it for nine years and that they ceased to pay it for the previous two years, in other words he admitted that they had been in possession for eleven years. Issues were framed on the 15th of April 1909, but on the 3rd of May, the date fixed for evidence, the parties asked for an adjournment as they wished to compromise. 28th of May was then fixed and on that date the suit was compromised, Arjan Singh giving up his claim upon receipt of Rs. 200. The present suit has been brought by Arjan Singh's sons for a declaration that the compromise effected by their father in the 1909 case should not affect their reversionary rights after their father's death. The lower Court without going into the merits of the compromise, held that it did not amount to an alienation which could be contested by reversioners. It, therefore, dismissed the suit.

Plaintiffs have filed an appeal to this Court and it is contended on their behalf that they can certainly bring a suit to contest the compromise under section 42 of the Specific Relief Act.

Their counsel admitted that having regard to *Buta* v. *Khuda Bakhsh* (1) and other authorities a compromise entered into in good faith binds a man's heirs, but urged that they are entitled to challenge the compromise on the ground that it was not entered into in good faith.

This point was not contested by Dr. Nand Lal on behalf of the respondents, and it is quite clear to us that the lower Court was wrong in dismissing the suit on this preliminary point. We have, therefore, heard arguments as to the merits of the compromise and as to whether it was entered into in good faith or not.

As already poirted out Arjan Singh admitted in the 1909 suit that the defendants had been in possession of the ⅙th share claimed by him for 11

(1) 97 P.R. 1906.

years. The suit was instituted on the 21st of January 1909 which means that the defendants were in possession at all events in January 1898. Now, the previous suit brought by them in which they said they were in possession of 1/6th and claimed the other 1/6th was dismissed on the 19th of June 1897. How they got possession of this 1/6th we have no means of knowing, but it seems at least probable that the 1/6th which Arjan Singh claimed in the suit instituted in January 1909 was the same 1/6th of which the defendants said they were in possession in the suit brought by them in 1897.

If this were so, Arjan Singh might very well have thought that he would not succeed in his suit. The onus was on him to prove that the defendants had been paying produce to him, or, in other words, he had to prove his own possession within twelve years of the suit, we have no doubt that having regard to this he compromised the suit upon the receipt of Rs. 200. That he did receive Rs. 200 has been held to be proved by the lower Court and the point has not been pressed before us. The allegation that he compromised it owing to the pendency of a criminal case has also been shown to be false.

In our opinion, the only fair conclusion from the facts on the record is that Arjan Singh entered into this compromise in good faith, believing that he had no real chance of succeeding in his suit. Under these circumstances the plaintiff's suit cannot succeed and we dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 36

ABDUL RAOOF AND MOTI SAGAR, JJ.

Mt. Umri—Defendant—Appellant.

v.

Shah Muhammad — Plaintiff—Respondent.

Mis. S. A. No. 89 of 1919 D/-12th December 1922, from the order of the Dt. J., Lyallpur, D/- 20th December 1918.

Civil P. C. O. 41 R. 23—Not exhaustive—Court is not restricted to R. 23 for reasons for remand.

An appellate Court is not confined to the grounds mentioned in rule 23 and if for the ends of justice it is necessary to remand a case for a fresh trial it may do so on any other good ground. 44 C. 929 F. B. Ref. [P 36 C 2]

Nand Lal—for Appellant.

Aziz Ahmad—for Respondent.

Abdul Raoof, J.—Shah Muhammad respondent obtained a decree for restitution of conjugal rights against *Mt.* Umri, the appellant before us. The decree was put into execution and *Mt.* Umri objected that as she had embraced Christianity the marriage tie had been put an end to. The executing Court dealt with the matter somewhat summarily and disallowed the application for execution. Thereupon the decree-holder preferred an appeal to the lower appellate Court. The learned Judge of the Court below considering the judgment of the first Court to be wholly inadequate, made an order of remand under order 41, rule 23. Against that order the present appeal was preferred. At the hearing a preliminary objection was taken that no appeal from the order of remand in this case was competent. The question was referred to a Full Bench. It has now been finally decided that an appeal does lie from the order of remand in such cases. The appeal has now come up for decision before us on the merits.

Dr. Nand Lal, counsel for the appellant *Mussammat* Umri, has contended that the present order was not justified by the terms of rule 23 of order 41 inasmuch as the judgment of the first Court had not been set aside on any preliminary point by the Court below. It has been held more than once that an appellate Court is not confined to the grounds mentioned in rule 23 and that if for the ends of justice it is necessary to remand a case for a fresh trial it may do so on any other good ground. In the case of *Ghuznavi* v. *Allahabad Bank, Ltd.* (1), a Full Bench of the Calcutta High Court laid down the rule that

(1) [1917] 44 Cal. 929—21 C.W.N. 877—26 C.L.J. 49—41 I.C. 598 (F. B.)

the power of remand under S. 107, Civil Procedure Code is limited to the case described in order 41, rule 23, but nothing in that section restricts in any manner the application of the principle of inherent power recognised by S. 151 of the Code.

Dr. Nand Lal has cited a number of rulings given under the old Code and some pronounced since the coming into operation of the new Code, but it will serve no useful purpose to discuss all those authorities here. No one can deny the fact that so far as rule 23 of order 41 is concerned a remand may be made on the grounds set forth therein but rule 23 is not exhaustive. Various circumstances may arise under which an appellate Court may not be able to decide completely a case and it may think it necessary to order a remand in the interests of justice. In this case the learned Judge of the Court below has given satisfactory reasons for making the order of remand.

Dr. Nand Lal has also cited some authorities on the question whether the alleged apostacy in this case had taken place or not. We do not think it is necessary to deal with this question at this stage. The whole question will be gone into by the Court of first instance to which the case is remanded under order 41, rule 23.

We see no force in this appeal and we accordingly dismiss it with costs.

Appeal dismissed.

1924 LAHORE 37

SCOTT-SMITH AND ZAFAR ALI, JJ.

Naman and others — Plaintiffs—Appellants.

v.

Batan Singh and another—Defendants Respondents.

S. A. No. 697 of 1919 D/- 20th December 1922, from the Dt. Judge, Hoshiarpur, D/- 13th December 1918.

(a) *Riwaj-i-am Evidentiary value is great as regards custom recorded therein.*

c. Where a statement in a *Riwaj-i-am* as to the existence of a custom is supported by instances it affords sufficient proof of that custom unless rebutted by the party who denies it. An entry in a *Riwaj-i-am* as to a custom is a strong piece of evidence in support of that custom, and it lies on the person denying that custom to rebut that evidence. Where the *Riwaj-i-am* declared that the adoption of sister's son is allowed by custom,

Held, that the onus of proving that the adoption of a sisters' son was not valid lay on the plaintiffs who impeached its validity. 45 P. R. 1917 P. C. Foll. 50 P. R. 1893 Dist. [P. 38 C. 2]

(b) *Custom* (Punjab)—*Adoption-Sister's son-may be adopted among Agriculturists of Hoshiarpur district.*

Gifts to sisters, sons, though not instances of adoption, strogly illustrate the force of the custom recognising the claims of sisters' sons. Though the instances of adoption of daughters' sons given in the *Riwaj-i-am* are not directly in point, they undoubtedly may be taken into consideration as indicating that the agricultural tribes of the Hoshiarpur District are not devoted votaries of the agnatic theory, and that the general custom is so far modified amongst them that it does not look with disfavour upon the drifting of ancestral land into the hands of such non-agnates as are related through daughters or sisters P. 39 C. 1]

Har Gopal for Tek Chand—for Appellants.

Nanak Chand—for Respondents.

Zafar Ali, J.—Kanhaya, a sonless Hindu *Jat* proprietor of the village Kukran, District Hoshiarpur, having adopted his sister's son, his first cousins on the father's side sued to have it declared that that adoption was invalid by custom and would not affect their rights as reversioners.

The *Riwaj-i-am* of the Hoshiarpur District prepared in 1884 declared that adoption of a sister's son had the sanction of custom and this was repeated in the *Riwaj-i-am* compiled in 1914 which cited several instances in support of the said custom. However, the trial Court (Munsif of Hoshiarpur) placed the onus of proving the custom on the defendants and eventually came to the conclusion that they had failed to discharge it. On appeal the learned District Judge held that the burden of proof was wrongly placed on the defendants and should be placed on the plaintiffs, and remanded the case to enable the latter to discharge the onus thus placed on them. Both parties produced further evidence before the Munsif who reported that that adduced by the plaintiffs was not sufficient to discharge the onus laid on them. On receiving this return to the order of remand, the learned District Judge issued a comt mission to the Revenue Assistan-Hoshiarpur, for a local enquiry which

he accordingly made and submitted a report. When this was received, counsel for the plaintiffs admitted before the District Judge that they had failed to discharge the burden of proof placed on them; and therefore he accepted the appeal and dismissed their suit. They preferred a second appeal to this Court which was admitted on a certificate which though originally refused was granted subsequently by the District Judge in pursuance of an order of this Court.

It is again contended before us on the authority of *Ralla* v. *Budha* (1) that the initial burden of proof lay on the defendants who alleged that the adoption of a sister's son was valid and that the District Judge was wrong in shifting the burden on to the plaintiffs. In the case, referred to, the parties were *Arains* of a village in the Nawanshahar Tahsil of the Jullundur District and the adoption contested was of a daughter's son. According to the *Riwaj-i-am* of the Jullundur District, a daughter's or sister's son could not be adopted, as stated in the penultimate paragraph at page 228 of the said judgment itself, and therefore the onus of proving that the adoption of a daughters son was valid by custom was rightly thrown on the party who set up that custom contrary to the *Riwaj-i-am*. This ruling therefore lends no support to plaintiffs' contention as to burden of proof. Another ruling cited on this point was *Buthu* v. *Bur* (2) in which it was held that the *onus* of proving the validity of the adoption of a daughter's son lay on the person asserting it, and that the *Riwaj-i am* of 1884 did not correctly represent existing custom; but the lat st decisions of this Court relating to the evidential value of a *Riwaj-i-am* are that where a statement in a *Riwaj-i-am* as to the existence of a custom is supported by instances, it affords sufficient proof of that custom unless rebutted by the party who denies it [see *Mt. Ishar Kaur* v. *Raja Singh* (3), *Chhuttan* v. *Hazari Lal* (4) and *Wazira* v. *Mt. Mariyam* (5)] Apart from these decisions there is the ruling of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (6), that an entry in a *Riwaj-i-am* as to a custom is a strong piece of evidence in support of that custom, and that it lay on the person denying that custom to rebut that evidence. We are therefore of opinion that the onus of proving that the adoption of a sister's son was not valid lay on the plaintiffs and was rightly placed on them by the learned District Judge.

Next it is argued that the plaintiffs did succeed in discharging the onus placed on them, but we are of opinion that they did not. Undoubtedly there is evidence either way, but there is a preponderance of evidence in support of the custom. In the first place this custom is stated in the two *Riwaj-i-ams* prepared in 1884 and 1914, successively, which shows that general opinion has uniformly been in favour of the custom. *Secondly*, the *Riwaj-i-am* compiled in 1914 cites no less than eight judicial instances (Nos. 130 to 133, 135, 137, 139 and 142) and three from registers of mutations (Nos. 313 to 315) in support of the custom. As against these eleven, there are only six instances to the contrary (Nos. 129, 134, 136, 138, 140 and 141). To give further instances the plaintiffs produced copies of Judgments marked P-2 to P-13. P-3 relates to instance No. 134; P-5 to No. 129 and P-6 and P-7 to No. 141 of the *Riwaj-i-am*. P-8 is the same as P-2, and P-9, 10 and 11 relate to the same instance. Thus only five new instances were cited by the plaintiffs, but instance No 141 is not relevant because it is of an adoption of a sister's son by a sonless occupancy tenant in

(1) [1893] 50 P. R 1893 (F.B.)
(2) [1895] 84 P. R. 1895.
(3) [1911] 94 P. L. R. 1911—29 P. R. 1911—124 P. W. R. 1911—9 I. C. 608.
(4) [1915] 7 P.R. 1916-46 P L.R. 1916-129 P. W R. 1915—30 I. C. 22.
(5) [1917] 84 P. R. 1917—151 P. W. R. 1917-3 P. L.R. 1918-42 I. C. 358.
(6) [1917] 44 Cal. 749—44 I. A. 89—19 Bom. L.R. 388-12 P.W.R. 1917-21 M. L. T. 310-32 M. L. J. 615—45 P. R. 1917—15 A. L. J. 525—21 C. W. N. 842—26 C. L. J. 175—38 I. C. 354 (P. C.)

whose case succession was governed by section 59 of the Tenancy Act. The defendants also produced copies of judgments relating to two new instances. These judgments are marked D-4 and D-5. In this way there were 13 instances in support of the custom as against ten to the contrary. *Thirdly*, in the course of the enquiry made by the Revenue Assistant it transpired—

(1) that the plaintiffs themselves had lately gifted 8 *kanals* and 3 *marlas* of land to their sister's son, and

(2) that one Diwan Singh of the village of the parties and a member of their *got* had adopted his daughter's son, Surat Singh, that lately Diwan Singh's son brought a suit to have the adoption cancelled, but that the suit ended in a compromise according to which Surat Singh's uncles (the sons of Diwan Singh) gave him 80 *kanals* of land in 1916-17.

These gifts to sister's sons, though not instances of adoption, stongly illustrate the force of the custom recognizing the claims of sister's sons. Having regard to these instances and other evidence taken by the Revenue Assistant he arrived at the conclusion that the defendants' evidence outweighed that adduced by the plaintiffs. *Forthly*, though the instances of adoption of daughter's sons given in the *Riwaj-i-am* are not directly in point, they undoubtedly may be taken into consideration as indicating that the agricultural tribes of the Hoshiarpur District are not devoted votaries of the agnatic theory, and that the general custom is so far modified amongst them that it does not look with disfavour upon the drifting of ancestral land into the hands of such non-agnates as are related through daughters or sisters.

Taking into consideration all the evidence reviewed above we are of opinion that the custom stated in the *Riwaj-i am* does obtain, and that the plaintiffs have failed to prove that it does not. The appeal fails and is dismissed with costs.

Appeal dismissed.

1924 LAHORE 39

BROADWAY AND ABDUL QADIR, JJ.

Mahomed Hussain and another—Defendants—Appellants.

v.

Ram Lal—Plaintiff—Respondent.

S. A. No. 1571 of 1919, D/- 15th June 1922 from the Dt. J., Lahore, D/- 12th April 1919.

(a) *Evidence Act, S. 101—Execution admitted, consideration denied—Onus is on executant.*

When a defendant admits the execution of a pronote and pleads want of consideration, the onus is on him to substantiate his plea. [P. 39 C. 2]

(b) *Civil P. C., S. 100—Finding as to consideration is one of fact.*

A finding that a pronote was executed for consideration is a finding of fact. [P. 40 C. 1]

Hukam Chand—for Appellants.

Jai Gopal Sethi and Dev Raj Sawhney—for Respondent.

Judgment.—A preliminary objection has been taken by Mr. Jai Gopal Sethi for the respondent. It is to the effect that the findings arrived at by the learned District Judge are findings of fact which cannot be attacked in second appeal. It appears that the suit giving rise to this appeal was based on a pro-note. The defence set up was that, although the pro-note had been executed by the defendants, no consideration had passed. In the written pleas the defendants then detailed what they asserted were the real facts of the case, and alleged that no cash had passed in connection with the document. Subsequently, with the advent of Mr. Hukam Chand as representing the defendants a totally new defence was set up and it was asked that the onus be shifted to the plaintiff. Objection was taken by the plaintiff's *vakil* and then Mr. Hukam Chand definitely stated that he did not press the application. It appears that, in spite of this statement, evidence relating to pleas set up therein was led but the question of onus was not re-agitated. It is perfectly clear that when a defendant admits the execution of a pro-note and pleads want of consideration, the onus is on him to substantiate his plea. The learned District Judge has in a very lengthy judgment considered every

one of the various pleas set up and has decided every one against the defendants. His finding is clear and unmistakeable that the pro-note was executed for consideration. This is clearly a finding of fact behind which we are unable to go. We therefore, dismiss the appeal but in the circumstances leave the parties to bear their own costs.

Appeal dismissed.

1924 LAHORE 40

ABDUL RAOOF AND MOTI SAGAR, JJ.

Hukam Chand -- Plaintiff—Appellant.

v.

Shahab Din and others--Defendants-Respondents.

S. A. No. 1917 of 1919, D/- 24th November 1922 from the D. J., Jullundur, D/- 2nd May 1919.

(a) *Evidence Act, S. 65 (c)—Proof of loss is necessary*

Where the loss of the original has not been proved the copy can not be accepted in evidence.

(b) *Limitation Act, Ss. 9 and 14—Exemptions not specially provided are not allowed.*

Exemptions not covered by Ss. 9 and 14 and the other sections should not be imported by Courts to relieve a party from the bar of limitation. [P 41 C. 1]

Mehr Chand Mahajan—for Appellant.

Fakir Chand—for Respondents.

Abdul Raoof.—The facts giving rise to this second appeal are few and simple and may be summarised as below:—

On the 17th February 1894 Umar Din mortgaged the land in dispute with possession to one Lachhman Das for Rs. 820, out of which Rs. 320 were paid to the mortgagor and Rs. 500 were left with the mortgagee to be paid to a previous mortgagee, Mohan Lal. The mortgage in favour of Mohan Lal was dated the 2nd October 1890 and was a simple mortgage without possession. There was a clause in this mortgage entitling the mortgagee to claim possession in the event of a default in payment of any of the instalments fixed in the deed. Lachhman Das did not pay Rs. 500 to Mohan Lal which led to a suit for possession by him in 1903 against Umar Din and Beli Ram, son of Lachhman Das, who had died in the meantime. A decree for possession was passed in the suit on the 21st May 1903, and Mohan Lal succeeded in getting possession of the land in execution of this decree. He remained in possession till 1917 when the heirs of Umar Din paid off his mortgage, redeemed the property and took possession. Thereupon the present suit was instituted on the 21st February 1918 by Beli Ram for possession as mortgagee on payment of Rs. 500. The suit was resisted on the plea of limitation. Both the Courts below holding that article 135 of the Indian Limitation Act was applicable, dismissed the suit. Hence this second appeal.

Mr. Mehr Chand Mahajan, holding the brief of Mr. Jagan Nath, has put forward two contentions before us in support of the appeal, namely:—

(1) That the mortgagor Umar Din has been allowed to retain possession of the mortgaged property under a lease executed on the date of the mortgage. This allegation is not supported by any evidence. A copy of the lease was produced in the Courts below, but it was not in favour of the mortgagor, and moreover as the loss of the original lease has not been proved the copy could not be accepted in evidence. This contention, therefore, must be disallowed,

(2) That inasmuch as there was a clause in Mohan Lal's mortgage deed entitling him to take possession under the contingency mentioned in his previous mortgage deed it was not possible for Lachhman Das or his heirs to sue for possession. This contention also cannot prevail, because the mortgagor Umar Din was admittedly in possession of the mortgaged property at the time the mortgage deed was executed, the mortgagor's right to possession had determined on that date and Lachhman Das could at once have sued for possession. As under the deed the plaintiff was entitled to immediate possession and the time had begun to run from the date of the mortgage no subsequent disability or inability to sue could stop it; see S. 9 of the Indian Limitation Act.

Mr. Mehr Chand, Mahajan however, has argued that his client was entitled to a deduction of the period during which Mohan Lal had remained in possession. There is no warrant for such plea in the Limitation Act. No suspension or extension of limitation is allowable unless it is provided in the Limitation Act. In the case of *Muthu Korakkai Chetty* v. *Madar Ammal* (1), Seshagiri Ayyar, J., is reported to have made the following observation:—

"The Judicial Committee have laid down that there can be no saving of limitation apart from the provisions of the Limitation Act. The Judicial Committee have drawn attention to Ss. 9 and 14 of the Act, and have held that exemptions not covered by these and the other sections should not be imported by Courts to relieve a party from the bar of limitation."

There can be no doubt that this is the law, and in the face of it the contention put forward cannot prevail.

The appeal fails and we accordingly dismiss it with costs.

Appeal dismissed.

(1) [1919] 43 Mad. 185—38 M.L.J. 1—26 M.L.T. 459—54 I.C. 66 (F.B.)

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924 LAHORE 41

SCOTT-SMITH AND MOTI SAGAR, JJ.

Muhammad Hassan-ud-din — Defendant—Appellant.

v.

Saif Ali Shah and others—Plaintiff & Defendants—Respondents.

S. A. No. 2516 of 1919, D/-9th January 1923, from the Dt. J., Attock, at Campbellpur, D/-30th July 1919.

(a) *Limitation Act, S. 5—Rule newly passed—Ignorance of the rule is sufficient excuse.*

Where the Lahore High Court made a rule on 17-10-1917 that in the case of second appeals the memorandum of appeal shall, in addition to the copies specified in Order 41, R. 1, be accompanied by a copy of the judgment of the Court of the first instance, which was published in the Punjab Government Gazette of the 24th October 1919 as Notification No. 4685-G and the appeals in question were filed on the 30th October 1919, in other words, six days after the new rule was published in the Government Gazette.

Held: that there is sufficient cause within the meaning of S. 5 of the Limitation Act for admitting the appeals beyond time, as there had not been sufficient time for the new rule to become well-known by the 30th October 1919. [P 42 C 1]

(b) *Custom (Punjab)—Alienation—Agricultural tribes—Money borrowed for trade on ancestors Property is legal.*

Although money borrowed for purposes of trade could not be regarded as money borrowed for a necessary purpose, a member of an argicultural tribe may alienate ancestral property for the purposes of engaging in trade especially when he has no other means of subsistence. 1 9 P.R. 1915 Expl. [P 43 C 1]

Ghulam Rasul and Mul Chand—for Appellant.

Nand Lal—for Respondents.

Scott-Smith J.—The facts of the two cases out of which the two connected second appeals Nos. 2516 and 2517 of 1919 arise are briefly as follows:—

On the 25th October 1911 Chiragh Ali Shah, a *Sayad*, of Campellpur Saidan, mortgaged a *serai* situate in Campbellpur Cantonment to one Sundar Singh for Rs. 700 and promised to pay interest at Rs. 1-8-0 *per cent. per mensem*. On the 9th January 1914 he sold this *serai* to Muhammad Hassan Din, defendant-appellant, of Mansar for Rs. 1,250 which included Rs. 750 payable to Sunder Singh, mortgagee. The plaintiff Saif Ali Shah is the son of the alienor and he brought two suits praying for declarations that both the mortgage and the sale should not affect his rights after the death of the alienor Consideration for the mortgage is said to have been borrowed to pay off a prior mortgage of Rs. 140 and for purposes of trade. The learned District Judge held that Chiragh Ali Shah being a *Sayad* agriculturist could not alienate ancestral property for purposes of carrying on trade and, therefore, found that there was no necessity for the mortgage. He also found that the balance received by the vendor at the time of the sale was not taken for a necessary purpose. He accordingly decreed both the suits. The vendee has filed a second appeal in each of these two cases.

A preliminary objection was raised by Dr. Nand Lal on behalf of the respondents that the appels ewer

barred by time. The appeals were filed within time on the 30th of October 1919, but were returned on the 11th November as copies of the judgments of the trial Court had not been filed. The appeals were re-filed on the 27th November 1919 and if that be taken as the date of filing the appeals they were time-barred. In *Molu Mal* v. *Sri Ram* (1) it was held that a memorandum of second appeal to the High Court must be accompanied by a copy of the judgment of the Court of first instance, and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected and barred by limitation. Under Order 42 read with Order 41, rule 1 Civil Procedure Code, the only copies which it is necessary should accompany the memorandum of appeal are copies of the appellate decree and of the judgment on which it is founded ; but this Court in exercise of the powers conferred upon it has made a rule that in the case of second appeals the memorandum of appeal shall, in addition to the copies specified in Order 41, rule 1, be accompanied by a copy of the judgment of the Court of first instance. This rule is dated the 17th October 1919 and was published in the Punjab Government Gazette of the 24th October 1919 as Notification No. 4685.G.

Now, the appeals in this case were filed on the 30th October 1919, in other words six days after the new rule was published in the Government Gazette It is, therefore, contended that there is sufficient cause within the meaning of S. 5 of the Limitation Act for admitting the appeals beyond time. In our opinion there had not been sufficient time for the new rule to become well-known by the 30th October 1919 and as the appeals were re-filed within a reasonable period we consider that there is sufficient cause within the meaning of S 5 of the Limitation Act. It is, however pointed out by Dr. Nand Lal that a copy of the judgment of the Court of first instance in the case relating to the mortgage has not been filed up to the present time. The Subordinate Judge disposed of both the suits Nos. 103 and 104 of 1917 by one and the same judgment and a copy of this has been filed in the appeal relating to the sale. In the case relating to the mortgage the Subordinate Judge recorded merely a brief order :--

'For detailed judgment see File No. 103 of 1917. Plaintiff's suit dismissed, parties to bear their own costs. File.'

This is not really a judgment at all and in our opinion there has been a substantial compliance with the law by filing a copy of the detailed judgment in the appeal relating to the sale. We, therefore, overrule Dr. Nand Lal's preliminary objection.

As will appear from what we have already stated the vendee was a different person to the mortgagee. Ordinarily the payment by an alienee of an antecedent debt due to a third person is justified and there is no necessity for the alienee to go further and to prove that the previous debt was in itself incurred for necessity. In the present case, however, the mortgage deed was attested by Muhammad Gul, the father of the vendee. Muhammad Gul was the agent of the vendee, his son, and the contract of sale was entered into through him. The learned District Judge therefore, was of opinion that the vendee's father and agent had reason to know or believe that the object for which the mortgage debt was raised was not a necessary one. He, therefore, held that the vendee was not protected merely by the fact that the antecedent debt was due to a third party. It is urged before us that the only knowledge with which Muhammad Gul was fixed was that the mortgage debt was raised to pay off a previous mortgage and for purposes of trade, and that the mortgagee was not bound to see that the money advanced by him was applied to the purposes for which it was alleged to have been taken. It appears that at the time of the mortgage Chiragh Ali Shah had only some 10 or 11 *kanals* of land. This was not sufficient for him to earn his living as an agriculturist. It was held in the case reported as *Santa Singh* v.

(1) [1921] 2 Lah. 227--63 I.C. 33.

Waryam Singh (2) that money borrowed for purposes of trade could not be regarded as money borrowed for a necessary purpose. What the Judges said in that case was that—

'We have no doubt that village custom would not look with favour upon the conversion of a Jat agriculturist into a shopkeeping trader and would not countenance an alienation of ancestral land in order to enable such agriculturist to carry on the business of his shop.'

The facts of that case are distinguishable from those of the present one. There the alienor was an agriculturist and *lambardar* and was alienating a part of the ancestral land in order to engage in trade. In the present case the alienor had no other means of subsistence and under these circumstances we think he was justified in alienating the *serai* for the purposes stated by him. We do not think that the Division Bench in the 1915 case intended to lay down that under no circumstances could a member of an agricultural tribe alienate ancestral property for the purposes of engaging in trade.

Having regard to the facts we think that the vendee in this case was fully justified in paying off Rs. 750 due to the prior mortgagee, and that he was not bound to show how the money advanced by the mortgagee was actually expended. As regards the balance of Rs 500 the finding of the learned District Judge is one of fact and cannot be contested in second appeal.

The result is that we accept both the appeals and setting aside the orders of the lower appellate Court we dismiss the plaintiff's suit in regard to the mortgage. In the suit relating to the sale we give the plaintiff a decree to the effect that the sale shall not affect his reversionary rights except to the extent on Rs. 750, and that he can recover the property sold on payment of this sum. Under all the circumstances of the case we direct that the parties should bear their own costs in all Courts.

Appeal accepted.

(2) [1914] 19 P. R. 1915—207 P.L.R. 1914—147 P. W. R. 1914—24 I. C. 361.

1924 LAHORE 43

SHADI LAL, C. J. AND FFORDE, J.

Jai Gopal Singh—Plaintiff—Appellant.

v.

Muna Lal and others—Defendants—Respondents.

S. A. No. 58 of 1920, D/- 2nd February 1923, from the Dt. J., Hissar, D/- 25th August, 1919.

Civil P. C., O. 41 R. 22—Appeal barred by time—Cross-objections cannot be heard.

An appeal must be properly before the Court in order that cross-objections may be heard. Where the appeal was admittedly barred by time.

Held: neither appeal nor the cross-objections were properly before the Court, and accordingly the Court had no power to proceed with the matter. [P. 44 C. 1]

Badri Das—for Appellant.

Oertel and Hazara Singh—for Respondents.

Fforde, J.—In this case the Court of first instance gave judgment for the plaintiff for possession of the land in dispute upon payment of a certain sum of money within a definite period. Against this judgment plaintiff appealed and defendant filed cross-objection.

It was held by the first appellate Court, on the preliminary point raised by defendant, that the appeal was late, but, proceeding to dispose of the case on the merits, on the assumption that such finding was wrong, the learned District Judge dismissed the plaintiff's appeal and allowed the defendant's cross-objections.

The matter now comes before us on second appeal by plaintiff. Counsel for the appellant now submits that his appeal in the Court of the District Judge was barred by time and should have been dismissed on that ground.

Respondent's counsel admits that the appeal was late but urges that the cross-objections could nevertheless be heard and that the order of the District Judge is valid in so far as the cross-objections are concerned,

We cannot accept this view. It is clear that an appeal must be properly before the Court in order

that cross-objections may be heard. As the appeal in question was admittedly barred by time, neither the appeal nor the cross-objections were properly before the Court, and accordingly the Court had no power to proceed with the matter. We must, therefore, accept the appeal and restore the decree of the Court of first instance. The plaintiff must deposit the price on or before the 31st March 1923. In the event of default his suit shall stand dismissed with costs.

Appeal accepted.

1924 LAHORE 44

MARTINEAU AND ZAFAR ALI, J.J.

Khazana Mal and another—Plaintiffs—Appellants.

v.

Jagan Nath and others—Defendants-Respondents.

S. A. No. 1351 of 1920, D/- 19th March 1923, from the Dt. J., Hoshiarpur, D/- 1st March 1920.

Hindu Law—Joint family—Debts by manager—Benefit of family is not presumed.

There is no presumption that a debt contracted by the manager of a Hindu family is contracted for the benefit of the family. 34 A. 135 Ref. [P. 44 C, 2]

M. C. Mahajan—for Appellants.

M. L. Puri—for Respondents.

Martineau, J.—The Plaintiffs sued Jagan Nath and the sons of Jagan Nath's deceased brother Ram Saran for money due on book accounts, alleging that Jagan Nath and Ram Saran were members of a joint Hindu family and had dealings with them. Jagan Nath pleaded that he was separate from Ram Saran and had had no dealings with the plaintiffs. The first Court passed a decree against all the defendants, but on Jagan Nath's appeal the District Judge dismissed the suit as against him, finding that although Jagan Nath had not proved his separation from Ram Saran the plaintiff's dealings had been only with Ram Saran, Jagan Nath not having signed any of the entries in the plaintiff's books, and holding that the plaintiffs had to prove that th debts were contracted for the benefit of Jagan Nath, which they had failed to do. The plaintiffs have preferred a second appeal.

On the question of onus the ruling of Sir Donald Johnstone in *Brij Lal* v. *Jaishi Ram* (1) is no doubt in the appellants' favour, but the other authorities are against them. In *Gunpat Rai* v. *Munni Lal* (2) it was held that there is no presumption that a debt contracted by the manager of a Hindu family is contracted for the benefit of the family, and the rulings of the High Courts of Calcutta and Bombay referred to in that judgment were to the same effect. The Allahabad ruling has also been followed in *Bhura* v. *Banarsi Das* (3); *Paras Ram* v. *Gian Chand* (4); and *Ram Dhan* v. *Ramji Das* (5). Counsel for the appellants has in fact not disputed the correctness of the view taken by the High Courts, but has contended only that as no issue was framed on the question whether the debts were incurred for the benefit of the family his clients should have been given an opportunity of proving that they were so incurred. There does not appear to be any force in this contention, for, as the plaintiffs alleged that their dealings had been with both Ram Saran and Jagan Nath, no occasion arose for a separate issue on the question whether the debts were incurred for the benefit of the family. Moreover the point was really covered by the second issue which was, whether the plaintiffs had advanced the amounts in suit to the family of the defendants. The plaintiffs knew that they had to prove such facts as would render Jagan Nath liable, and when it was found that they had not proved them, the suit was rightly dismissed. We cannot agree that the plaintiffs were entitled to a remand and we accordingly dismiss the appeal with costs.

Appeal dismissed.

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(1) [1915] 106 P. W. R. 1915—172 P. L. R. 1915—30 I. C. 500.
(2) [1912] 34 All. 135—9 A. L. J. 54—13 I. C. 34.
(3) [1915] 113 P. W. R. 1915—174 P. L. R. 1915—30 I. C. 481.
(4) [1919] 48 P. W. R. 1919.
(5) [1919] 50 I. C. 215.

1924 LAHORE 45

BROADWAY AND ZAFAR ALI, JJ.

Gulli—Plaintiff—Appellant.

v.

Sawan and others (Defendants), *Puran Chand, and others* (Plaintiffs)—Respondents.

C. A. No. 2053 of 920, D/-6th January 1923, from th D. J. Lu hiana D/-12th June 1920.

Civil P. C. O. 22 R. 1—Rights of legal representative—His disabilities, do not affec rights of the deceased.

When a party to a suit dies, a legal representative is appointed merely in order that the suit might proceed, and a decision be arrived at. It is the original parties' rights and disabilities that have to be considered and not those of the legal representatives. [P 46 C 2]

Jai Gopal Sethi—for Appellant.

Tek Chand and B. A. Cooper—for Respondents.

Broadway, J.—The following pedigree table will afford assistance :—

KAMAN

Phalli

Dehra

Bhupa — Maghi

Gulli

Nigahia (Plaintiff).

Bega

Jhaba

Rabi — Mangal

Puran

On the 9th of March 1898 Jhaba sold certain lands for Rs. 2,200. On the 6th of June 1902 Gulli and Puran sold some of their lands for Rs. 1,000 and on the 7th of August 1902 Rabi and Mangal sold some land belonging to them for Rs. 900. On the 25th February 1919 Nagahia, son of Gulli, instituted three suits relating to the aforesaid alienations alleging that the lands alienated were ancestral and that the alienations had been made without consideration and for no necessity. He prayed that the said sales should not affect his reversionary rights. The trial Court dismissed the suit relating to the first alienation (by Jhaba), but decreed the other two suits, holding necessity proved in the second alienation to the extent of Rs. 570 and in the third to the extent of Rs. 565. The vendees, Sawan, etc., appealed against these decisions. They also appealed in the suit relating to Jhaba's alienation as they had not been allowed costs. Nigahia himself preferred an appeal against the dismissal of the suit in connection with Jhaba's sale. Gulli, Nigahia's father, was a respondent in all the appeals. While the appeals were pending, on the 6th of March 1920. Nigahia died. The vendees-appellants applied to the Court in their appeals asking that Gulli, the father of Nigahia, be brought on the record as Nigahia's legal representative, as being his sole heir and legal representative, and at the same time urging that Gulli had forfeited any rights he might have had in the land. In the appeal filed by Nigahia, Gulli himself made an application, alleging that he was the legal representative of his son, and asking that he be brought on the record as such.

The learned District Judge (Misra Jwala Sahai) held that Gulli could not himself question the validity of the sale in question and dismissed the appeal by Nigahia and accepting the appeals by the vendees-appellants in the other two cases, dismissed all the suits. The learned District Judge's order was passed on the 12th of June

1920, and on the 6th July 1920, one Arjan Singh, acting through Sardar Attar Singh, *Vakil*, who had been acting for Gulli throughout, filed an application in connection with the appeal filed by Nigahia relating to the alienation by Jhaba, alleging that he and certain other persons named in the application were Nigahia's legal representatives and should be brought on the record. This application was dismissed on the 7th of July 1920, the learned District Judge recording the fact that the appeal had already been decided.

Arjan Singh has now come up to this Court in revision *qua* the order dismissing his application and Gulli has preferred appeals in the other three cases. The revision and the appeals have been filed through Mr. Jai Gopal Sethi, and we have heard Mr. Tek Chand for the vendees-respondents. This judgment will dispose of all the appeals and the revision.

Turning to the revision (No. 728 of 1920) it was contended by Mr. Sethi that the learned District Judge should have re-opened the appeal in question (relating to the alienation by Jhaba), inasmuch as Arjan Singh had come into Court within six months of Nigahia's death. Reliance was placed on *Vellayam Chetty* v. *Jothi Mahalinga* (1) and *Janardhan* v. *Ram Chandra* (2). Neither of these authorities appear to us to be in point. In the first case it was held that an unsuccessful appellant could not insist upon having a rehearing of the case because it turned out at the time of the hearing that the respondent was dead. In the Bombay case the facts were entirely different We are unable to see any ground for revision and the order admitting the petition clearly shows that it was admitted because in it, it was asserted that Nigahia had left a son. Mr. Jai Gopal Sethi has admitted before us that this was wrong and that Nigahia died without issue. The petition is, therefore, dismissed with costs.

(1) [1915] 39 Mad. 386—28 M.L.J. 138—2 L.W. 166—(1915) M.W.N. 201—28 I.C. 83.
(2) [1901] 26 Bom. 317—41 Bom. L.R. 23.

Turning now to the appeals relating to the alienations by Jhaba and Rabir and Mangal, the learned District Judge appears to have been under the impression that the disabilities of the legal representatives should be taken into account. In this view we are unable to agree. When a party to a suit dies a legal representative is appointed merely in order that the suit might proceed and a decision be arrived at. It is the original parties' rights and disabilities that have to be considered and the mere fact that Gulli could not have brought a suit to set aside these alienations on the ground of limitation is not, in our opinion, sufficient to render the suit by Nigahia liable to dismissal. Gulli in these two cases was undoubtedly the legal representative of his son and the learned District Judge should have decided the appeals on the merits. We accordingly accept these two appeals Nos. 2054 and 2055 of 1920 and remand them to the learned District Judge for disposal in accordance with law. Costs will follow the event, and the stamps will be refunded.

Turning now to the appeal relating to the alienation by Gulli and Puran (Appeal No. 2053 of 1920), it appears to us that here again the learned District Judge has erred. Mr. Tek Chand contended that Nigahia was really suing as representative of all the reversioners of Gulli and that Gulli could not be regarded as his own reversioner. For the purposes of this suit it seems to us that, strictly speaking, Gulli could not be regarded as the legal representative of his son. The alienation attacked in the suit was made by him (Gulli) and his brother Puran, and Gulli was not, therefore, the proper legal representative. The appellants in the case were the vendees and it was incumbent on them to move the Court to bring on the record the proper legal representatives. The pedigree table shows that there were other reversioners, for instance, Rabi and Mangal, and the vendees were to blame for having brougnt the wrong person on to the record. Their appeal accordingly abated, and no proper application having been made within the prescribed

period from the death of Nigahia, this appeal has abated.

We accordingly accept this appeal as well and setting aside the order of the learned District Judge restore that of the learned Senior Subordinate Judge. As, however, Gulli himself claimed to be the legal representative of his son, we direct that the parties in this appeal should bear their own costs in this and in the lower appellate Court.

Appeal allowed.

1924 LAHORE 47

HARRISON, J.

Dyal Singh and others—Convicts—Appellants.

v.

King Emperor—Respondent.

Criminal A. No, 1052 of 1921, D/-7th March 1922, from the Mag. First Class, Lahore, D/-5th December 1921.

Penal Code, Ss. 300 and 325—Death of child one year old—Accused ignorant of the child's presence—Child killed in an attempt to beat the mother.—Conviction under S. 325 is proper.

The accused with three others, came to beat the owner of the house. His wife who had her small son, aged 1, in her arms, tried to close deorhi door but the three men forced it open and the accused aimed a blow at her which struck the little child and killed it. It was doubtful whether he even knew that the owner's wife was carrying the child. The affray took place at half past seven in the evening on the threshold of the deorhi which was a roofed building. The sun had set at 6 O' clock and it was, therefore, dark. The woman was trying to shut the door to keep out the three men who had come to attack her husband, and the accused struck at her as he forced the door open.

Held: A woman or anybody else closing a door against a person trying to get in would naturally put down anything he or she was carrying in order to have both hands free. Therefore the offence appears to be equivalent to striking the woman and nothing more. Conviction altered from S. 304 to S. 325. [P. 48 C. 1]

Ram Chand Manchanda—for Appellants.

M. Saleem—for the Crown.

Judgment.—The facts of this case have been found to be that one Wadhawa Singh had gone to Lahore from his village and in his absence his mother who lives near by and his wife, Musammat Budhan, had a heated altercation about an amulet which had been lost. He returned in the middle of the dispute and ordered his mother out of the house. She went home and, shortly afterwards, at about 7-30 p. m. Natha Singh who is Wadhawa Singh's father, and Dyal Singh, Jiwan Singh and Ishar Singh, his uncles, all returned armed with *lathis*. *Mt.* Budhan, who had her small son, aged 1, in her arms, tried to close the *deorhi* door but the three men forced it open and Dyal Singh aimed a blow at her which struck the little child and killed it. Jiwan Singh and Ishar Singh then struck her. They forced their way into the house and all of them beat Wadhawa Singh, Natha Singh slapped *Mt.* Soman, Wadhawa Singh's daughter, a girl aged 10. Ishar Singh has absconded. Kyal Singh has been convicted under S. 304 (II) and Natha Singh and Jiwan Singh have both been convicted under S. 452 and sentenced to 6 months' rigorous imprisonment each. All three appeal.

The evidence for the prosecution falls under two heads, that of the family consisting of Wadhawa Singh. *Mt* Budhan and *Mt.* Soman, and that of the three independent witnesses, Sundar Singh, *Lambardar*, Hazara Singh and Kahna, a servant of Wadhawa Singh. These men say that *Mt.* Budhan fell down on being pushed by Wadhawa Singh and that the child was killed in this way.

Dyal Singh and Jiwan Singh have produced evidence as to their having been in Kasur and Lahore respectively at the time the affray took place and Natha Singh tells the same story as the unrelated witnesses So far as Natha Singh and Jiwan Singh are concerned, I find that it is not established that they struck *Mt.* Budhan.

The *post-mortem* of the child showed that it had distinct marks of two blows on the head but all that *Mt.* Budhan is able to say about the injuries to her child is that one blow struck it and that Dayal Singh was the person who inflicted it She herself had only one mark of injury and this on her buttocks. I, therefore, find that, so far as these two men are concerned, they are only guilty of

striking Wadhawa Singh and this not very seriously, and under the provocation caused by his conduct to his mother. They have been in confinement for nearly two months including the under-trial period and this is, I think, sufficient under the circumstances. I, therefore, reduce their sentences to the amount of imprisonment already undergone but dismiss their appeals as I am satisfied that they did go into the house of Wadhawa Singh with every intention of beating him.

So far as Dyal Singh is concerned, I find that his *alibi* evidence, as explained by the Magistrate, is worthless and that he certainly did strike the child and kill it. I am not, however, of opinion that he even knew that *Mt.* Budhan was carrying the child. The affray took place at half past seven in the evening on the 15th of October on the threshold of the *deorhi* which is a roofed building. The sun had set at 6 o'clock. and it was, therefore dark. The woman was trying to shut the door to keep out the three men who had come to attack her husband, and Dyal Singh struck at her as he forced the door open. A woman or anybody else closing a door against a person trying to get in would naturally put down anything he or she was carrying in order to have both hands free. It is not stated that the woman had been outside where Dyal Singh might have seen what she was carrying but that she came from the inside of the house and, as there was no lamp burning and it was dark, it appears to me to be only natural to suppose that Dyal Singh cannot have seen the child. His conduct in striking the woman is no doubt reprehensible but the offence appears to be equivalent to striking the woman and nothing more. The question, therefore, remains whether the offence is that of causing simple hurt or that of causing grievous hurt and, inasmuch as he used a *lathi* and struck at the woman with some force, I think he must be held to have intended to cause grievous hurt. I, therefore, accept his appeal in so far as to alter the conviction to one under S. 325, Indian Penal Code, and I reduce the sentence to one year's rigorous imprisonment.

Wadhawa Singh applies for enhancement of all the sentences passed. Fo the reasons given above, I dismiss this application.

Sentence reduced.
Application dismissed.

1924 LAHORE 48

SHADI LAL, C. J., AND FFORDE, J.

Salig Ram and others—Defendants-Appellants.

v.

Barkat Ali and others (Plaintiffs) *and Mt. Karam Bibi etc.*, (Defendants)—Respondents.

S. A. No. 80 of 1920, D/-3rd February 1923, from the decree of the Dt. J., Gujranwala, D/-7th October 1919.

Punjab Pre-emption Act (1913), S 3 (5) (a)—Sale authorised by Civil Court under Guardian and Wards Act, S. 29 can be pre-empted.

A sale effected by guardian of a minor and approved of and sanctioned by Court under Guardians and Wards Act S. 29 is not a sale in execution of a decree of Civil Court and not therefore exempt from pre-emption. [P. 49 C. 1]

Shuja-ud-din—for Appellant.

Nemo—for Respondents.

Fforde, J.—The only question we have to determine in this appeal is whether the sale in respect of which the right to pre-emption is sought to be exercised, comes within the exceptions in S. 3 (5) (*a*) of the Punjab Pre-emption Act of 1913. It is there provided that 'sale' shall not include, *inter alia*, a sale in execution of an order of a Civil Court. The sale in the present case was of certain property owned by a minor and therefore required the sanction of the Court.

The guardian of the minor accordingly applied to the Court, under S. 29 of the Guardians and Wards Act (Act No. VIII of 1890) for leave to execute a sale deed which had already been drawn up and approved of by the parties. Leave was granted and the conveyance was duly executed and registered.

The appellant contends that this transaction comes within the defin - tion of a sale in execution of an order of a Civil Court. We cannot accept this contention.

The sale in the present case was an ordinary private transaction and only required the sanction of the Court because one of the parties to it was under disability. S. 29 of the Guardians and Wards Act prohibits the sale by a guardian of the property of a ward without permission of the Court. Court under this section makes no order for sale, but merely authorises a transaction which would otherwise not be binding upon the minor. The sale is in fact a transaction *inter parties* approved of by the Court. The Court having approved of the contemplated sale has no further say in the matter.

We are accordingly of opinion that S. 3 (5) (a) of the Pre-emption Act has no application to the case before us and we dismiss the appeal.

Appeal dismissed.

1924 LAHORE 49

BROADWAY AND ABDUL QADIR, JJ.

Kallan—Defendant—Appellant.

v.

Jowahar Singh, Plaintiff, and *Syed Karar Hussain* (Defendant)—Respondents.

S. A. No. 13 of 1922, D/- 8th June 1922, from the D, J., Delhi, dated the 6th December 1921.

T. P. Act, Ss. 111 (g) and 114—Ejectment suit by lessor's transferee—Forfeiture for non-payment—Penal clause—Effect.

One H owned certain shops four of whioh had been let to one. K for several years. On 21st November 1919, the landlord gave a notice to K to vacate the shops by the 24th December 1919, or to pay enhanced rent. On the 19th January1920, he leased these very shops to J the present plaintiff-respondent, for 10 years by a registered lease, in which the latter was authorised to take possession by ejecting K privately or through Court and to occupy the shops for the period stipulated on payment of rent of Rs. 16 per mensum on the first of every lunar month. A condition was introduced in clause 8 of the lease to the effect that in case of non-payment of rent on the first of every lunar month the period of 10 years will be cancelled and the landlord will be entitled to evict the lessee at once and to re-enter into possession. The rent for the first month was admittedly paid. The rent for the second month, which fell due on the 22nd February 1920, calculated according to lunar months, was not paid in time but was sent by money order on the 6th March 1920, *i. e.* about a fortnight after the due date. In the meanwhile H had sent a notice, dated the 4th March, 1920 to J informing him that the lease stood cancelled on account of his default in payment of rent at the proper time. J there upon brought a suit on the 26th March 1920, praying for a declaration that the lease had not been cancelled and asking also for possession of the shops by ejectment of K.

Held : (1) that it was against equity and good conscience to allow the defendant No. 1 (H) to cancel the lease, after having taken a large sum of (Rs. 1,000) as nazarana, simply on account of a few days' delay in payment of rent in a case where the lessee had not yet even succeeded in getting possession of the property he took on lease. (2) That wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument and the penalty is deemed only as necessary, and therefore, as intended only to secure the due performance thereof, and (3) that the right of the plaintiff to eject the old tenant was not affected by want of a proper notice of the lease in favour of the plaintiff who was clearly entitled to the possession from K.

[P 50 C 2, P 51 C 2, P 52 C 1]

Mool Chand—for Appellant.

Sardha Ram Kapur—for Respondents.

Abdul Qadir, J.—Two connected appeals will be disposed of by this judgment, as both of them arise out of the same suit. One Karar Hussain owns certain shops in Delhi, four of which had been let to one Kallan for several years. On 21st November 1919, the landlord gave a notice to Kallan to quit the shops by the 24th December 1919, or to pay enhanced rent. On the 19th January 1919, he leased these very shops to Jowahar Singh, the present plaintiff-respondent, for 10 years, by a registered lease, in which the latter was authorised to take possession by ejecting Kallan privately or through Court and to occupy the shops for the period spipulated on payment of rent of Rs. 16 per mensem on the first of every lunar month, A condition was introduced in clause 8 of the lease to the effect that in case *na dehindi* (non-payment) of rent on the first of every lunar month the period of 10 years will be cancelled and the landlord will be entitled to evict the lessee

at once and to re-enter into possession. The rent for the first month was admittedly paid. The rent for the second month, which fell due on the 22nd February 1920, calculated according to lunar months, was not paid in time but was sent by money-order on the 6th March 1920, *i. e.*, about a fortnight after the due date. In the meanwhile Karar Hussain had sent a notice, dated the 4th March, 1920, to Jawahar Singh, informing him that the lease stood cancelled on account of his default in payment of rent at the proper time. Jawahar Singh thereupon brought a suit on the 26th March, 1920, praying for a declaration that the lease had not been cancelled and asking also for possession of the shops by ejectment of Kallan. The trial Court decreed the plaintiff's suit against Karar Hussain and also ordered the ejectment of Kallan. Both the latter appealed to the District Judge, who dismissed their appeals. Each one of them has now preferred a second appeal to this Court. Kallan is represented by Mr. Mool Chand and Karar Hussain by Mr. Moti Sagar, while Lala Sardha Kam appears on behalf of the respondent.

The case for the appellants has been argued before us by Mr. Mool Chand, who says that the interests of his client are identical with those of Karar Hussain, because the latter has not executed a fresh long lease in favour of Kallan.

The main question in this appeal is whether the Courts below were justified in coming to the relief of the plaintiff as Court of equity. In this connection the following points are worth consideration. It has been found as a matter of fact by both the Courts below that, according to a well-known custom of Delhi, the plaintiff has paid the sum of Rs. 1,000 by way of *nazarana* to Karar Hussain before securing the lease in his favour. It has also been found by the Courts below that the bargain which Karar Hussain struck with the plaintiff was not an equitable one. The trial Court expressed an opinion that the terms of the lease were "very severe, one-sided and unconscionable." Similarly the lower appellate Court has expressed an opinion that "the landlord's action in terminating the lease was in the circumstances fraudulent, oppressive, harsh and vindictive." We do not think it is necessary for us in the face of such decided expressions of opinion by the Courts, which were fully coversant with all the facts of the case, to add any comment of our own on the conduct of the appellant in this case. It strikes us that in all probability the lease executed by Karar Hussain in favour of Jowahar Singh, plaintiff, was intended as a sort of trap for him. It was pleaded by the plaintiff that the terms of the lease were not explained to him. The trial Court held that the plaintiff did not fully realise the significance of the terms introduced in the deed. The lower Appellate Court, however, held that he must be presumed to know the terms of the contract and was bound by them, but that the eighth clause in the lease was pinch and that it seemed to be against equity and good conscience to allow the defendant No. 1 to cancel the lease, after having taken such a large sum as *nazarana*, simply on account of a few days' delay in payment of rent in a case where the lessee had not yet even succeeded in getting possession of the property he took on lease.

It is argued by Mr. Mool Chand that the stipulation involving forfeiture of the lease on default of payment of rent of any one month on the due date may seem to be harsh but was accepted by the plaintiff with his eyes open and defendant No. 1 was entitled to insist on cancelling the lease according to the said condition. He refers to a Madras decision, published as *Mussa Kutti* v. *Rangachariar* (1) in which it was held that where there is a covenant for re-entry on breach of the conditions of the lease, the non-payment of rent operates as a forfeiture of the lease. He relies also on *Naraina Naika* v. *Vasudeva Bhatta* (2) in which no relief against forfeiture for non-payment was given, on the

(1) [1910] 8 M.L.T. 238—8 I.C. 309
(2) [1905] 28 Mad. 389—15 M.L.J. 208.

ground that the condition of forfeiture was not penal as a period of grace was allowed. This last ruling has no application to the present case, as here there is no period of grace of any kind allowed and the condition is strictly penal. It is admitted by defendant No. 1 himself, in his statement in Court, that the object of this condition was to enforce payment of rent. The Madras case is also not very helpful, because, though there is provision for re-entry in the lease before us, the dispute has arisen before there can be any question of re-entry and is really due to the fact that the lessor has failed to give notice to his former tenant and has evidently intentionally refrained from helping his lessee in getting into possession of the property leased to him. Mr. Mool Chand says that if the plaintiff had got possession of the shops and if the defendant No. 1 was now suing to eject him on the ground of cancellation of the lease, possibly the principle underlying S. 114 of the Transfer of Property Act could have given the Courts jurisdiction to help the lessee by permitting him to tender the unpaid rent with damages and to have his lease declared as valid and subsisting, but inasmuch as he had not yet got into possession he cannot claim any help under S. 114, or rely on that section to justify the Courts in going against the express terms of the contract between the parties. We do not think this reasoning can help the appellants very much in case where the fact that the plaintiff has not got possession is not due to any negligence or omission on his part. There is apparently some kind of collusion between the defendant No. 1 and his old tenant Kallan. It is pointed out by *Lala* Sardha Ram that the so-called notice of cancellation, dated the 4th of March 1920, which Karar Hussain gave to his client was not a *bona fide* notice at all, but was merely a counter-blast against the notices dated 1st March 1921, which the plaintiff had given to Karar Hussain as well as to Kallan. He had asked Kallan to vacate the property and had asked Karar Hussain to help him in securing possession. The learned *Vakil* refers to paras 1314, 1315 and 1316 of Story's well-known book on Equity (1920 edition), parts of which may be quoted here-para 1314 says :—

"The general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument and the penalty is deemed only as necessary, and therefore, as intended, only to secure the due performance thereof." The same learned author goes on to say in para 1315 :—

"The same doctrine has been applied by Courts of equity to cases of leases, where a forfeiture of the estate and an entry for the forfeiture is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment, for the right of entry is deemed to be intended to be a mere security for the payment of the rent."

The reasoning in favour of the equity jurisdiction of Courts in cases of this nature is given in para 1316 as follows :—

"In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party."

This is exactly the principle, which the learned District Judge has followed in upholding the decision of the trial Court in this case, and we see nothing in the argument that has been addressed to us on behalf of the appellants, to justify our interference with the discretion legitimately and judiciously exercised by the lower Appellate Court.

It is urged by Mr. Mool Chand that his client was not privy to the contract between Karar Hussain and Jowahar Singh and had not even been informed by the former of the lease executed in favour of the latter and he was, therefore, not liable to ejectment at the instance of Jowahar Singh. We think, however, there is no force in this plea. Jowahar Singh

stepped into the shoes of the lessor, by virtue of the lease dated the 19th January 1920, and the assignee of the owner was in a position to ask for ejectment of the previous tenant, where original lease had expired and who was under a notice of ejectment at the time when the lease in favour of the plaintiff was executed. As held in *Parbhu Ram* v. *Tek Chand* (3) the right of the plaintiff to eject the old tenant is not affected by want of a proper notice of the lease in favour of plaintiff, and as we are holding that Jowahar Singh has been rightly relieved by the Courts below against the forfeiture of the lease and the lease is still subsisting, there can be no doubt that Kallan's ejectment has been correctly ordered and we uphold that order.

The last question which has been discussed before us is as to the compensation to which Kallan may be entitled on account of certain materials of his in the shops in dispute. Mr. Mool Chand insisted that the question of compensation should have been decided in the suit instead of being left to be decided in execution proceedings, that it should be decided by this Court on a remand order on this point. We notice that no issue was framed by the trial Court on this point and it is noted by the Court in that judgment that perhaps it was given up to be settled in execution. The lower Appellate Court, therefore, could not go into this question and was apparently justified in leaving it to be decided in execution. It is also to be noted that Jowahar Singh has already deposited Rs. 500 in Court, which is the sum which Kallan claimed as compensation. The interests of Kallan, therefore, do not suffer in any way if this matter is not decided in the suit, because he can get any sum to which he may be found to be entitled against Jowahar Singh out of the sum deposited by the latter in Court. We, therefore, dismiss both the appeals with costs and uphold the decree of the Courts below, declaring that the lease has not been forfeited by the delay in payment of rent of one month and giving the possession of shops by ejectment of Kallan. We direct that the question of compensation due to Kallan for any materials, that may be proved to be his, may be gone into by the Court executing the decree and it may allow any sum within the limit of Rs. 500 to Kallan, which it may find due against Jowahar Singh.

Appeals dismissed.

(3) [1920] 1 Lah. 241--53 I.C. 865.

1924 LAHORE 52

SHADI LAL, C. J. AND LUMSDEN, J.

Chet Ram and others—Plaintiffs—Appellants.

v,

Spedding & Co. Ltd., and another—Defendants—Respondents.

Civ. App. No. 1295 of 1920, D/-- 20th April 1923, from the decree of the Dt, J., Hoshiarpur and Kangra Dt. D/- 1st March 1920.

Hindu Law—Decree against coparcener—Attachment of property gives no cause of action.

Defendant No. 1 attached certain property belonging to one H. in execution of a decree against him. The judgment-debtor's sons brought a suit for a declaration that the attachment should not affect their reversionary rights.

Held that mere attachment of ancestral property of a joint family, governed by the customary law which imposes a restriction on alienation by proprietor of his ancestral property does not give a cause of action to his sons to get a declaration that their reversionary rights should not be affected.[P 53 C 1]

M. C. Mahajan—for Appellants.

M. Obedulla—for Respondents.

Shadi Lal, C. J.—On the 5th February, 1918, defendant No. 1 attached certain property belonging to Harnamgir in execution of a decree against him. The judgment-debtor's sons, after making an infructuous objection to the attachment, have now brought a suit for a declaration that the attachment should not affect their reversionary rights after the death of their father.

Now, it was admitted in the trial Court on behalf of the contesting defendant that the property attached was ancestral, and that the plaintiffs'

family was governed by the usual customary law which imposes a restriction upon the power of a proprietor to alienate his ancestral property. The question for determination is whether a mere attachment of the property entitles the plaintiffs to institute a suit for a declaratory decree. There can be no doubt that an attachment infringes the rights of the judgment-debtor and has the effect of placing the property *in custodia legis*, but it does not by itself amount to an infringement of the rights of the reversioners. It is possible, nay it is probable, that the attachment will lead to an alienation, and if the alienation is not confined to the period of the judgment-debtor's life-time, the plaintiffs will be entitled to impeach the alienation. It is, however, clear that no alienation has so far been made, and a mere attachment does not give the plaintiffs a cause of action,

Mr. Mehr Chand for the appellants contends that the contesting defendant denied their reversionary rights in the property, but a perusal of the plaint shows that the action is not based upon any such denial. The only ground disclosed in the plaint for bringing the action is the attachment of the property, and, as pointed out above, a mere attachment does not injure the plaintiffs.

For the aforesaid reasons we dismiss the appeal with costs.

Appeal dismissed.

✱ 1924 LAHORE 53

SHADI LAL, C. J. AND FFORDE, J.

ri Narain—Defendant—Appellant.

v.

Liquidator, Union Bank of India—Applicant—Respondent.

Let. Pat. Appl. No. 13 of 1922 D/-24th December 1922 from the Judgment of Mr. Justice, Chevis, D/-2nd December 1921.

Companies Act, S. 186 (1)—'At any time' means in the course of liquidation proceedings.

S. 186 (1) does not over-ride the provisions of the Limitation Act, nor does it enable a Court to enforce by a summary order the payment of a debt which it could not have enforced in an action at law e. g., a time barred debt. The words "at any time" can only mean at any time in the course of liquidation proceedings, commencing from the date of the winding up order. [P, 54 C, 1]

M. N. Mukerji—for Appellant.

Prem Lal—for Respondent.

Fforde, J.—The appellant B. Sri Narain is a contributory of the Union Bank of India, Delhi, which is now in course of liquidation. The Official Liquidator has called upon B. Sri Narain under the provisions of S. 186 of the Indian Companies Act to pay to him certain sums of money amongst which is an item of Rs. 2,000. This sum of Rs. 2,000 is expressed to be payable upon foot of a promissory note, dated the 13th April 1911, made by the appellant, and payable to the order of the Union Bank of India on demand.

The District Judge of Delhi made an order under S. 186 calling upon the appellant to pay to the Official Liquidator the several sums demanded, and the appeal is brought in respect of the item of Rs. 2,000.

Under the Indian Limitation Act a suit to enforce payment of this note would be barred by time. This is admitted; but it is claimed on behalf of the Liquidator that this statute-barred debt may be enforced against the contributory by an order under S. 186, sub-section (1), of the Indian Companies Act. The relevant part of the section reads as follows:—

"The Court may at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay in manner directed by the order any money due from him * * * * to the Company exclusive of any money payable by him * * * * by virtue of any call in pursunce of this Act."

It is contended by counsel for the Liquidator that the words "at any time" exclude the idea that there is any period of limitation within which the order may be made. In other words that the Court by virtue of this section may order the payment of any debt due by a contributory to the Company in liquidation regardless of the time when that debt was incurred. We are asked to hold that this section overrides the provisions of th Limitation Act, that it enables th e

Court to enforce by a summary order the paymant of a debt which it could not have enforced in an action at law. We cannot accept this view of the powers conferred upon the Court by S. 186. This section does not create new liabilities or confer new rights. It merely provides a summary procedure for enforcing existing legal liabilities. The words "at any time" can only mean at any time in the course of liquidation proceedings, commencing from the date of the winding up order. The section creats new machinery for bringing in debts due by a contributory to the Company, and nothing more.

We therefore, hold that the payment to the Liquidator of the Rs. 2,000 represented by the promissory note cannot be enforced in the manner sought. We accordingly allow the appeal with costs throughout.

Appeal accepted.

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MARTINEAU, J.

Gian Singh Bahadur Singh—Petitioner.

v.

The Crown—Respondent.

Civil Ref. No. 20 of 1922, D/-10th February 1923.

Excess profits Duty Act (X of 1919), S. 18—Rules under R. 24 (3)—Interpretation.

The words "proceedings for the recovery of any sum" in sub-rule (3) of rule 24 mean the proceedings taken under sub-rule (1) of that rule after default has been made in payment. [P, 54 C, 2]

G. C. Narang, Amin Chand and Man Singh—for Petitioner.

Nemo—for the Crown.

Martineau J.—This is a reference from the Financial Commissioner, made on the application of Messrs. Gian Singh-Bahadur Singh under S. 51 of the Income-tax Act, VII of 1918, the provisions of which apply to the Excess Profits Duty Act, X of 1919, by virtue of S. 15 of the latter Act, for a decision as to the interpretation of sub-rule (3) of rule 24 of the rules made under S. 18 (1) and (2) of Act X of 1919 and published in Finance Department Notification No. 149-F, dated the 23rd June 1919. Sub-rule (3) of rule 24 provides that save in accordance with the provisions of sub-rule (1) of rule 11 no proceedings for the recovery of any sum payable under the Act or these rules shall be commenced after the 31st of March 1921, and the question for decision is whether the words "proceedings for the recovery of any sum" refer to proceedings taken after default has been made in payment, or whether such proceedings begin when a notice of demand has been served on the assessee. The learned Financial Commissioner is inclined to the opinion that the presentation of the demand statement to the assessee is the beginning of the proceedings for the recovery of the tax, whereas the petitioners contend that this is not a correct interpretation of the rule.

It seems to me clear that the view for which the petitioners contend is the correct one. Rule 24 (1) describes how the excess profits duty is to be recovered when default has been made in payment. This is the only rule dealing with the mode of recovery, and the subject of the rule is entered as "mode and time of recovery." Also rules 23 and 24 are classed under the heading "recovery of duty," whilst rule 13, which is the rule providing for a notice of demand being served on the person assessed, is put under the heading "demand." From this it is evident that the demand made on the assessee is treated in the rules as something quite distinct from the recovery of the duty, the proceedings for which begin when default has been made. The same distinction is made in the Income-tax Acts, VII of 1918 and XI of 1922, where the notice of demand is provided for in a chapter the subject of which is "Deductions and Assessment," whilst there is a separate chapter dealing with the subject of the recovery of the tax.

My decision, therefore, on the point referred is that the words in sub-rule (3) of rule 24 "proceedings for the recovery of any sum" mean the proceedings taken under sub-rule (1) of that rule after default has been made in payment.

The petitioner's costs in this case will be borne by the Government.

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ABDUL RAOOF AND HARRISON, JJ.

Donald—Petitioner.

v.

The Crown—Respondent.

Cr. Mis. No. 41 of 1922 D/-13th June, 1922, from the Dt. Mag., Lahore, D/-30th March 1922.

Lunacy Act (IV of 1912), Part. II—Order of Dt. Mag. under revision.

The Act deals specifically and under separate headings with two branches of proceedings, executive and judicial. Any person considering himself aggrieved by an executive order passed by the Dt. Magistrate may apply under Part III for a regular inquisition conducted by a judicial officer. The result of such inquisition is conclusive and overrides and overrules any order which may have been passed summarily by the executive authority. Under this Act the orders passed by the District Magistrate under Part II are purely executive and cannot form the subject matter of a revision application to the High Court.

[P. 57, C. 2, P. 58, C. 1.]

O'Connor—for Petitioner.

Jai Lal—for the Crown.

Order of Reference.

Abdul Raoof. J.—This is an application presented by Mr. W. B. O'Connor, Barrister-at-Law, on behalf of Mr. Douglas Donald and Mr. William Henry Donald under the circumstances summarised below invoking the owers of revision and superintenence possessed by the High Court under the Civil and Criminal Law and under the Charter Act :—

Mr. Douglas Donald is married to the daughter of one Mrs. Mercer. The husband and wife have been living separately for many years. Mr Douglas Donald has, however, been making an allowance for his wife's maintenance through Mr. Alexander Mercer of Lahore, which he is said to have stopped lately. He is under the impression that his wife is dead, and this fact is being kept concealed from him by Mr. and Mrs. Mercer. On the 23rd of March 1922, he wrote a threatening letter to Mr. Mercer, and this letter was sent by the latter to Major Ferrar, District Magistrate of Lahore, with a covering letter dated the 26th March 1922, complaining of the behaviour of Mr. Douglas Donald towards him and his wife, expressing apprehension of violence from him and asking for protection. The matter was at once placed in the hands of Lieutenant Colonel Gregson, Senior Superintendent of Police, Lahore, who, after taking necessary steps, the details of which need not be given, took action under section 13 of the Lunacy Act, IV of 1912, and, believing Mr. Douglas Donald to be a dangerous person by reason of lunacy produced him before Major Ferrar, the District Magistrate of Lahore. The District Magistrate on the 30th March 1922 proceeded to deal with the matter under section 14 of the Lunacy Act, IV of 1912. He examined Mr. Douglas Donald and, being of opinion that there were grounds for proceeding further caused him to be examined by Major Cox, Superintendent of the Lunatic Asylum, Lahore. Being satisfied that Mr. Douglas Donald was a dangerous lunatic and a proper person to be detained, he obtained a certificate from Major Cox, and was prepared to make an order for the admission for Mr. Douglas Donald in the Lunatic Asylum, when Mr. William Henry Donald, the brother of the alleged lunatic, entered into a bond undertaking that the lunatic shall be properly taken care of, and shall be prevented from doing injury to himself or to others. The Magistrate, instead of making a reception order, made over Mr. Douglas Donald to the care of his brother. Three medical certificates testifying to the lunacy of Mr. Douglas Donald have been placed on the record : (1) one dated the 30th March 1922, given by Major Cox, (2) another certificate by the same medical gentleman dated the 31st March 1922, (3) a certificate dated the 31st March 1922 by Lieutenat Colonel S. M. Davidson, Civil Surgeon, Lahore.

Against the order of the District Magistrate, dated the 30th March 1922, the present petition has been presented. On the petition being called on for hearing, Mr. Jai Lal, the learned Government Advocate, appearing on behalf of the Crown, raised a preliminary objection to the hearing of the petition on the ground that the proceeding taken by the learned District Magistrate was not a judicial proceeding, and that the order passed

being of a purely executive character an application for its revision cannot be entertained by the High Court.

The Act is divided into four parts. Part I deals with "*Preliminary matters.*" Part II deals with "*Reception, Care and Treatment of Lunatic.*" Chapter II in this part deals with "*Reception of Lunatics,*" and Chapter III provides for the "*Care and Treatment.*" Part III provides for "*Judicial Inquisition as to lunacy.*" Chapter IV in this part lays down "*Rules for the conduct of proceedings in lunacy in Presidency towns.*" Under this chapter is laid down the procedure relating to the "*inquisition*" and "*rules* for the exercise of judicial powers over person and estates, of lunatic," "management and administration of such estates, etc., etc." Chapter V lays down the "proceed ings in lunacy outside Presidency towns." Part IV deals with certain miscellaneous matters.

From the above summary of the provisions of the Act, it appears that the legislature intended to make a clear distinction between the proceedings which are of a judicial character, and those of a purely executive nature. The order passed by the District Magistrate in this case, therefore, *prima facie*, does not appear to be of a judicial character. It is, therefore, doubtful whether the High Court can interfere with it in the exercise of its revisional powers. Mr. O'Connor has vehemently contended that where there is a wrong there ought to be a remedy for it, and that this High Court, being the highest Court in this Province, must be possessed of some authority to remedy the wrong done to his clients. He has relied on the provisions of section 151 of the Civil Precedure Code and has contended that under this section the High Court has full powers to entertain this petition for revision. It is clear, however, that this section does not empower the High Court to deal with an order passed by a Magistrate.

The learned Counsel has, in the alternative, contended that the High Court can deal with this matter on its original side, and can institute a judicial inquisition as to the alleged lunacy of the petitioner, Douglas Donald, under section 12 of the Letters Patent. The said section provides as follows:—

"And we do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents."

The learned Counsel, however, has failed to show that the Chief Court of the Punjab used to exercise original jurisdiction in matters of lunacy. In any case it cannot be conceived that the Chief Court could have exercised, or this High Court can exercise, such power and authority in disregard of the provisions of the Lunacy Act. Section 12 of the Letters Patent relating to the Allahabad High Court lays down almost a similar rule on the subject but it was held in *Jaundha Kaur* v. *The Court of Wards* (1) that the High Court had not, under section 12 of the Charter, any original jurisdiction in respect of the persons and estates of lunatics, who are natives of India. The learned Judges of the Division Bench who decided the case, refrained from expressing any opinion respecting their jurisdiction over persons and estates of lunatics who were European British subjects. The section, as it stands, however, does not profess to make any distinction in this respect between the cases of persons who are natives of India, and those who may be European British subjects. It was laid down in that case that under Act XXXV of 1858 the principal Civil Court in the district had jurisdiction to deal with such matters. Under the present Act only the High Courts in the Presidency towns are empowered to exercise original jurisdiction in matter of lunacy (see Chapter IV of the Act), and proceedings in lunacy outside Presidency towns under Chapter V of the Act are provided to be taken in District Courts. Section 83 of the Act gives a right of appeal to a High Court

(1) [1881] 4 All. 159—(1881) A.W.N. 172.

from an order made by District Courts under Chapter III. Clause (2) of section 65 provides that—

"Upon the completion of the inquisition, the Court shall determine whether the alleged lunatic is of unsound mind and incapable of managing himself and his affairs, or may come to a special finding that such alleged lunatic is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others."

This is exactly what the petitioners want this Court to hold. Mr. William Henry Donald may present this application to the District Judge within whose jurisdiction Mr.Douglas Donald, the alleged lunatic, resides and ask him to hold a judicial inquisition under Chapter V. He can then apply for the discharge of the lunatic under section 34, which provides that—

"If any lunatic detained in an asylum on a reception order made under sections 7, 10, 14, 15 or 17 is subsequently found on an inquisition under Chapter IV or Chapter V not to be of unsound mind and incapable of managing himself and his affairs, the person in charge of the asylum shall forthwith, on the production of a certified copy of such finding, discharge the alleged lunatic from the asylum."

I take it that the same rule will apply to a case where a lunatic is placed in charge of a friend or a relative under the provisions of S. 14 of the Act. The proper course to adopt in this case is to return the petition of Mr. O'Connor so that he may present it to the proper Court. The other alternative which suggests itself to me is that I should refer this case to a larger Bench for decision as the questions raised are of great importance and their decision may have a far reaching effect on the practice of this Court. Having regard to the fact that there appears to be no decided case on this point, I adopt the latter course and direct that the papers be laid before the learned Chief Justice with a view that a Bench be constituted to hear the case.

Harrison, J.—After hearing Mr O'Connor for the petitioner and *Rai Bahadur* Jai Lal, Government Advocate, for the Crown, I entirely agree with the view taken by my learned brother in his order of reference. The Act, as pointed out in that order, deals specifically and under separate headings with the two branches of proceedings, executive and judicial. Any person considering himself aggrieved by an executive order passed by the District Magistrate may apply under Part III for a regular inquisition conducted by a judicial officer. The result of such inquisition is conclusive and overrides and overrules any order which may have been passed summarily by the executive authority. This being so it is useless to contend, as has been done, that no remedy is provided against an incorrect or improper executive order, and the position is made even clearer by S. 2 of the Act, which expressly provides that nothing in Part II, *i. e*, that portion which deals with executive orders, shall be deemed to affect the powers of the High Court under Part III. Had the High Court any power of revision of the orders passed under Part II this section would be wholly meaningless and superfluous. Mr. O'Connor has relied on the analogy of the English Law on the subject and has referred us to Halsbury's Laws of England, Volume XIX (passim). In the English Act on which the Indian is based, the executive authority is described as the judicial authority, an even more unfortunate title than that of District Magistrate for designating an executive officer. This 'judicial authority' is a justice of the peace and it is his duty to exercise powers similar to those entrusted in this country to the District Magistrate. The machinery for a judicial inquisition is provided in exactly the same way as in the Indian Act and provision is made for quashing a finding on an inquisition just as an appeal to the High Court is allowed from an order passed by a District Judge in India, but as in India, so in England, no provision is made for any sort of appeal or revision to the High Court from an

executive or summary order. Beyond showing therefore that the executive authority is as unsuitably described in England as in India the English Act assists the petitioner not at all.

It might appear at first sight that all acts of a District Magistrate as such must be open to the revision of the High Court, and that, when it is desired to exclude such jurisdiction, the officer in question would be described as "Collector" or as "Deputy Commissioner" in a non-regulation province. This, however, is not the general practice as is shown by the Police Act, the Arms Act, the Explosives Act and many others, and the position with regard to the Police Act is explained in *Useh Chandra Gupta* v. *Emperor* (2). Under this Act also the orders passed by the District Magistrate under Part II are purely executive and cannot form the subject matter of a revision application to this Court.

The petition is therefore dismissed and the petitioner is directed to seek his remedy, if he wishes to do so, by application to the District Judge under Part III.

Petition dismissed.

(2) [1906] 10 C. W. N. 322.

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SHADI LAL, C. J. AND FFORDE, J.

Ali Muhammad Khan—Plaintiff—Appellant.

v.

Ali Akbar Khan and others—Defendants—Respondents.

L. P. A. No. 75 of 1922, D/-18th January 1923, from the judgment of Martineau, J. D/-6th February, 1922.

Mahomedan Law—Waqf—no express dedication—Presumption — Sajjadanashin without waqf holds only a Courtesy title.

Where the plaintiff was appointed Sajjadanashin in the absence of waqf.

Held this title must be regarded as a courtesy title. The mere burial of a saintly person in a plot of land does not convert that land into trust property, in spite of the cricumstances that *urs* was held there for a few years without any demur by the defendants proprietors. 107, P. R. 1917 Foll. [P. 59, C. 1]

Tek Chand and Niaz Ali—for Appellant.

Badri Das and Abdul Rashid—for espondents.

Shadi Lal, C. J.—The circumstances which have given rise to this appeal under clause 10 of the Letters Patent are brefly as follows :—

Mian Mahomed Khan, a *Pir* of the *Chishti* sect, lived in the defendants' village, Bassi Nau, in the Hoshiarpur District. The second defendant was married to one of his daughters, and the plaintiff is the son of another daughter. The *Pir* died in May 1914 at Bassi Nau, and was buried in a grove belonging to the defendants in the neighbouring village of Kakkon. On the 23rd June 1914, the fortieth day after his death, a large number of persons including his disciples and representatives of the leading shrines of the *Chishti* sect assembled at the tomb, and the plaintiff was installed by a majority of the congregation as *Sajjadanashin*. The plaintiff claims that the defendants dedicated 16 *kanals* of land to the shrine as *wakf* and he has brought the present action for a permanent injunction restraining the defendants from interfering with the shrine and with his management thereof.

Now, the Courts below have concurred in holding that the plaintiff was duly appointed a *Sajjadanashin*, but that the alleged appropriation of the land to religious purposes has not been established. The question, which has been argued before us by the learned advocate for the plaintiff-appellant is that the land on which the tomb of the saint was erected is trust property, and that the plaintiff is entitled to a free access thereto. It is admitted that the defendants, who were undoubtedly the owners thereof, did not expressly dedicate the land under or around the tomb to religious uses, and the only question is whether a presumption of implied dedication arises from the fact that the saint was buried there, and that *urs* has since been held at the tomb four or five times on his death anniversary.

Now, it is true that on account of the saintly character of the deceased the parties intended that his tomb

should be regarded as a religious institution of a sort, but we are not prepared to dissent from the conclusion of Mr. Justice Martineau that the circumstances mentioned above do not justify the finding that the defendants divested themselves of their rights of ownership and appropriated the property to a religious trust. The plaintiff was undoubtedly appointed *Sajjadanashin*, but in the absence of a *wakf* this title must, as pointed out in *Zinat Bibi* v. *Aimna* (1), be regarded as a courtesy title.

Mr. Tek Chand for the appellant is unable to cite any authority to support the contention that the mere burial of a saintly person in a plot of land has the effect of converting that land into trust property, and we do not think that the cricumstance that *urs* was held for a few years without any demur by the defendants materially advances the case for the plaintiff. It must be remembered that the deceased was the father-in-law of the second defendant, and there is nothing improbable in the theory that he himself buried the saint in the land of which he was a part proprietor. Be that as it may, the *onus* was clearly upon the plaintiff to establish a dedication, express or implied, to public religious uses, and we consider that he has failed to discharge that *onus*.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

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(1) [1917] 107 P. R. 1917—92 P.W.R. 1917—111 P.L.R. 1917—40 I. C. 240.

1924 LAHORE 59

MARTINEAU, J.

Sher Khan—Convict—Appellant.

v.

The Crown—Respondent.

Cr. App. No. 130 of 1922, D/- 31st May 1922, from the First Class Magistrate, Jhang, D/- 17th January 1922.

Criminal Trial—Evidence—Story of eye witness and medical evidence conflicting conviction based on former is untenable.

Where the medical evidence conflicted with the story given by the eyewitnesses, who were also relations of the deceased, *held*, the conviction based on their evidence is untenable.

Nand Lal—for Appellant.

Amar Nath Chona—for the Crown.

Judgment.—The appellant Sher Khan has been convicted of an offence under S. 304, Indian Penal Code, for killing Sardar Khan, whose death resulted from fracture of the skull, and his uncle Muhammad Khan, who has not appealed, has been convicted of causing hurt to Sardar Khan, Fateh Khan, and Gahna.

The occurrence took place at Thatta Khaira in the Jhang District, and the case for the prosecution is as follows. Muhammad Khan's mare got into Sardar Khan's *jawar* field and Sardar Khan's wife Sattan saw it damaging the crop and called to her husband, who came and turned the mare out and began abusing Muhammad Khan. The latter came up with a hatchet in his hand and abused Sardar Khan. While these two men were abusing each other Sher Khan came up, armed with a thick piece of wood called a "*Mutahar*" and dealt Sardar Khan two blows on the head with it. Sardar Khan fell and Muhammad Khan struck him on the face with the hatchet. Fateh Khan, a brother of Sardar Khan, who had been seeing to the watering of the field, arrived on the scene, and he received a blow on the arm from Sher Khan with the "*Mutahar*" and a blow on the head from Muhammad Khan with the hatchet. He fell down, and then Ganha a nephew of Sardar Khan, came and struck Muhammad Khan on the head with a "*Phaora*," and Muhammad Khan in turn dealt Gahna a blow on the head with the hatchet. Gahna grappled with Sher Khan, each catching hold of the other's heir, and Sher Khan dropped his "*Mutahar*."

Then Masti Khan, whose wife is a neice of Sardar Khan, and Chirag came and separated the combatants, after which Sher Khan and Muhammad Khan went off towards Kadirpur, the former on foot and the latter on his mare.

Sattan, Fateh Khan, Gahna, Masti Khan, and Chiragh have given evidence in support of this story. There is also the evidence of Ahmad Khan *Zaildar* to the effect that he was at Kadirpur that day, engaged in investigating a case of theft when Sher Khan and Muhammad Khan, whose head was bleeding came and said they had been beaten and went on to the *thana* to make a report. Shahmad constable corroborates the *Zaildar* on this point.

Sher Khan pleads an *alibi* and he has produced some witnesses to prove that on the day of the occurrence he was buying cattle at a village in the Multan district, and others to prove that Sardar Khan received his fatal injury at the hands of his nephew Gahna, who, while Muhammad Khan and Sardar Khan were fighting with each other, aimed a blow with his stick at Muhammad Khan, but missed him and hit Sardar Khan instead.

I agree with the Magistrate in disbelieving all this evidence for the defence, and I may note that Muhammad Khan in his report at the *thana* did not even mention that Sardar Khan had been struck, but mentioned only the injuries that he himself had received.

But the question is whether the story told by the eye-witnesses produced by the prosecution is true. Now in the first place their statements that Sher Khan dealt Sardar Khan two blows on the head do not agree with the medical evidence, which shows that there was only one injury on the head, and the Civil Surgeon, who made the *post-mortem* examination, says that the fractures and injury to the brain were probably the result of one heavy blow.

In the second place the medical evidence also contradicts the statements of the eye-witnesses as to Muhammad Khan having struck Sardar Khan, Fateh Khan, and Gahna with a hatchet, as it shows that the wounds which those men received were all contused wounds, inflicted with a blunt weapon. In the third place the story told by the eye-witnesses entirely fails to account for Muhammad Khan's injuries. They say he received only one blow, which was struck by Gahna, but the medical evidence shows he had nine injuries. This serious discrepancy cannot be explained by the theory that Gahna may have dealt more blows than he cares to admit, and that Fateh Khan may have dealt some blows to Muhammad Khan, as according to the story there were no opportunities for other blows to be given. The first flow is said to have been the one dealt by Sher Khan to Sardar Khan, who fell down senseless. Fateh Khan also, as soon as he came, was struck and rendered *hors de combat*. Then came Gahna and according to the story he was only able to get in one blow at Muhammad Khan, as he and Sher Khan immediately closed with one another. There was thus no chance of Muhammad Khan being struck again before Masti Khan and Chiragh came up and stopped the fight. The medical evidence therefore seems to me to falsify completely the story told by the eye-witnesses.

All these eye-witnesses are related to the deceased man except Chiragh, and Chiragh admits that it was not till a week after the occurrence that he appeared before the Police and made his statement. It may also be noticed that all these persons say they saw the blows inflicted by Sher Khan and Muhammad Khan on Sardar Khan, notwithstanding that Sattan says that she alone was present when they were inflicted.

A report was made at the *thana* on the night following the occurrence by Khanu, a relation of Sardar Khan, and it is noteworthy that Khanu, though he was not an eye-witness, implicated not only Sher Khan and Muhammad Khan, but also Sher Khan's father Dad Khan and his father-in-law Ahmad, saying in his report that when he got to the spot those four men were there armed with sticks, and that Sardar Khan and Fateh Khan said that the former had been beaten by all four. The *Zaildar's* evidence however proves that Dad Khan and Ahmad Khan had nothing to do with the affair as he says they were with him at Kadirpur

and it is probably on this account that Sardar Khan's relations found it necessary to limit the number of Sardar Khan's assailants to two, namely Sher Khan and Muhammad Khan. It seems to me very likely that Muhammad Khan alone may have inflicted the two injuries that Sardar Khan received and that Sher Khan (who the witnesses admit received no injuries) has been implicated in accordance with the usual practice of accusing not only the person who committed the assault, but his relations as well. Muhammad Khan, it is to be observed, is an old man of sixty, so that it may have been thought better to make his nephew responsible for the fatal injury and Sher Khan for the less serious one.

What actually happened it is impossible to say, but the eye-witnesses admit that the affair started with an altercation between Muhammad Khan and Sardar Khan, and it may be that Muhammed Khan struck Sardar Khan with the "*Mutahar*" (which the Sub-Inspector found lying on the ground when he arrived) and that Fateh Khan and Gahna came up to Sardar Khan's assistance and struck Muhammad Khan. Possibly Sher Khan may then have come up and joined in on Muhammad Khan's side, but the evidence produced to show that it was he who struck the first blow and inflicted the fatal injury on Sardar Khan is quite unreliable.

I accordingly accept the appeal, set aside the conviction of, and sentence passed on, Sher Khan, and acquit him.

Appeal accepted.

1924 LAHORE 61

CAMPBELL, J.

Mala Singh—Convict—Appellant.

v

The Crown—Respondent.

Criminal App. No. 178 of 1922, D/-25th April 1922 from the Sub-Div. Mag., Ferozepore, D/-23rd Dec. 1921.

Criminal trial--Reduction of sentence—Grounds.

In view of the fact that the accused also was injured and of the possibility that he merely exceeded the right of private defence, his sentence was reduced. [P 62 C 2]

B.N. Kapur—for Appellant.

M. Saleem—for the Crown.

Judgment.—In this case Narain Singh and his two sons Chanan Singh and Mala Singh have been convicted under S. 304 read with S. 34, Indian Penal Code of causing the death of Arjan Singh and have been sentenced, Mala Singh to five years' rigorous imprisonment and the other two to two years' rigorous imprisonment. There are two appeals, one by Mala Singh and the other by Narain Singh and Chanan Singh and this judgment will dispose of both.

The finding of the learned Magistrate is that Narain Singh and the deceased's wife quarrelled over an accusation brought by the deceased against Narain Singh and his sons of stealing fodder. The deceased came up to intervene. Narain Singh went to his hut and brought out a *dang* and attacked Arjan Sing, who had grappled with him. Then the other two appellants came up with sticks to help Narain Singh; Arjan Singh retreated backward and was struck twice on the head by Mala Singh and fell down, after which he was beaten by the other two appellants. *Mt.* Jewni, who tried to rescue Arjan Singh, was also struck on the head by Mala Singh and one Dhanu, who also tried to interfere, was struck by Mala Singh on the hand.

According to the medical evidence Arjan Singh died as the result of fracture of the skull. Two contused wounds were observed on the head. The body was decomposed and the skin was peeling off and no marks were observed on other parts of the body. Mala Singh appellant was found to have two contused wounds on the head. *Mt.* Jewni had a contused wound on the head and Dhanu had a swollen left hand.

According to the *naqsha surat hal* prepared by the Head Constable, who saw the dead body, besides the two wounds on the head, the deceased had a mark on the left jaw, one on the left eye, one on the right wrist, one on the back of the right hand, one on the left elbow and a scratch on the calf of the leg.

The prosecution evidence does not attempt to account for the injuries to Mala Singh and there is no finding about them by the learned Magistrate. Mala Singh said, that they were the result of the branch of a tree falling on his head. This palpable falsehood is not relied upon before me.

There is also evidence that the three appellants confessed to other persons that they had beaten the deceased. They produced sticks one of which, said to have been used by Mala Singh, was a heavy bludgeon, 4 feet long and weighing over 2 seers.

It does not appear to me that any common intention is proved on the part of the three appellants to inflict on the deceased such injuries as were likely to cause death. The two sons, when their father was wrestling with the deceased, came up to help him. There is no reliable evidence of the character of the blows struck by Narain Singh and Chanan Singh. The injuries to Mala Singh make it extremely probable that Arjan Singh had a stick and that the prosecution witnesses have lied in saying that he had not. The injuries to the head and arms of Arjan Singh and on Dhanu's hand may have been sustained in a fight with sticks. It is, of course, possible also that they were received by the injured persons when trying to ward off blows with bare hands, but in view of Mala Singh's injuries, some one must have had a stick.

That Mala Singh struck the deceased on the head and caused his death is not denied by his learned Counsel, but it is pleaded that he should be presumed to have acted in the exercise of the right of private defence. For Narain Singh and Chanan Singh it is argued that they are not proved to have struck the deceased at all.

The evidence of the prosecution witnesses cannot be relied upon in all its details, but the injuries to the woman and other circumstances indicate that all the three appellants were concerned in a fight with the deceased and perhaps others. They have not proved that they acted in exercise of the right of private defence. On the other hand the prosecution has not proved that the appellants had a common intention to inflict anything more than simple hurt on the deceased.

I maintain the conviction of Mala Singh under S. 304, Indian Penal Code, who I consider knew that he was likely to cause death, but in view of the fact that he also was injured and of the possibility that he merely exceeded the right of private defence, I reduce his sentence to one of 3 years' rigorous imprisonment without solitary confinement. The appeal of Narain Singh and Chanan Singh is accepted and their convictions are altered to convictions under S. 323 and their sentences are reduced to 6 months' rigorous imprisonment in each case without solitary confinement.

Appeal partly accepted.

1924 LAHORE 62

SHADI LAL, C. J. AND CAMPBELL, J.

Mahomed Yar and another—Convicts—Appellants.

v.

The Crown—Respondent.

Criminal A. No. 348 of 1922, D/12th June 1922, from the order of S. J., Mianwali, D/-10th April 1922.

(*a*) *Criminal Trial—Circumstantial evidence.*

Where there was no eye-witness of the affair and circumstantial evidence was that the victim was seen lying wounded on a charpoy with accused No. 1 standing near him and accused No. 2 standing in the door-way of the *Kotha* the scene of murder, that accused No. 1 was at that time wearing a *chadar* and a *Kurta* both of which bore marks of blood and he had blood stains also on his feet and calves that his brother accused No. 2's *chadar* and feet were stained with blood, and that the deceased had been paying attentions to their sister, and that this conduct on his part was resented by the brothers.

Held that the evidence is wholly inadequate to bring the charge home to accused No. 2 and that he be acquitted. [P 64, C 1]

(*b*) *Penal Code, S. 300—Provocation.*

Where the victim was found in the house about midnight and was fully aware of the fact that the accused did not like

his visits to his mother's house and it appeared that he had contracted liaison with the sister of the accused and was seen by the accused, when he had put his arms round her,

Held that accused must have lost his power of self control when he saw a stranger in the house at midnight taking liberties with his sister, that the culprit had received grave and sudden provocation, and that he was guilty of culpable homicide not amounting to murder. [P. 64, C. 2]

M. S. Bhagat, Advocate—for Appellants.

Diwan Ram Lal, Advocate for the Government Advocate—for the Crown.

Shadi Lal, C. J.—Two brothers, Muhammad Yar and Allah Yar, residents of *Mauza* Jahl in the Mianwali District, have been convicted of the murder of one Fateh Khan of the same village, and have been sentenced to death each. It is beyond dispute that the deceased Fateh Khan was subjected to a brutal assault on the night of the 8th or 9th January 1922 while he was in the *Kotha* occupied by the prisoners' mother *Mt.* Sabhai and her three daughters. There can be no doubt that these ladies must have seen the assault and are fully cognizant of the circumstances which resulted in the death of the victim. Two of the three daughters are, however, deaf and mute, and the third *Mt.* Sahiban has appeared as a witness for the defence and supported the plea set up by her brother Muhammad Yar which will be discussed hereinafter. The mother *Mt.* Sabhai has preferred to keep quiet and has given no information of what actually took place on the fateful night.

The victim's brother Nura deposes that one of the mute daughters came to his house at about midnight and made signs which were interpreted by him to mean that her brothers with two other men had tied Fateh Khan in the house and were beating him. Nura, there upon, went to the *lambardar*, Fateh Sher, and then proceeded with him to the house of *Mt.* Sabhai. The *lambardar*, however, advised him to remain outside and went in himself and found Fateh Khan lying wounded on a *charpoy*. He then sent Nura to the police-station at Piplan about one *Kos* from the village where the latter recorded the first information report at about 2 a. m. accusing both the prisoners of assaulting his brother Fateh Khan.

It appears that the victim succumbed at about 3 a. m. to his injuries which consisted of numerous bruises and other simple hurts and a deep incised wound causing fracture of the skull. This fatal injury on the head was, in the opinion of the medical witness, due to more than one blow inflicted with a sharp-edged weapon.

The story for the prosecution is to the effect that the deceased Fateh Khan was anxious to marry *Mt.* Sahiban, and that, while her mother *Mt.* Sabhai was in favour of the match and is said to have received gold worth Rs. 300 from her prospective son-in-law, the elder brother Muhammad Yar was entirely opposed to the proposal and intended to marry his sister to a person who was in a position to give in exchange a bride for his younger brother Allah Yar who was a bachelor. Fateh Khan, however, used to visit the house of *Mt.* Sabhai, and it is alleged that, while he was there on the night in question, he was assaulted by the two prisoners in concert with two other persons who have been acquitted by the learned Sessions Judge.

Now we may clear the ground by stating at once that there is no eye-witness of the affair, and all the case for the prosecution rests wholly upon circumstantial evidence. The evidence of the witnesses Jiwan, Ghulaman and Fateh Sher leaves no doubt whatsoever that, when they and other persons went to the house at about 2 a. m. on that night, Fateh Khan was lying wounded on a charpoy with Muhammad Yar standing near him and Allah Yar standing in the door-way of the *Kotha*. Jiwan also says that Muhammad Yar told him that he had beaten Fateh Khan because the latter had a illicit intimacy with his sister. It is further proved that Muhammad Yar was at that time wearing a *chadar* and a *Kurta* both of which bore marks of blood and he had blood

stains also on his feet and calves, and that his brother Allah Yar's *chadar* and feet were stained with blood. Moreover, we have evidence to the effect that the deceased had been paying attentions to their sister, and that this conduct on his part was resented by the brothers.

Now, Allah Yar protests his innocence and denies altogether his participation in the assault, and we do not think that the circumstances narrated above, which are the only evidence relied upon by the prosecution in support of the conviction, satisfy the test which has been repeatedly laid down that in order to justify the inference of guilt the circumstantial evidence must be such as to be incompatible with the innocence of the accused and incapable of explanation on any reasonable hypothesis other than that of his guilt. It appears that Allah Yar was attracted to the house of his mother by a noise emanating therefrom, and his presence in that house on the night in question does not, therefore, excite any suspicion. The only suspicious circumstance proved against him is the presence of blood on his garment and feet, but we are not prepared to hold that that fact coupled with the alleged motive, establishes his participation in the crime. We consider that the evidence adduced by the prosecution is wholly inadequate to bring the charge home to him, and we accordingly accept his appeal and direct that he be released forthwith.

The case against Muhammad Yar, however, stands on a different footing. Apart from the fact that he admitted to Jiwan that he had committed the assault on the deceased Fateh Khan, we have his own confession before the Committing Magistrate to which he adhered before the Sessions Judge. In this confession he admitted that upon hearing a noise from the *Kotha* of his mother he hastened to the place and finding Fateh Khan there inflicted upon him several blows with a *lathi* which resulted in the death of the victim shortly afterwards. He, however, explains that the intruder was at that time dragging his sister *Mt.* Sahiban in order to abduct her, and that he could not bear the sight and committed the assault in a fit of rage. It is true that this theory of the alleged abduction is supported by the evidence of *Mt.* Sahiban, but considering that there was no indication of any struggle such as would be furnished by a torn garment or an injury on her person, and that paramour, if he really desired to abduct her, could have secured his object by seizing her outside the village where he used to meet her often, we are not prepared to hold that Fateh Khan went there in order to take away the girl by force. It is, however, clear that he was found in the *Kotha* about midnight, and that he must have been fully aware of the fact that Muhammad Yar did not like his visits to his mother's house. The evidence on the record does not furnish any clue to the motive which prompted the visit on the night in question, but there are indications that he had contracted a liaison with the girl. We do not think that the deceased was caught in the act of sexual intercourse with *Mt.* Sahiban, but it is likely as deposed to by the girl herself, that he had put his arms round her, and there can be no doubt that Muhammad Yar must have lost his power of self control when he saw a stranger in the house at midnight taking liberties with his sister. Having regard to all the circumstances of the case, we are of the opinion that the culprit had received grave and sudden provocation, and that his offence is reduced to that of culpable homicide not amounting to murder.

The result is that, while acquitting Allah Yar altogether, we accept the appeal of Muhammad Yar so far as to alter the conviction to one under the first part of S. 304, Indian Penal Code and to reduce the sentence to rigorous imprisonment for five years

Appeal partly accepted.

1924 LAHORE 65

SHADI LAL, C. J. AND MARTINEAU, J.

(*Bhagat*) *Gobind Das and others*—Defendants—Appellants.

v.

Rup Kishore and others—Plaintiffs-Respondents.

L. P. A. No 193 of 1922, Decided on 21th May 1923 from the order of Harrison, J., passed in Civil Appeal No. 41 of 1922, D/-3rd July 1922.

(a) Limitation Act (1908) Art. 177—Amending Act of 1920—Period of Limitation is still 6 months

The words "six months" that occur opposite Article 177 in the authenticated text of the Limitation Act, have not been altered by anything contained in the amending Act of 1920, and that the period of limitation for making an application to implead the legal representatives of a deceased defendant or of a deceased respondent is still 6 months.[P 67 C 2]

(b) Interpretation of Statutes—Words admitting of one meaning—Courts should not speculate on the intention of the Legislature.

When the words admit of but one meaning Court is not at liberty to speculate on the intention of the legislature and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it But the business of the interpreter is not to improve the statute; it is to expound it. The question for him is not what the legislature meant, but what its language means; i. e. what the Act has said that it means. To give a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret law but to make it, and the judges are to remember that their office is *Jus-dicere* not *Jus-dare*. [P 67 C 2]

B. T Chand, S. Ram and F. Chand—for Appellants.

K. D. Singh, Piare Lal, K. Varain, and S. Narain—for Respondents.

Shadi Lal, C.J.—The question of law, upon which we are invited to express our opinion in this case, is whether the period of six months for an application under the Code of Civil Procedure to have the legal representatives of a deceased defendant or of a deceased respondent made a party, as prescribed by Article 177 of the first Schedule to the Indian Limitation Act IX of 1908, has been reduced to 90 days. Now S. 2 of the Indian Limitation and Code of Civil Procedur (Amendment) Act, XXVI of 1920 provides that in the third division of the First Schedule to the Indian Limitation Act 1908, in Articles 176, 178 and 179 for the word "Ditto" in the second column the words "ninety days," "six months" and "ninety days" respectively shall be substituted. It will be observed that this section deals directly with only three Articles namely 176,178 and 179 and makes no reference to Article 177 with which we are concerned in the present case. It is beyond dispute that the period of six months as originally prescribed by Article 176 has now been reduced to 90 days; and the question for determination is whether this amendment of Article 176 has resulted in a corresponding amendment of Article 177 which immediately follows the amended Article.

In order to answer the question we must turn to the Indian Limitation Act of 1908 as passed by the Legislature, and find out the exact word or words used in the second column relating to Article 177. Now the aforesaid Act was published in the Gazette of India in August 1908, and the first schedule is so printed that, while Articles 175 and 176 along with certain Articles preceding them appear on one page, Articles 177 and 178 and a few other Articles appear on the succeeding page; and the period of limitation under these Articles is indicated in the following manner.

PAGE 190.

175. For payment of the amount of a decree by instalments.	Six months	The date of the decree.
176. Under the same Code to have the legal representatives of the deceased plaintiff or of a deceased appellant made a party.	Ditto.	The date of the death of the deceased plaintiff or appellant.

PAGE 191.

177. Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	Six months.	The date of the death of the deceased defendant or respondent.
178. Under the same Code for the filing in Court of an award in a suit made in any matter referred to arbitration by order of the Court, or of an award made in any matter referred to arbitration without the intervention of a Court.	Ditto.	The date of the award.

This is undoubtedly the authorised text of the Act printed by order of Government, and it is clear that the words " six months " which occur opposite Article 177 have not been modified, either directly or indirectly, by anything contained in the Amending Act of 1920.

Our attention has, however, been invited to the text of the Act as printed in the unrepealed General Acts of the Governor General in Council (1909 Edition) and also to the 1908 and 1919 Editions of the Act published in book form under the heading.

" Government of India "

" Legislative Department "

In all these books Articles 175 to 178 all appear on the same page, and the period of limitation under these Articles is described in the following manner.

175. For payment of the amount of a decree by instalments.	six months	The date of the decreee.
176. Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ditto.	The date of the death of the deceased plaintiff or appellant.
177. Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made by a party.	Ditto.	The date of the death of the deceased defendant or respondent.
178. Under the same Code for the filing in Court of an award in a suit made in any matter referred to arbitration by order of the Court, or of an award made in any matter referred to arbitration without the intervention of a Court.	Ditto.	The date of the award.

On the other hand, we find that in 1910 Edition of the Act the aforesaid Articles are printed in the same way as in the Gazette of India, and that the words " six months " occur opposite Article 177.

In view of the confusion created by the various copies of the Indian Limitation Act 1908, referred to above it is necessary to decide which text of the Act should be consulted in order to determine the controversy as to whether the Act as it emerged from the Legislative Council, contained the expression "Ditto" or the words " six months " opposite Article 177.

Now S. 18 of the Indian Councils Act 1861 (24 and 25 Vict., c. 67), which was in force at the time the Indian Limitation Act of 1908 was passed, authorised the Governor General in Council to make rules prescribing *int r alia*, the mode of promulgation and authentication of the laws made by the Council, and one of the rules framed under this section provides that " when a Bill is passed by the Council, a copy thereof shall be signed by the President, and, when the Governor General has declared his assent thereto, such copy shall be signed by the Governor General, and the Bill shall be published as soon as possible in the official Gazette under the signature of the Secretary, as an Act of the Governor General in Council. Such publication shall be made in the Gazette of India in English..... ..(Vide General Statutory Rules and Orders, Vol., 1, 1915 Edition, page 15, rule 34). It was in accordance with this rule that the Limitation Act was published in the Gazette of India, and under sub-section 2) of section 78 of the Indian Evidence Act the text as published in the Gazette must be taken to be the authorised text of the Act. The books containing the Act, which have been relied upon by the learned *Vakil* for the appellant, do not purport to have been printed by Order of Government and cannot be used under the aforesaid Sub-section for the purpose of proving the provisions of the Indian Limitation Act as passed by the Legislature.

It is possible, nay probable, that the draftsman of the Amending Act of 1920 had before him a copy of the Indian Limitation Act in which Articles 175 to 178 were all printed on the same page, and he accordingly thought when the limitation under Article 176 was altered to 90 days the word "Ditto" opposite Article 177 which existed in his copy of the Act, would be regarded as equivalent to 90 days, and that the retention of that word would automatically reduce the period of limitation under Article 177. It is not, however, for the Court to speculate as to the intention of the Legislature if that intention has not been carried into effect by the language used. As pointed out by Maxwell in his book on the Interpretation of Statutes, 6th Edition at page 10 " When the words admit of but one meaning a Court is not at liberty to speculate on the intention of the Legislature and to construe them according to its own notions of what ought to have been enacted Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the statute; it is to expound it. The question for him is not what the Legislature meant, but what its language means; i. e. what the Act has said that it meant. To give a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret law, but to make it, and Judges are to remember that their office is *Jus-dicere*, not *Jus-dare.*"

It is urged that the text contained in the Gezette of India makes the amendment of Article 178 superfluous for the word " Ditto " that occurs opposite that Article would attract to it the words " six months " printed in the Gazette opposite Article 177; and it is contended that the interpretation of an enactment should be such as not to render any portion of it superfluous. This consideration however, applies only when the language of the Statute, is capable of two rival meanings, but in the case before us the language is clear and unambiguous, and there is, therefore no scope for the application of the rule against superfluity.

We must accordingly hold that the words " six months " that occur opposite Article 177 in the authenticated text of the Limitation Act have not been altered by anything contained in the amending Act of 1920, and that the period of limitation for making an application to implead the legal representative of a deceased defendant or of a deceased respondent is still six months. It is regrettable that the question of amendment

should depend upon the use of word "Ditto" which has, it appears, been used only in those copies of the Act in which Article 177 has been printed on the same page as the preceding Article. It is certainly desirable that the word "Ditto" should be omitted altogether and that it should be replaced by words mentioning the actual period which it was intended to represent.

In this view of the law it is unnecessary for us to deal with the contention urged on behalf of the respondent that sufficient cause has been shown for setting aside the abatement. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 68

LUMSDEN AND ABDUL RAOOF, JJ.

Sanwal Das — Defendant — Appellant.

v.

Jaigo Mal and others—Plaintiff and Defendant—Respondents.

F. A. No. 1596 of 1919, Decided on 4th June 1923, against the decree of the Senior Sub-Judge, Delhi, D/- 20th June 1919.

(a) Punjab Pre-emption Act (1913) S. 22 Sub-S. (5) cl. a) and Sub-Ss. (2) & (1)—Deposit withdrawn after decree — Pre-emptor's claim is not liable to dismissal.

The word "so" in clause (a) refers to the preceding section and in the case of an appeal obviously relates to an action taken by an appellate Court under Sub-S. (2). The object of an order under S. 22 (1) is to guarantee vendees against frivolous proceedings on the part of possible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree the need for a deposit no longer exists so far as the trial Court is concerned. No doubt such deposits are available for the discharge of costs [S. 22 (3)] but such satisfaction is not the *raison detre* of the deposit and there is nothing to suggest that a vendee appellant is entitled to any advantage of the kind [P. 69, C. 1]

(b) Pre-emption (Punjab)—Waiver by father of right to pre-empt—Son is not bound.

Waiver of the right to pre-empt by father does not disentitle son to bring a suit for the pre-emption. [P. 69, C. 2]

B. T. Chand and *S. Chand*—for Appellant.

S. Narain—for Respondents.

Judgment.—The hearing of this appeal was delayed in order to await an authoritative decision on the question of the period allowable under Article 177 of the Limitation Act. It has now been held in *Gobind Das* v. *Rup Kishore* (1) that the amending Act has left that article unaltered. We have no hesitation in following this authority which is the result of an exhaustive enquiry into the question rather than the Bench Decision published in the All India Reporter 1922 at page 61, Lahore Series [*Chunni Lal* v. *Kala Khan* (2)] where it appears to have been taken for granted that the effect of the amending Act was to reduce the period to 90 days. It follows that this appeal has not abated. The plaintiffs in this case who are father and son sued to pre-empt a house situated at Delhi on the ground of vicinage. They alleged that the price actually paid was only Rs. 6,000 and not Rs. 9,000 as entered in the deed of sale registered on the 19th May 1917. The vendor and vendee both opposed the claim asserting that the plaintiffs had waived their rights and that the full price of Rs. 9,000 plus Rs. 426-3-0 on account of costs and other expenses had been paid. The trial Court found that the vendee had actually paid Rs. 9,221-13-0 but that no waiver on the part of the plaintiffs had been established. A decree for possession by pre-emption on payment of the sum mentioned was accordingly granted, parties being left to bear their own costs.

Against this order the vendee has preferred this appeal. It appears that after the institution of this appeal the appellant obtained an order for stay of execution. The plaintiffs pre-emptors thereupon applied for permission to withdraw the pre-emption money deposited in accordance with the decree and this application was accepted by a Judge in Chambers. The pre-emptors armed with this permission accordingly withdrew their deposit of Rs. 9,221-13-0. Counsel for the appellant now argues that the

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(1) 1924 Lah. 65—4 Lah. 367.
(2) 1922 Lah. 611—4 Lah. L.J. 171—134 P.W.R. 1922—67 I.C. 596.

withdrawal of this sum entails the dismissal of the pre-emptors' claim under the provisions of clause (a) of sub-S. 5 of S. 22 of the Pre-emption Act, 1913. In the special circumstances we have allowed this objection to be raised though no additional ground of appeal relating to it was put in. We are satisfied, however, that the objection must be repelled. In the first place the pre emptors are not the appellants in the case. In the second place the word "so" in the clause cannot be ignored. That word refers to the preceding section and in the case of an appeal obviously relates to action taken by an appellate Court under sub-S. (2). In the present case there is no order by this Court under that sub section. In the third place it is clear that the object of an order under S. 22 (1) is to guarantee vendees against frivolous proceedings on the part of possible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree, the need for a deposit no longer exists so far as the trial Court is concerned. No doubt such deposits are available for the discharge of costs [S. 22 (3)] but such satisfaction is not the *rai-on detre* of the deposit and there is nothing to suggest that a vendee appellant is entitled to any advantage of the kind. We have no hesitation, therefore in holding that S. 22, 5 (a) does not apply to the present appeal.

The only other question requiring determination is that of waiver. Great stress has been laid by the appellant on the statement of Chhanga Mal plaintiff in the trial Court. In that deposition Chhanga Mal admits that he asked the vendee to sell him a part of the property and that he had told a messenger sent by the vendee to offer a small sum as *solatium*, that he neither wanted the house nor the money He explains that he would not have brought the suit at all had it not been for the pressure brought on him by the ladies of his household. Counsel contends with some reason that this conduct amounts to waiver, *i.e.* a surrender of the right to pre-empt and though on behalf of the pre-emptors it is urged that these admissions should not be taken too seriously we are of opinion that it was not open to Chhanga Mal to bring a suit for pre-emption on the top of this waiver. At the same time we do not consider that there was any estoppel—a further argument urged on behalf of the appellant. Chhanga Mal asserts that he was not consulted about the sale before it took place and the vendor admits that he neither gave any notice to the pre-emptors nor made any enquiry from them. The evidence produced to prove estoppel does not appear to us to be at all convincing.

But while we are of opinion that Chhanga Mal was not entitled to sue by reason of his waiver, we can see no reason for supposing that his son was not competent to sue. We regard the proof that he too waived his rights as entirely inadequate and we are not prepared to accept the contention that he is not entitled in view of his father's waiver to maintain a suit. Reliance has been placed on 67 I. C. page 76 but that authority has no applicability to the present facts. On the other hand P. R. 35 of 1918 is clearly in point, and a similar opinion was expressed by the Allahabad Court in I. L. R. 7. All. page 184. In this case it has nowhere been even suggested that the father was acting as the manager of the family at the time of waiver and the terms of the plaint itself are directly opposed to any such theory.

It follows that so far as Jaiju Mal, plaintiff, is concerned the decree of the lower Court must be maintained; while Chhanga Mal's name must be removed from the decree. Ground 7 of this appeal regarding payment of stamp duty and brokerage has not been seriously pressed and we see no reason to differ from the finding of the learned Sub-Judge on the point. The sum found due *viz.* Rs. 9,221-13-0 must be re-deposited within 30 days from the date of this order otherwise the appeal will be accepted and the suit dismissed with cost throughout. Should the sum be deposited by due date we direct that in the circumstances of the case parties bear their own costs in this Court.

Appeal dismissed.

1924 LAHORE 70

MARTINEAU, J.

The Firm Kahna Mal Benarsi Das—Plaintiffs—Petitioners.

v.

The Firm Kahna Mal Nathu Mal—(Defendant) *and Bishan Das and others* (Objectors)—Respondents.

Civil Rev. Petition No. 589 of 1921, Decided on 10th April 1922, for revision of the orders of the Small C. C., J., Ambala Cantonment, D/-18th July 1921.

(a) *Civil P. C., S. 73—Assets held by Court—Right to rateable distribution.*

Although the respondents had actually had the money attached before judgment this fact would not entitle them to an order for the rateable distribution when they had not obtained their decree before the money was realised. 21 C. L. J., 614 Ref [P. 70 C. 2]

Where money was wrongly paid over to the petitioners.

Held even if the petitioners had not been entitled to receive the money the respondents could not compel them to refund it without bringing a suit in accordance with the provisions of S. 73. [P. 70 C, 2]

(b) *Civil P. C., O. 21 R. 74—Administrative order—Procedure for execution sales does not apply.*

If a sale did not take place in execution of a decree of a Court but the order for the sale was an administrative one the procedure laid down in the Civil P. C. for sales in execution of decree does not apply. [P. 70 C. 2]

(c) *Civil P. C., S. 151—Applies only when there is no provision.*

S. 151 has no application where there is an express provision of law applicable to the case. [P 71, C. 1]

Shamair Chand—for Petitioners.

Jai Gopal Sethi and Lala Gopal Chand—for Respondents.

Judgment.—On the 20th June 1921 the petitioners got a decree in the Cantonment Small Cause Court, Ambala, for Rs. 349-9-9 against Nathu Mal, and on the same date obtained payment, in satisfaction of the decree, of a sum of money attached by them before judgment, which was in the hands of the Nazir of the Court and had been realized from the sale of some of Nathu Mal's property which had been taken from his shop. On the 23rd June the respondents got decree against Nathu Mal, and they applied for proportionate shares in the above mentioned money and asked that the petitioners might be called upon to refund it. The Judge of the Small Cause Court having granted their applications the petitioners have applied to this Court for revision of his orders.

It is clear that the learned Judge was wrong in ordering the petitioners to refund the money paid to them on the 20th June. The respondents had not got their decree when the money was paid to the petitioners on that date, so that S. 73 (1) of the Civil Proecdure Code does not apply and the respondents are not entitled to share in the money. It is urged on behalf of the respondents that they also had the money attached before they obtained their decree.

The records before me do not show whether or not this was the case but even if the respondents had actually had the money attached before judgment this fact would not entitle them to an order for the rateable distribution when they had not obtained their decree before the money was realized, *Madhu Sudan* v. *Rash Mohan Sen* (1) is a case in point.

Counsel for the respondents has referred to O. 21 R. 52, Civil Procedure Code, but that rule which relates to the mode of attaching property in the custody of a Court or Public Officer has nothing to do with the present case. The learned Judge of the Court below says in his order of the 23rd June 1921 that an irregularity was committed in paying the petitioners before the expiry of 15 days from the date of the sale of Nathu Mal's property, but this view is wrong, as the sale did not take place in execution of a decree of a Court but the order for the sale was an administrative one to which the procedure laid down in the Civil Procedure Code for sales in execution of decrees does not apply.

Further, even if the petitioners had not been entitled to receive the money the respondents could not compel them to refund it without bringing a suit in accordance with the provisions of S. 73 of the Civil Procedure Code.

Counsel for the respondents relies on S. 151 of the Civil Procedure Code.

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(1) [1915] 21 C.L.J. 614—30 I. C. 38.

but that section has no application here, where there is an express provision of law, contained in S. 73 which covers the case.

I hold, therefore, that the orders passed by the lower Court on the 23rd June and 18th July 1921 directing the petitioners to refund the money are not in accordance with law, and, accepting the application for revision, I set those orders aside. The respondents will pay the petitioner's costs in this Court.

Application accepted.

✱ 1924 LAHORE 71

LE ROSSIGNOL, J.

Bir Sen—Plaintiff—Petitioner.

v

Raja Ram and others—Defendants—Respondents.

Civ. Rev. No. 295 of 1922, Decided on 10th February, 1923. from the decree of the Dt. J., Karnal, D/- 9th January, 1922.

(a) *Limitation Act, Arts. 48 and 49—Suit to recover trees cut or compensation.*

Defendant sold standing trees to plaintiff in 1915, by registered-deed for Rs. 200/- and covenanted that plaintiff should be at liberty to cut them and remove the timber within one year. Plaintiff did not cut within the year. Meanwhile the land had been sold and was pre-empted and the pre-emptor sold the trees to third persons in 1917 who cut them and the plaintiff in 1920 sued for possession of the timber or Rs. 400/-.

Held :that this was a sale of moveable property and that article 18 or Art, 49 does apply. [P. 71 C. 2]

(b) *Prov. S. C. C. Act, Art., 35 (ii)—Suit for price of timber sold.*

Suit for price of timber sold to plaintiff as standing trees but removed by pre-emptor owing to sale by vendor of plaintiff, falls under Art. 35 (ii). [P. 71 C. 2]

Shamair Chand—for Petitioner.

Sagar Chand—for Respondents.

Judgment.—The principal defendant sold standing trees to plaintiff by registered-deed for Rs. 200/- and the covenant was that plaintiff should be at liberty to cut them and remove the timber within one year.

This sale was in 1915 but plaintiff did not cut within the year. Meanwhile the land had been sold and was pre-empted and the pre-emptor sold the trees to third persons on 12th July 1917. These persons cut the trees and the plaintiff in 1920 sued for possession of the timber or Rs. 400/-.

The lower appellate Court has held the suit to be barred by time and has dismissed it applying article 62 of the Limitation Act.

The suit was for recovery of the timber or for compensation and the act complained of is said to have been wrongful, so that Articles 48 or 49 applied and the suit if brought within three years of the cutting and misappropriation of the trees was within time.

The sale was a sale of standing trees which were to be cut and converted into timber. This was a sale of moveable property.

The plaintiff however has produced evidence that his servants were prevented from cutting the trees 4 years before suit, so that the suit was too late, if Articles 48 or 49 apply.

I think Article 48 or Article 49 does apply for plaintiff does allege a transfer to him, then a wrongful transfer to third parties and he prays for delivery of the timber or compensation. The suit appears to be time barred. As it falls under Art 35 (ii) of the second Schedule of the Provincial Small Cause Courts Act as amended by Act VI of 1914, it was excluded from the cognizance of a Court of Small Causes, and the appeal lay to the District Court.

On the merits too, plaintiff has not much to complain about. His timber occupied the land for several years and it might well be held that time was of the essence of the contract.

I dismiss the petition with costs.

Application dismissed.

1924 LAHORE 72

BROADWAY AND MARTINEAU, JJ.

Emperor—Appellant

v.

Mauj Din and others—Respondents.

Criminal App. No. 617 of 1922 Decided on 19th September 1922.

Penal Code, S. 498—Death of husband before decision—Probate and Admn. Act S. 89.

S. 89 of the Probate and Administration Act has no application to a criminal prosecution. (14 M. 417 Foll.) And therefore criminal prosecution under S. '98 I. P. C. cannot abate merely on account of the death of the injured party i. e. the husband. 25 P. R. Cr. 1919 Ref.

[P. 73 C. 2, P. 73 C. 1]

D. C. Ralli—for Appellant.

Nemo—for Respondents.

Broadway, J.—Mauj Din Muhammad Afzol, *Mt* Sabhrai, and *Mt.* Jawai were proceeded against on a complaint filed by Mangal Sain under S. 498, Indian Penal Code, in which he charged the said four persons with having abducted his wife *Mt.* Bhagwanti.

Apparently after the trial had come to an end and judgment alone remained to be pronounced Mangal Sain died. The Magistrate convicted the four persons above named and passed various sentences on them.

These persons appealed to the Sessions Court and their appeal was accepted on the ground that a complaint under S 498 Indian Penal Code, was a personal action and the right to continue the case came to an end on the death of the complainant. Mauj Din and his three companions were therefore acquitted and against this acquittal the Local Government has preferred an appeal under S. 417, Criminal Procedure Code

The learned Sessions Judge proceeded on *Ishar Das* v. *Emperor* (1), an an authority that was followed in *Rama Nand* v. *Crown* (2) and *Labhu* v. *Crown* (3), but was dissented from in *Hazara Singh* v. *Crown* (4).

In *Ishar Das* v. *Emperor* (1) the criminal proceedings were for defamation and it was held by a Division Bench of the Chief Court that such proceedings terminated on the death of the complainant, a prosecution for defamation being essentially a personal action. Reliance was placed on S. 89 of the Probate and Administration Act and *Krishna Behari* v. *Corporation of Calcutta* (5) by way of analogy. In *Rama Nand* v. *Crown* (2) the complainant had instituted criminal proceedings under S. 323. Indian Penal Code, and I held that just as a prosecution for defamation was a personal action so was a prosecution for causing simple hurt and applying the same analogy and following *Ishar Das* v. *Emperor* (1) I held that the prosecution could not be carried on after the death of the complainant.

This view was accepted by Rattigan C. J. in *Labhu* v. *Crown* (3). In *Hazara Singh* v. *Crown* (4), four persons had been sent up by the police for trial under S. 304, Indian Penal Code. Two were convicted under S. 304, Indian Penal Code, and the two others under S. 325, Indian Penal Code. On appeal the learned Sessions Judge altered the convictions of all 4 to convictions under S. 323, Indian Penal Code. They then moved the High Court on the Revision side contending that as the injured man had died the prosecutions had abated. The case came before a Division Bench of this Court when the three decisions above quoted were considered, and it was held that S. 89 of the Probate and Administration Act had no application to a criminal prosecution. A reference to that section will show that this view is undoubtedly correct and the same view has been expressed by the Madras High Court in *Muhammad Ibrahim* v. *Shaik Davood* (6) in which the circumstances were very similar. Indeed the previous authorities did not lay down that S. 89 of the Probate and Administration Act

(1) [1908] 10 P. R. 1908 Cr.
(2) [1917] 26 P. R. 1917 Cr.—18 Cr. L. J. 638 31 P.W.R. 1917 Cr. 40 I. C. 1008.
(3) [1919] 25 P.R. 1919 Cr.—20 Cr. L. J. 711—52 I. C. 791.
(4) [1921] 2 Lah. 27—22 Cr. L. J. 166—59 I. C. 918.
(5) [1904] 31 Cal. 993—8 C.W.N. 745 (F. B.)
(6) [1921] 44 Mad. 417—13 L. W. 379—40 M.L.J. 351—(1921) M W. N. 227—65 I. C. 549.

governed criminal prosecutions, but that section was relied on as laying down certain principles, that by way of analogy might be applied to criminal proceedings, having regard to the narrowness of the line between a prosecution and a suit for damages.

After a careful consideration of the judgment of Scott-Smith J. in *Hazara Singh* v. *Crown* (2), I have no doubt that the later view is preferable and a criminal prosecution cannot abate merely on account of the death of the injured party see also *Imperator* v. *Nur Muhammad* (7) I would therefore accept this appeal and as the learned Sessions Judge has given no finding on the merits, I would set aside the order of acquittal and return the appeal to him for disposal.

Martineau, J.—I concur.

Appeal accepted: Case remanded.

1924 LAHORE 73

BROADWAY AND MARTINEAU, JJ.

Emperor—Appellant.

v.

Puran Singh—Respondent.

Criminal App. No. 632 of 1922 Decided on 19th September 1923 from the S. J. Jhelum, D/-23rd May 1922.

Punjab Excise Act (I of 1914), S. 24 (3)—Excise Manual, S. 407 of Vol. I.

S. 407 of Vol. I of the Excise Manual cannot, and does not, override the provisions of the Excise Act and therefore a licensee in possession of liquor in excess of the prescribed quantity and outside the place of license is rightly punishable under S. 61, 16 P. R. Cr. 1917 Foll. [P. 73 C. 2]

D. C. Ralli—for Appellant.

B. N. Kapur—for Respondent.

Judgment—One Puran Singh, son of Ganga Singh, a licensed retail vendor of country liquor, was on the evening of the 19th July, 1921, found in possession of a wooden case containing 8 bottles of country liquor at Dhudial Railway Station. His home is at Dhudial but his licensed liquor shop is at Said Kasran. He was convicted of an offence under S. 61 of the Excise Act and sentenced to pay a fine of Rs. 50, or in default to undergo 6 months' imprisonment.

An appeal by him to the Sessions Court proved successful. The learned Sessions Judge did not apparently come to any definite decision on the merits of the case, but accepted the appeal on the ground that as Puran Singh was a licensed vendor of country liquor, he was entitled to be in possession of such liquor at any place without any limit as to quantity. This couclusion he arrived at on the provisions of section 407 of Volume I of the Excise Manual.

The Government has appealed against the acquittal on the ground that the view taken by the learned Sessions Judge of the law applicable to the case is erroneous. In our opinion the appeal must succeed. S. 407 of Vol. I of the Excise Manual cannot, and does not, override the provisions of the Excise Act, and the learned Sessions Judge has entirely overlooked the provisions of S. 24 (3), which are as follows:—

A licensed vendor shall not have in his possession at any place, other than that authorised by his license, any quantity of any excisable article in excess of such quantity as the Local Government has under S. 5 declared to be the limit of sale by retail except under permit granted by the Collector in that behalf.

In the case of country liquor this quantity has been fixed by the Local Government at one seer by Punjab Government Notification No. 141-A, dated 1st February 1914. Admittedly if Puran Singh can be held to have been in possession of the case of 8 bottles, he has exceeded this limit and has committed the offence of which he was convicted. We would note that *Gokal Chand* v. *Crown* (1) was applicable to this case and the learned Sessions Judge should have followed it.

S. 407 aforesaid would empower a license-holder to possess country liquor to any extent on the licensed

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(7) [1907] 8 Cr.L.J. 190.

(1) [1917] 16 P. R. 1917 Cr.—18 Cr. L. J. 521—39 I. C. 489.

premises but does not entitle him to possess more than the prescribed amount elsewhere.

We therefore accept the appeal and setting aside the order of the learned Sessions Judge return the appeal to him for a decision on the merits.

Appeal allowed.

1924 LAHORE 74

CAMPBELL, J.

Narain Dass — Defendant—Appellant.

v.

Jawahir Singh—Plaintiff—Respondent.

S. A, No. 78 of 1922, D/- 15th May 1922, from a decree of the Add. Dt. J., Amritsar D/- 6th October 1921.

Specific Relief Act, S. 35—Wrong description—Rescission granted.

In a contract for sale of a house, the house was described as 12½ yards long and 4½ yards broad and as bounded on three sides by other houses and on the south by courtyard which was joint of the house in question and other houses. The house was actually found to be 10 yards by 4½ yards, that is to say, there was a shortage of 13¾ square yards.

Held a defect of 13¾ square yards, in a stated area of 56¼ square yards is substantial and the plaintiff was justified in withdrawing in terms of the agreement and was entitled to a refund of his earnest money. [P 75 C 1]

Fakir Chand—for Appellant

Shamair Chand—for Respondent.

Judgment.—This second appeal is the result of a suit for recovery, on the ground of a breach of warranty, of Rs. 1,000 paid by Jawahir Singh, plaintiff, to Narain Dass, defendant, as earnest money in consideration of an agreement to sell a house executed on the 28th of January 1920. The suit was decreed by the trial Court and the order was upheld on appeal by the learned District Judge. The agreement in question was registered on the 27th of February 1920. The house was described as 12¼ yards long and 4½ yards broad and as bounded on three sides by other houses and on the south by courtyard which was joint of the house in question and other houses. The lower Courts have found that the actual measurements were 10 yards by 4½ yards, that is to say, there was a shortage of 13¾ square yards. The agreement contains the following warranty clauses :—

Tassai-wa-tashaffi mutalliq bai mazkur, wa har qisam mujh Baia Mushtri ko kara dega. This was held by Courts below to cover mis-statement as regards area and to justify the plaintiff in resiling from the agreement and claiming refund of his earnest money.

It is argued before me that the warranty did not relate to the mis-statements at all: that the boundaries were clearly given: that the plaintiff inspected the house before entering into the agreement; and that the primary canon of interpretation, where there is conflict between descriptions of the boundaries and of the quantity of land conveyed is that the description of the boundaries, if precise and accurate, dominates the description of the quantity.

The last contention is derived from what was held by the Madras High Court in *Tyada Poosapati Rudra* v. *Maharaja of Jeypore* (1), but it was also stated in that judgment that in every case the question of the intention of the parties must be considered. The evidence in this case does not show that the plaintiff made a thorough inspection before entering into the agreement. He is stated to have seen the house from outside and that it was at the time in the possession of a mortgagee, a fact which is mentioned in the deed of agreement itself. The question for determination is, whether the concurrent findings of the lower Courts that the very wide terms of the warranty clause included a guarantee that the measurements stated were correct, is to be held wrong.

It appears to me that there are no grounds for reversing their finding. The vendor plainly guaranteed everything set forth about the house, and the guarantee was expressed in em-

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(1) [1912] 23 M.L.J. 97—11 M.L.T. 385—14 I.C. 286.

phatic terms, a defect of 1 ω 3/4 squared yards, in a stated area of 56 1/4 square yards is substantial and the plaintiff, in my opinion, was justified in withdrawing in terms of the agreement.

There are no grounds, therefore, for interference and I dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 75

MOTI SAGAR, J.

Kanshi Ram — Petitioner—Appellant.

v.

The Crown—Respondent.

Cr. Rev. No. 635 of 1922, Decided on 21st November 1922, from the S. J. Karnal, D/-11th February 1922.

Criminal P. C., Ss. 517 and 520—Powers under—No limitation for application under S. 517 exists.

No period of limitation is prescribed for an application for restoration of property under S. 517; it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he is charged. The words "and make any further orders that may be just," in S. 520 are obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under S. 517.

[P 75 C 2

Anant Ram for *Raj Krishna*—for Petitioner.

Ram Lal—for Respondent.

Moti Sagar, J.—This is an application for revision of an order passed by the Sessions Judge of Karnal under S. 520, Criminal Procedure Code.

The facts are briefly these:—

One Rahim Bakhsh, a *Lambardar*, lost a large sum of money in currency notes in January 1920. In May, the police received information that the notes were in the possession of one Thara, a *Kumhar* of Ramgarh. As a result of this information Thara was prosecuted and convicted of criminal misappropriation.

During the investigation Thana informed the police that he had given notes for Rs. 500 to Kanshi Ram, the present petitioner, who was one of his creditors. Kanshi Ram is alleged to have admitted his guilt before the police and to have given up Rs. 400 in cash. Proceedings were taken against him, and he was convicted by an Honorary Magistrate under S. 411, Indian Penal Code, of the offence of dishonestly receiving stolen property knowing the same to be stolen property. On appeal to the Sessions Judge the conviction was set aside, and the petitioner was acquittted No orders were passed by the trial Court or by the Sessions Judge with respect to Rs. 400 which had been recovered from him by the police in the course of the investigation and made over to the complainant by the order of the Magistrate on the conviction of Thana in June 1920.

In January 1922, about six months after his acquittal, Kanshi Ram made an application to the Sessions Judge for the restoration of this money. The Sessions Judge rejected the application on the ground that it was barred by limitation.

In my opinion the order of the learned Sessions Judge is erroneous and must be set aside. The application for the return of Rs. 400 made by the petitioner was in no sense an application by way of an appeal against the order of the trying Magistrate directing return of the money to the complainant but an independent application to the Sessions Judge himself with a view to his taking action under Ss. 517, and 520, Criminal Procedure Code. No period of limitation is prescribed for such an application and it can in my opinion be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he is charged It appears that the learned Sessions Judge has overlooked the provisions of S. 520, Criminal Procedure Code, under which he is possessed of very wide powers to pass any orders that may be just. The words—"and make any further orders that maybe just.'—in S. 520 are obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders n cases where property has been erroneously disposed of under S. 517, Criminal Procedu Code.

I would reverse the order of the Sessions Judge and return the case with the direction that he should hear the application and decide the same according to law after giving notice to the complainant.

Revision accepted.

1924 LAHORE 76

BROADWAY, J.

Chuni Lal—Petitioner

v.

Ishar Das—Respondent.

Cr. Rev, No. 651 of 1922, Decided on 29th May 1922, from the S. J., Jhelum, No. 320 of 24th April 1922.

(a) *Criminal P. C. S. 523—Order passed on police papers alone is not wrong.*

An order passed by a Magistrate on the police papers alone and not on any enquiry made by him is not necessarily wrong. 9 B.131 Ref. [P. 78 C. 1]

(b) *Criminal P. C. S. 439—Order under S. 523 Cr. P. C. can be examined.*

On a proper case being made out, a High Court has jurisdiction to examine orders passed under S. 523, Cr. P. C. [P. 78 C. 1]

Arjan Das—for Petitioner.

Nand Lal—for Respondent.

Reference.—The petitioner was ordered by *Sardar* Balwant Singh, exercising the powers of a Magistrate of the 1st Class in the Jhelum District on 12th October 1921 to hand over nearly 22 *tolas* of gold (about 6 *tolas* converted into ornaments and about 16 *tolas* in pieces, to Ishar Das-respondent under S. 523, Criminal Procedure Code.

The facts of this case are as follows:—

On 27th July 1921, Chuni Lal, goldsmith of Pind Dadan Khan, reported to the police that he had been beaten by Lala Ishar Das, Municipal Commissioner, and servants of the latter, and robbed of Rs. 1,000. The police investigated the case and found that it was false, and that the report had been made with the object of depriving Lala Ishar Das of certain gold which he had entrusted to Chuni Lal, to be converted into ornaments. The case was struck off as false on 12th October 1921 by the Sub-Divisional Magistrate, who by a separate order of the same date made over to Ishar Das certain gold and ornaments under S. 523, Code of Criminal Procedure, directing him,

"not to change the appearance of the ornaments for 6 months at least, as Chuni Lal may possibly bring a Civil Suit."

The gold and ornaments had been recovered from the possession of Chuni Lal during the investigation of the case instituted by him against Ishar Das and others.

Chuni Lal was subsequently prosecuted under section 182, Indian Penal Code, for making a false report and the case is understood to be still pending.

On 3rd November 1921, Chuni Lal filed a complaint against Ishar Das and others under sections 395/ 323; Indian Penal Code. The complaint was dismissed after preliminary enquiry on 3rd February 1922, and Chuni Lal's application for revision was dismissed by me in case No. 19 of 1922, decided on 22nd March 1922.

The proceedings are forwarded for revision on the following grounds;—

Chuni Lal has filed an application for revision of the order passed by the Sub-Divisional Magistrate under S. 523 Code of Criminal Procedure, on 12th October 1921, on the ground that the gold and ornaments should not have been made over to Ishar Das, as they belonged partly to himself and partly to one of his customers.

I issued notice twice to Ishar Das, directing him to produce the gold and ornaments for my inspection. The notices have not deen served, and Chuni Lal alleges that Ishar Das, who is an influential man, is evading service.

It does not appear that the notice is legally necessary before a case is reported to the High Court under S. 438, Code of Criminal Procedure. It is clear that the order under S. 523, Code of Criminal Procedure, was passed without any independent enquiry, the Magistrate having acted merely on the material contained in the preceedings of the police. This Court cannot interfere with the order under S. 523, Code of Criminal Procedure, nor can it recover the gold and ornaments made over to Ishar

Das. In my opinion, the order under revision was passed on insufficient grounds, and should be set aside, the gold and ornaments being made over to Chuni Lal, from whose possession they were taken and Lala Ishar Das being left to file a civil suit for their recovery, if he wishes to do so. An alternative course would be to direct the Magistrate to make further enquiry into the case, and take such action under S 523, Code of Criminal Procedure or otherwise as may appear to be justified by the results of the enquiry.

The records of the case are accordingly submitted to the High Court under S. 438, Code of Criminal Procedure, with the recommendation that action may be taken as indicated above.

JUDGMENT

Broadway, J.—On the 27th July 1921 Chuni Lal, a goldsmith of Pind Dadan Khan, reported to the police that he had been beaten by Lala Ishar Das, Municipal Commissioner, and some servants of his and had been robbed of Rs. 1,000.

On investigation the police came to the conclusion that the charge laid was false and that it had been brought with the object of depriving Ishar Das of certain gold which he had made over to Chuni Lal to be converted into ornaments. During the investigation made by the police Ishar Das had brought this allegation forward and had given a description of certain ornaments which led the police to take possession of the said ornaments from Chuni Lal's custody. On the 1st October 1921, Chuni Lal applied to the Court asking that the said ornaments be made over to him alleging that some of them belonged to clients of his who were agitating for their return and that the others belonged to him. On the 3rd October 1921 Ishar Das filed an application before the same Magistrate alleging that the articles were his and had been entrusted to Chuni Lal and that in order to be able to misappropriate them Chuni Lal had brought a false case of assault and robbery against him. On the 12th October 1921, on a report made by the police to the Magistrate stating the facts and giving expression to their opinion that the case brought by Chuni Lal was false and asking for orders *qua* the property, the Magistrate purporting to act under S. 523, Criminal Procedure Code, recorded an order directing that the property should be made over to Ishar Das as in the Magistrate's opinion the ornaments belonged to that person. Chuni Lal being at liberty to take such action in the Civil Court as he considered necessary. On the 3rd November 1921 Chuni Lal filed a complaint against Ishar Das and others under Ss. 395 and 323, Indian Penal Code which complaint was dismissed and an application for revision by him likewise proved ineffectual. He then moved the Sessions Judge attacking the correctness of the order, under S. 523, Criminal Procedure Code, dated the 12th October 1921. The Sessions Judge came to the conclusion that the order complained against was wrong and had been made without due enquiry. He accordingly reported the matter to this Court under S. 438, Criminal Procedure Code.

Before me Mr. Arjan Das has supported the recommendation of the learned Sessions Judge on behalf of Chuni Lal while Mr. Nand Lal has endeavoured to support the order of the Magistrate. It was contended first that an order under S 523 could only be passed after a proper enquiry, whereas the order in the present case was passed on the police report and papers, and *In re Ratanlal* (1) was cited in support, an authority which was differed from in a case reported as *Asi* v. *Emperor* (2). The section itself does not make any magisterial enquiry imperative. It appears that the Magistrate has to satisfy himself, on such material as is before him who is entitled to possession of the property concerned. In *Husansha* v. *Mashaksha* (3), and *Queen Empress* v. *Tribhovan* (4) it appears to have been laid down

(1) [1892] 17 Bom. 748.
(2) [1911] 5 S. L. R. 3—12 Cr. L.J. 108 9 I C. 634.
(3) [1910] 12 Bom. L. R, 232—11 Cr. L.J. 339—5 I. C. 973.
(4) [1884] 9 Bom. 131.

that the Magistrate would be justified in proceeding on the police papers, while in *Ma Thein Nu* v. *Ma The Hnit* (5) it is laid down by Rutledge, J. that it was not incumbent upon the Magistrate to hold a judicial enquiry upon oath. The weight of authority, therefore, appears to be against the contention advanced by Mr. Arjan Das that the order of the Magistrate was wrong as being passed on the police papers alone and not on any enquiry made by him.

The next question is whether this Court has jurisdiction to interfere with the order in revision, it being contended by Mr. Nand Lal that no such power existed. The authority already cited, *i. e.*, *Ma Thein Nu* v. *Ma The Hnit*. (5) and which was referred to by Mr. Nand Lal is, however, opposed to this contention, and I have no doubt that, on a proper case being made out, a High Court has jurisdiction to examine orders passed under S. 523, Criminal Procedure Code.

Turning to the case itself it appears that the police obtained possession of the property in question in the course of an investigation into an offence which in no way related to this property. Chuni Lal is a goldsmith and admittedly Ishar Das had had dealings with him. There would thus be nothing extraordinary in Ishar Das being able to describe ornaments which could be found in Chuni Lal's shop. The property was not taken possession of by the police under S. 51, nor under S. 54 (4) as urged by Mr.Nand Lal. The property was not taken possession of by the police under the suspicion of its being stolen property nor at that stage, at any rate, had Chuni Lal been charged with having committed any offence with reference to it. All that had been urged was that he intended at some future date to misappropriate these articles and that he had falsely charged Ishar Das with a criminal offence in order to facilitate the crime contemplated by him.

In these circumstances I am of opinion that the learned Sessions Judge is right in his view that the property ought not to have been made over to Ishar Das even on the material which was before the Magistrate. The mere fact that Ishar Das was admitted by Chuni Lal, to be the owner of one of the bracelets did not necessarily mean that Ishar Das was entitled to possession of the same for admittedly Ishar Das had given this bracelet to Chuni Lal for certain definite purposes and it is not unlikely that Chuni Lal could claim to retain possession of any articles belonging to Ishar Das until such time as he was paid for work done in connection with them. As, however, Chuni Lal definitely admitted before the Magistrate that one of the bracelets was the property of Ishar Das I maintain the order of the Magistrate *qua* that bracelet, but direct that the remaining ornaments and gold be forthwith made over to Chuni Lal. In making this order I have not lost sight of Mr. Nand Lal's contention that Chuni Lal has a right to go to the Civil Court to establish his claim to this property. I do not see any reason, however, to place him in the position of having to prove his title, a matter with which these proceedings are not concerned.

Revision accepted.

(5) [1919] 57 I. C. 81.

1924 LAHORE 78

ABDUL RAOOF, J.

Bishan Das alias *Parmeshara Nand*—Convict.

v.

King Emperor—Respondent.,

Criminal App. No. 658 of 1922 Decided on 7th November 1922, from an order of the 1st Class Mag. Gurdaspur, D/-12th June 1922.

Penal Code, Ss. 232 and 235—One offence part of the other—Sentences under both are illegal.

The accused were charged under Ss. 235 and 232, Penal Code with being in possession of implements and materials for counterfeiting King's coins and with actually counterfeiting King's coins, and sentenced to various terms of imprisonment under each section.

Held that the possession of such implements and materials is part and parcel of the transaction of counterfeiting coin and therefore the sentences passed on the appellants under S 235, Penal Code, were illegal. 11 P. R. 1901 Cr. Foll. [P 80 C 1]

B. P. Khosla—for Appellant.

Lala Jai Lal—for Respondent.

Judgment.—Darsha Nand, Bishen Das and Bhagat Singh were charged under S. 235 and 232, Indian Penal Code, with being in possession of implements and materials for counterfeiting King's coins and with actually counterfeiting King's coins. They have been found guilty under both the sections. Darsha Nand has been sentenced to seven years rigorous imprisonment under each of the charges and the sentences have been ordered to run separately and consecutively. Bhagat Singh has been sentenced to five years' rigorous imprisonment on each count and in his case the sentences are made to run concurrently. Bishen Singh has also been sentenced to two years' rigorous imprisonment on each count and in his case also the sentences are made to run concurrently. Two of the convicted persons, namely, Bhagat Singh and Bishen Das, have filed separate appeals. Darsha Nand has not appealed.

The case for the prosecution was that in the village of Shahpur Kaudi there is a *Dharamsala* belonging to one Kanshi Ram (P. W. No. 11). The *Dharamsala* is in a dilapidated condition and is situated at some distance from the city. It is surrounded by a thick cactus hedge. All the three accused lived in the *Dharamsala*. The accused are said to be *Sadhus*. They were seen loitering about in the city making purchases but were not seen begging. This aroused the suspicion of the Police. The Head Constable in charge of the Police *howki* at Shahpur Kaudi sent Constable Arjan Singh (P. W. No. 12) to the *Dharamsala* to make enquiries about the three men Arjan Singh after making enquiries reported at the Thana that the so-called *Sadhus* were apparently persons who were counterfeiting coins as he had seen moulds, etc., for counterfeiting coins. Thereupon the Head Constable called the Lambardar the Choukidar and a respectable shopkeeper and taking Arjan Singh and some other Police Constables with him went to the *Dharamsala*. There the three accused were found seated under the cover of some bushes and trees at a short distance from the *Dharamsala*. Numerous articles suitable for counterfeiting coins were found there, such as moulds, a sieve, some wet clay and earthen pitchers, etc. A long list of the articles found was prepared and it is on the record as Exhibit P. C. Two boxes, one wooden and another made of tin, were found in the *Dharamsala*, one of which belonged to Bhagat Singh and the other to Bishen Das. On a search being made of the persons of the accused a purse was found in the possession of Bishen Das. This contained two keys and a counterfeit four-anna piece. The wooden box belonging to Bishen Das was opened with one of the keys and in addition to other articles one eight anna piece and three two anna pieces were found in it. The evidence of Bhai Indar Singh, Treasurer, Gurdaspur, shows that all these coins were counterfeit. An examination of the list, Exhibit P. C., clearly shows that all the articles mentioned therein were used for the purpose of counterfeiting coins. This list was carefully prepared and was signed by respectable witnesses. Subsequently, enquiries were made in the bazar and a number of witnesses came forward to prove that *Sadhus* had made purchases from them and produced certain coins which had been given to them by the accused as the price of the articles purchased. These coins, also according to the evidence, were found to be counterfeit. Bishen Das accused pointed out the spot from which 18 eight-anna pieces were dug out. They were all counterfeit coins.

On the evidence there can be no possible doubt as to the fact that all the three accused were in possession of the articles for counterfeiting coins and that they had actually counterfeited coins. Having regard to the facts disclosed in the evidence the conclusion is irresistible that they were all in joint possession of these articles.

The accused admitted that all the articles recovered were found as

disclosed in the evidence, but they stated that they had no knowledge of them and had no connection with them. The only defence put forward was that of good character. Some respectable persons came forward to swear to the good character of Bishen Das. The learned Magistrate has taken into consideration the good character of the appellant Bishen Das in awarding sentence in his case, but the evidence of good character does not in any way throw any doubt on the evidence as to the discovery of the articles found in the joint possession of three accused. Their guilt is clearly established.

The only question which arises for consideration is whether the sentences passed under both counts are sustainable. In the case of *Hyat* v. *Emperor* (1) the prisoner was convicted of and sentenced for an offence under S. 232, Indian Penal Code, *i. e.*, for performing a part in the process of counterfeiting King's coins and on a second count under S. 235, Indian Penal Code, for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coins and it was held that the possession of such implements and materials being part and parcel of the transaction of counterfeiting coin the sentence for the second offence was illegal.

Following this rule I must hold that the sentences passed on the appellants under S. 235, Indian Penal Code, were illegal. I accordingly set aside the sentences passed under that section.

As regards the amount of sentence passed on Bhagat Singh I see no reason why a heavier sentence should have been passed on him than that passed on Bishen Das. They both occupied the same position and apparently the part they took in the process of counterfeiting coins was a minor one. The principal part must have been taken by Darsha Nand. I, therefore, reduce the sentence passed on Bhagat Singh from five years' rigorous imprisonment to one of two years' rigorous imprisonment. So far Bhagat Singh's appeal is allowed. In other respects it is dismissed.

(1) 14 P. R. (Cr.) 1904.

The appeal of Bishen Das is so far allowed that the sentence passed on him under S. 235 is set aside; otherwise, his appeal is dismissed.

As already stated, Darsha Nand has not appealed, but I took up his case under S. 439, Criminal Procedure Code, and gave notice to the Government Advocate to show cause why the sentence passed on him under S. 235 should not be set aside. Mr. Jailal, the learned Government Advocate, at once admitted the illegality of the sentence. I accordingly set aside the sentence passed on him (Darsha Nand) under S. 235 The sentence passed under S. 232, Indian Penal Code, will stand.

Appeals allowed in part.

1924 LAHORE 80

ABDUL RAOOF, J.

Mt. Gulzar Jan and another—Petitioners.

v.

The Crown—Opposite Party.

Criminal Rev. No. 1137 of 1922 Decided on 8th January 1923 from the Dt. Mag. Jullundar, Case. No. 3205 of 1922.

(a) Punjab Municipal Act, Ss. 33 and 152—Delegation of powers to president without sanction is not valid.

According to S. 33 of the Act the Committee cannot delegate its powers under S 152 of the Municipal Act Over and above this the second class Committee cannot delegate any of its powers to the President without the previous sanction of the Commissioner, and similarly the 1st class Committee without the sanction of the Local Government. Where no such sanction is ever obtained for delegating such powers to the President a notice issued by the latter cannot be held as legal.

(b) Punjab Municipal Act, S. 228—Authority to prosecute must be written and in detail.

The authority to prosecute a person under Municipal Act must be in writing and full particulars of the person to be prosecuted should be given with the authority so given to the prosecutor.

Order of Reference:—The accused on conviction by Main Muhammad Aboul Fateh, exercising the powers of a Magistrate of 1st Class in the Jullundur District, were sentenced, by order, dated the 15th May 1922, under S. 152 of the Municipal Act, III of 1911, to pay a fine of Rs. 15 ach.

The facts of this case are as follows:—

Two prostitutes, Gulzar Jan and Sardar Jan, were prosecuted under S. 152 of the Muncipal Act for failing to obey an order issued by the Municipal Committee, Jullundur, to remove themselves from a certain locality of the town. An exactly similar case was instituted against other prostitutes in the Court of Khan Muhammed Zaman Khan, Magistrate, 3rd class, Jullundur, and resulted in a conviction, which was however upset on appeal by Rai Sahib Lala Shankar Das on the 13th of June 1922. The grounds on which the appeal was accepted were based on points of law, and I give below the relevant portion of the appellate Magistrate's decision in the case.

The proceedings are forwarded for revision on the following grounds :—

" The counsel for the appellant has, however, raised an objection to the effect that the notice in question was bad in law as it was not issued by the Committee itself as required under S. 152 (1) of the Municipal Act, III of 1911. Counsel for the Municipality urges that the Committee had delegated its powers to the President in its resolution No. 63 of 20th June of 1921, and that consequently as the notice in dispute was issued by the President it was quite legal and valid. But on reading S. 33 of the Act it appears that the Committee could not delegate its powers under S. 152 of the Municipal Act. Over and above this it further appears on reading S. 33 that the 2nd class Committee cannot delegate any of its powers to the President without the previous sanction of the Commissioner, and similarly the 1st class Committee without the sanction of the Local Government. In this case no such sanction was ever obtained for delegating such powers to the president, hence notice issued by the latter cannot be held as legal. Another objection in this case is that the authority given to Pir Bakhsh for prosecuting people on behalf of the Committee is also not within the purview of law. "

" In explanation under S. 228 of the Municipal Act it is provided that the authority in all cases must be in writing. This written authority is explained at page 230 of the Act, edited by Hari Chand, M. A., LL. B., in his first edition of 1913. According to this explanation complete and full particulars of the person to be prosecuted should be given with the authority so given to the prosecutor. As this procedure was not adopted in this case the prosecutor who appeared in Court was not properly and legally authorised to conduct this case. Under these circumstances there remains no doubt that the prosecution of the appellant was not legal and under the strict sense of law. "

I agree with this interpretation of the law; it has also been accepted by the Municipal Committee, Jullundur, which has consequently issued revised notices in accordance with a resolution passed at their last meeting. For these reasons this case is forwarded to the High Court with a recommendation that the sentences and fines passed on the appellants Gulzar Jan and Sardar Jan should be remitted.

Note.—The fines have been paid.

Judgment.

Abdul Raoof, J.—For the reasons stated by the District Magistrate I accept his recommendation and set aside the convictions and sentences.

Revision accepted.

✱ 1924 LAHORE 81

HARRISON, J.

Abdulla and others—Convicts—Petitioners.

v.

King Emperor—Respondent.

Criminal Rev. No. 351 of 1922, Decided on 8th May 1922, from the order of S. J., Gujranwala D/-31st October 1921.

Penal Code, S. 63—Sentence of fine—Ability to pay should be considered—Imprisonment to be preferred.

However serious may be the offence, a fine should not be imposed which it is wholly impossible for the accused person to pay without ruining himself and inflicting great hardships upon his family, and the maximum fine to be imposed upon any individual should depend in every case upon his position in life, especially because no option is allowed under the Penal Code and the liability to pay the

fine is not terminated by the serving of the sentence of imprisonment. If the offence is of an aggravated type a sentence of imprisonment is obviously more suitabl than a fine. [P. 82 C. 1]

Zafrullah Khan—for Petitioners.

Sayed Mohsin Shah—for Respondent.

Judgment.—This revision was admitted on the question of sentence only. Three *Mochis*, Imam Din, Ghulam Muhammad and Abdullah, have been convicted under S 323, Indian Penal Code of striking Din Muhammad, Sub-Inspector who was inquiring into a case in their village against the son of one of the accused, Abdullah. Ghulam Muhammad hit the Sub-Inspector with a stick and the other two struck him with their fists. They have been sentenced to pay fines of Rs. 100 each or in default to undergo rigorous imprisonment for one month. Were it not that the accused are poor menials, the sentence would be by no means excessive, and Counsel for the Crown has contended that the gravity of the offence renders it necessary to inflict heavy fines, however humble may be the circumstances of the accused persons. With this view I cannot agree. In my opinion, however serious may be the offence, a fine should not be imposed which it is wholly impossible for the accused person to pay without ruining himself and inflicting great hardships upon his family, and the maximum fine to be imposed upon any individual should depend in every case upon his position in life. A *Mochi's* income in all probability is not more than Rs. 20 a month and the fines imposed amount to the income of five months of each of the accused. I reduce the sentences to fines of Rs. 20 each and this not because I do not take a serious view of the offence committed but because I consider that the fine should be within the capacity of the accused to pay and this more especially because no option is allowed under the Penal Code and the liability to pay the fine is not terminated by the serving of the sentence of imprisonment. If the offence is of an aggravated type a sentence of imprisonment is obviously more suitable than a fine.

Sentence reduced.

1924 LAHORE 82

ABDUL RAOOF AND MARTINEAU, JJ.

Nawaz Ali and others—Defendants—Petitioners.

v.

Allu and athers—Plaintiffs—Respondents.

Civ. Mis. Pet. No. 554 of 1922, Decided on 17th Feb. 1923, against the decree and judgment of the High Court, D/-19th May, 1922.

(a) Civil P. C., O. 45, R. 7—Decree.

Decree includes a decree passed on review which modifies the first decree. [P. 82 C. 2]

(b) Civil P. C., S. 110—Market value is to be taken and not valuation vnder Suits Valuation Act.

The rules under the Suits Valuation Act in accordance with which the land in suit is valued for the purposes of jurisdiction in the Lower Courts do not apply in determining the value for the purposes of S. 110 of the Civil Procedure Code but it is the market value which has to be ascertained. [P. 82 C. 2]

M. S. Bhagat—for Petitioners.

C. S. Salaraya—for Respondents.

Martineau, J.—This is an application for leave to appeal from a decree of this Court which reversed the decree of the Court of first instance. The decree of this Court was first passed on the 20th November 1921, but on an application for review it was modified on the 19th May 1922. It is clear that the period of limitation for the present application is to be reckoned from the latter date, on which a new decree was passed in substitution for the first one and *Joykishen Mookerjee* v. *Ataoor Rohoman* (1), and *Vadilal* v. *Ful Chand* (2) are authorities in support of this view. The rulings to which counsel for the respondents has referred us are not in point. We hold, therefore, that the application which was made on the 8th August 1922, is within time.

It remains to determine whether the value of the land in dispute is Rs. 10,000 or upwards. The rules under the Suits Valuation Act in accordance with which the land was valued for the purposes of jurisdiction in the Lower Court do not apply in determining the value for the

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(1) [1880] 6 Cal. 22—6 C L.R. 575.
(2) [1905] 30 Bom. 56—7 Bom.L.R. 664.

purpose of S. 110 of the Civil Procedure Code, but it is the market value which has to be ascertained.

We accordingly direct the Subordinate Judge to make inquiry and report to this Court whether the value of the land in dispute is Rs. 10,000 or upwards.

Petition allowed.

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* 1924 LAHORE 83

LE ROSSIGNOL AND HARRISON, JJ.

Nabi Bakhsh and others—Plaintiffs—Appellants.

v

Muhammad Salam Ullah and others—Defendants—Respondents.

S. A. No. 2146 of 1922, Decided on 8th February 1923, from an order of the Addl. Dt. J., Jhelum, D/-26th April 1922.

Civil P. C., S. 11 Expl. IV—Might and ought—Pleas if raised would have been fatal to the prior suit, cannot be raised in the subsequent suit.

Where it was found that the previous suit would certainly have been defeated by the pleas put forth in the subsequent suit had they been established,

Held: those pleas were barred in the subsequent suit by explanation IV. [P. 83 C. 2]

Zafrulla Khan—for Appellants.

M. Iqbal and *K. Zaman*—for Respondents.

Judgment.—The plaintiffs in this case are one branch of the reversioners of one Mahbub Alam, who died leaving two widows, Mt. Jawahar Bibi and Mt. Niamat Bibi and a daughter Mt Rasul Bibi, who is the child of Mt. Jawahar Bibi. Both widows have now died and the plaintiffs claim their share of the land left by Mahbub Alam, the only contesting defendant being Salam Ullah, the son of Mt. Rasul Bibi and grandson of Mahbub Alam. The suit was decreed by the trial Court on the ground that, in consequence of the previous litigation, the pleas now put forward by Salam Ullah were governed by the law of *res-judicata*. On appeal the learned District Judge held that Explanation IV of S. 11 did not apply and remanded the case for decision on the merits; and the only point before us is whether the present defence to the claim is barred by that section.

On the death of Mahbub Alam, both widows had the land entered in the name of their son-in-law, Aman Ullah. In 1886 the present reversioners sued for a declaration that the gift by the widows in favour of this son-in-law of Mahabub Alam would not affect their reversionary rights. The suit was resisted on two grounds, that the gift was valid and that he (Aman Ullah) was a *Khanadamad*, but the plaintiffs succeeded and obtained a decree. Aman Ullah died in 1890 and the land standing in his name was mutated in favour of the present defendant, his son Salam Ullah, in 1895. In 1905 Mt. Jawahar Bibi died and then the reversioners brought another suit for possession against Salam Ullah. This suit was dismissed on the ground that the second widow was still alive, but the plaintiffs were given a declaration that the mutation did not affect their reversionary rights. That suit was contested by Salam Ullah only on the ground that he stood in his father's shoes. He did not urge either of the pleas which he now puts forward that he is entitled to the land as his mother's son and that the land is not ancestral. On the question whether these pleas should have been taken in the previous suit, we find that the suit would certainly have been defeated by the present pleas had they been established, or rather by the plea that Salam Ullah, as grandson of Mahbub Alam, was entitled to succeed, that as the plea was not taken it cannot be taken now and that the present defence of Salam Ullah is barred by S. 11, Explanation IV.

We, therefore, accept the appeal and restore the order of the trial Court giving the plaintiffs the decree they seek. The plaintiffs' costs will be paid throughout by Salam Ullah. The other defendants were merely *pro forma* and have not appealed.

Appeal accepted.

✱ 1924 LAHORE 84

CAMPBELL, J.

R. A. Byrne—Convict—Appellant.

▼

The Crown—Respondent.

Criminal App. No. 827 of 1922, Decided on 29th November, 1922, from the order of the 1st Class Mag., Ferozepore, D/-29th August, 1922.

Criminal P. C., S. 342—Fresh examination of accused after examination of Prosecution witnesses recalled by accused is not necessary.

The accused was questioned very fully and very fairly by the learned magistrate after all the witnesses for the prosecution had been examined and cross-examined at considerable length before the charge was framed. After the charge was framed most of the witnesses were recalled for a further lengthy cross-examination at the termination of which the Magistrate proceeded to record the defence evidence without questioning the accused again.

Held: that S. 256 is the section under which the accused is enabled to recall the prosecution witnesses for further cross-examination after the charge has been framed, and while making it clear that the accused does not enter upon his defence until the termination of such cross-examination, that section says nothing about any second examination of the accused after the further cross-examination. It is often desirable that the accused should be asked at this stage whether he wishes the Court to record any additional explanation but S. 342 cannot be interpreted as conveying a peremptory direction to that effect, if the Court has already questioned him before the charge when the case for the prosecution has been closed and the prosecution witnesses have been cross-examined.
6 P. L. J. 644 Dist. [P. 88 C. 2]

The reason for questioning the accused as set forth in S. 342 is to enable him to explain any circumstance in the evidence appearing against him, but an accused person does not recall the prosecution witnesses for the purpose of discovering fresh circumstances against himself. [P. 88 C. 2]

Kashi Ram—for Appellant.

Mehr Chand Mahajan—for the Crown.

Judgment.—The appellant R. A. Byrne has been tried as an European British subject by a Justice of the Peace and Magistrate of the First Class, Ferozepore, on three charges under S. 409, Indian Penal Code, has been found guilty on each charge and has been sentenced to an aggregate of six months' rigorous imprisonment and a fine of Rs. 400/-.

The finding of the Magistrate is as follows

The appellant, Byrne, was station Electrical Engineer, Ferozepore, up to 31st August 1921. On 1st March he presented a cheque for Rs. 98/7/- at the Alliance Bank Simla, Ferozepur, received payment and failed to account for the money or to deposit it in the Government Treasury. The cheque had been sent to him by the Quartermaster of the Welch Regiment in payment of a charge due to Government. It was drawn by Lieutenant Allen of the Welch Regiment on the 2nd February 1921 in favour of the Quartermaster or bearer. It was endorsed on the back by Lieutenant Edwards, the Quartermaster, and was further endorsed "pay self" and signed by the appellant. The original words written were "pay to Babu Munsa Ram;" but the last four words were scored through and the words "self" written above. This cheque and its proceeds were the subject of the first charge and it was found by the learned Magistrate that the appellant being a public servant had committed criminal breach of trust in respect of them and for the offence he was sentenced to three months' imprisonment and a fine of Rs. 200/- with three weeks further imprisonment in default of payment of fine.

Subsequently, so the Migistrate holds, on the 21st March 1921 the proceeds of a similar cheque for Rs. 269/3/3, dated 18th March were misappropriated by the appellant, his endorsement in this case being confined to his own signature. Finally on the 4th May 1921 the appellant received Rs. 119/-8/- in cash from the Quartermaster of the Welch Regiment and omitted to show it in his accounts or credit it in the Treasury. The appellant was charged separately with an offence under S. 409 for each of these amounts and was found guilty on both charges. He was sentenced for the two offences to a further term of three months' rigorous imprisonment and another fine of Rs. 200/- with three weeks imprisonment in default of payment. The two sentences of imprisonment were ordered to run consecutively.

There is no doubt of the correctness of the convictions in respect of the two cheques. The evidence that the appellant received the cheques and endorsed them and that he did not pay into the Treasury or enter in his accounts their amounts is not contested. All that is disputed is the Magistrate's finding that he cashed the cheques himself and retained the money. This finding is supported principally by Arjan Das cashier of the Bank who has deposed that he paid to the appellant personally the amount of each cheque. The witness is able to state this positively because invariably he requires the person who gets the money to sign on the back of the cheque, whether the cheque is a bearer cheque or not. The fact that the Agent of the Bank called for the defence has stated that the cashier cannot legally refuse to pay a cheque without such endorsement does not prove that Arjan Das is lying when he says that this is his practice. Arjan Das has no ostensible reason for giving false evidence against the appellant and the theories of the appellants' Counsel for his doing so are quite unintelligible. The defence is able to suggest no other particular person who cashed the cheques. I am asked to hold that it is possible that the appellant sent some chaprasi or clerk to get the money and that the cashier did not obtain the signature of that person. Having done so, I am next to suppose it possible that the appellant having endorsed the cheques and given them to some messenger unspecified, made no demand for the money or enquiry when the messenger returned and took no steps to have any record of the cheque made in his books owing to forgetfulness. The only basis claimed for such a supposition is evidence given for the defence that the appellant was addicted to drink and was habitually neglectful of his duties, and in my opinion it is quite inadequate.

The appellant's engagement as Station Electrical Engineer terminated, as already stated, on the 31st August 1921. On this date and during the few preceding days an inspection of his accounts was made by Lieutenant Ryan, the Garrison Engineers who embodied the results in a report dated 1st September to the Deputy Assistant Director of Military Works, Jullundur. The report specified the three sums in respect of which the appellant has been convicted as being unaccounted for and also a fourth item of Rs. 182-8-0. On the same day, 1st September, Lieutenant Ryan called upon the appellant, who was still at Ferozepore, for an explanation regarding the Cheque for Rs. 269-3-3 which, he informed the appellant, had been "encashed" by him. The appellant wrote in reply that he remembered "having encashed" the Cheque several months previously "but due either to my negligence or the loss (sic), I am prepared to deposit the sum referred above by Saturday afternoon". On 3rd September the appellant forwarded Rs. 269-3-3 to Lieutenant Ryan accompanied by a letter in the following terms. "I send herewith the value of Rs. 269-3-3 which was encashed by me and no records are available for its deposition (sic) I pay this as promised under protest," concluding with a request for a receipt. Lieutenant Ryan refused to accept the money and placed the matter in the hands of the police on 5th September. On 7th September the appellant paid the money to the police and went off to Bombay where he was arrested on 9th September.

The Magistrate regarded these two letters as admissions that the appellant had personally received the money from the Bank. It is argued before me that the word "encash" cannot be taken to mean more than "cause to be converted into cash." The terms of both letters show that the appellant had not the gift of expressing himself lucidly on paper and it is impossible to say what he meant. It is urged further that the appellant's offer to refund is evidence that he did not misappropriate but this argument has no force. He allowed his engagement to terminate without making any attempt to credit the money to Government in accordance with definite and well known rules, and this fact distinguishes his case altogether from that of a clerk or servant who

is found, while still in service, in possession of money received some time previously which it was his duty to credit to his employer at once. The ruling reported as 40 I. C. 303 and cited to me has no applicability for this reason. The case is clear against the appellant in respect of the proceeds of the two cheques that he was entrusted with both sums in his capacity of a public servant and that he dishonestly misappropriated them.

The case, however, is not so clear in regard to the cash payment of Rs. 119-8-0 which is the subject of the third charge, for it is one of the word of a single witness against that of the appellant. The money is proved to have been sent to the appellant's office and to have been received by a Clerk named Prabhu Diyal who gave the regiment a receipt. Prabhu Dial says that he passed on the money to the appellant; the appellant says that he did not. The Magistrate considered that the version of Prabhu Diyal was established by a receipt which he produced and which he stated the appellant gave him when the money was handed over, but the genuineness of this receipt has been contested and not altogether without success.

The receipt is on what is evidently the bottom half of a single sheet of note paper. The words written, admittedly by Prabhu Diyal with an indelible pencil, are, "Received Rs. 119-8-0 of 1st Battalion Welch Regiment Ferozepore". Below is the appellant's signature (admitted) in green ink and below the signature. "Station Electrical Engineer" also admitted to have been written by the appellant. There is no date.

Prabhu Dial has given evidence and has been cross-examined twice at considerable length. His story is that the appellant was not in the office when the money arrived, but when he came in, the witness gave him the money and asked for a receipt in order to protect himself. The witness picked up a piece of paper from the appellant's table, tore it in half and wrote the receipt with a pencil which he had in his hand and the appellant signed it. He (the witness) put the receipt in the pocket of the waist-coat which he was wearing that day and it stayed there. Subsequently Mr. Talbot, the controller of Military accounts when auditing the appellant's accounts in connection with the alleged defalcations told the witness that the Quartermaster of the Welch Regiment held his receipt for this money. The witness told Mr. Talbot on a Saturday (presumably 10th September) that he had a receipt from the appellant, and at midday on Monday (12th September) he showed the receipt to Mr. Talbot, who gave it back to him. Afterwards (the date is proved to be the 17th September) the witness gave the receipt to the police.

Prabhu Diyal further admitted that he assisted Lieutenant Ryan in the examination of the appellant's accounts on 31st August or thereabouts, and said that Lieutenant Ryan's report dated 1st September which includes the item of Rs. 119-8-0 among those not accounted for, was based on a memorandum drawn up by him (Prabhu Diyal). He added that he told Lieutenant Ryan that he had received the money and had given it to the appellant, but he did not show Lieutenant Ryan the receipt.

Mr. Talbot has not given evidence. All that Lieutenant Ryan can recollect is that Prabhu Diyal on one occasion told him that he had paid to the appellant some sum which he had received.

The appellant admitted his signature on the receipt, but said that Prabhu Diyal must have secured the signature on a blank paper or to the document some time when he, the appellant, was under the influence of liquor. He denied all knowledge of the money.

It was elicited in cross-examination from Prabhu Diyal and from another witness, Mr. J D. Hay, Electrical Engineer, Military Works Services, that the appellant was asked for certificates by members of his staff, when he was leaving and that he gave several of them blank pieces of paper signed by him and told them to write above whatever they liked. Prabhu Diyal says that he was told by the appellant in more than one case to fill in the certificate. Thus there was material which Prabhu Diyal could

have used for forging a receipt bearing the appellants' signature. This is one point in favour of the appellant.

A second point is the late production of the receipt. This is no doubt capable of some sort of explanation and Prabhu Diyal's explanation may be true. But it is not absolutely convincing. Prabhu Diyal knew on 1st September that the authorities had to be satisfied about the item of Rs. 119-8-0. It is true that the police were asked in the first instance to take action only in regard to the cheque for Rs. 269-3-3, but it must have been obvious that the appellant's dealings with all the missing sums would come under enquiry. There is no independent evidence that the receipt was seen by any one until 17th September.

Thirdly there is the absence of any date from the receipt. If it had been written on the date of the payment of the money it was more likely than not, in my opinion, to have been dated by the writer. Prabhu Diyal was acting head clerk at the time and the ordinary course of business by a trained office man would have been to date the receipt. It is in evidence that Prabhu Diyal before giving the receipt to the police was made aware that his signature was in the Quartermaster Welch Regiment's dak book, but not that he was told the date, which actually was 4th May, more than four months earlier. Thus it has not been made clear that Prabhu Diyal, if he had desired to make a forged document, could have made a more complete job of it.

Fourthly the only reasonable explanation of there being no date on the receipt, assuming it to be genuine, is that it was intended to be the roughest kind of memorandum of the handing over of the money. If this were so, the appellant was not likely to have written formally below his signature. "Station Electrical Engineer" although it must be conceded that the appellant is shown by the evidence to have done several curious things. On the other hand the recipients of blank papers for the subsequent concoction of certificates would in the natural course have required the full official designation of the appellant below his signature.

Lastly (and this is the reply to the argument for the Crown that Prabhu Diyal, had he set about forging a receipt, would at least have manufactured one in ink) the evidence of the Sub-Inspector who investigated the case shows that Prabhu Diyal was asked for his receipt at the Garrison Engineer's office, that he did not immediately produce it, that he was told to go away and fetch it to the Electrical Engineers' office, and that he appeared with the receipt at the latter office, some two or three furlongs from the Garrison Engineer's office, about 5 or 6 minutes after the Sub-Inspector himself arrived. It is quite possible that Prabhu Diyal, a young man and presumably of respectable antecedents, shrank from committing forgery until driven to desperation by the terror, which in a person of his position would certainly be very poignant, of arrest and participation in a police enquiry in the role of accused. He may have written the receipt at this stage and in a frantic hurry.

I am not to be understood as holding the belief that the Rs. 119-8-0 were in fact appropriated by Prabhu Diyal, who is not before me to defend himself. His story may be perfectly true; but the above circumstances have to be taken into consideration in determining whether it has been proved to be so in the present proceedings beyond possibility of reasonable doubt. There is yet one other circumstance, the evidence alluded to already about the appellants' propensity for drink and his general neglect of his duties. Lieutenant Ryan has deposed that both the stock in the appellant's charge and the accounts of his office were found to be in a state of utter confusion. With such a person head of the office the subordinate staff must have had opportunities for irregular behaviour.

I consider for the reasons given above that the authenticity of the receipt is open to doubt of which the appellant must have the benefit. With the receipt eliminated there is the

appellants' word against that of Prabhu Diyal, who undoubtedly handled the money and who, if he has misappropriated it, would be as interested in asserting that he gave it to the appellant as the latter in denging that he ever received it. After careful examination of all the evidence I hold that the guilt of the appellant under the third charge has not been conclusively established.

It remains to notice a last plea raised on behalf of the appellant that the whole trial was vitiated by the omission of the magistrate to question the appellant at the end of the cross-examination of the witnesses for the prosecution after the charge had been framed. The plea is basad upon a judgment by a Division Bench of the Patna High Court in *Mitarjit Singh* v. *Emperor* (1). The correctness of that decision need not be discussed for the case is distinguishable on its facts from the present case. The report of *Mitarjit Singh* v. *Emperor* (1) indicates that the accused were questioned by the Magistrate after the examination-in-chief of the prosecution witnesses and before there had been any cross-examination at all, and that after the subsequent cross-examination (whether this was held before or after the framing of the charge is not stated) they were not questioned again. It was held by the High Court that the word "examined" in S. 342, Code of Criminal Procedure, includes cross-examination and re-examination, that the provisions of S. 342 being mandatory, the magistrate had no option but to examine the accused after the cross-examination of all prosecution witnesses, that not having done so he had omi ted to do something in regard to which he had no discretion, that consequently he had committed an illegality and not merely an irregularity and that the case must be reheard from the stage at which the trial became illegal.

In the present case the accused was questioned very fully and very fairly by the learned Magistrate after all the witnesses for the prosecution had been examined and cross-examined at considerable length before the charge was framed. After the charge was framed most of the witnesses were recalled for a further lengthy cross-examination, at the termination of which the Magistrate proceeded to record the defence evidence without questioning the accused again.

S. 342, Criminal Procedure Code, requires the Court to question the accused generally on the case after the witnesses for the prosecution have been examined and before the accused is called on for his defence. This injunction has been carried out by the Magistrate in the present case and at the stage indicated in the rules of procedure for the trial of warrant cases vide S. 254. S. 256 is the section under which the accused is enabled to recall the prosecution witnesses for further cross-examination after the charge has been framed, and, while making it clear that the accused does not enter upon his defence until the termination of such cross-examination, that section says nothing about any second examination of the accused after the further cross-examination. It is often, no doubt, desirable that the accused should be asked at this stage whether he wishes the Court to record any additional explanation, but I am not convinced that S. 342 can be interpreted as conveying a peremptory direction to that effect, if the Court has already questioned him before the charge when the case for the prosecution has been closed and the prosecution witnesses have been cross-examined. It there is any such direction I consider that failure to comply with it amounts to no more than an omission in the proceedings during trial within the meaning of S. 537 of which the accused will obtain full advantage if he satisfies the Court of appeal or revision that it has occasioned a failure of justice, but which otherwise is no ground for setting aside the finding of the trial Court.

The reason for questioning the accused is set forth in S. 342 and is to enable him to explain any circumstance in the evidence appearing against him. An accused person does not recall the prosecution witnesses for the purpose of discovering fresh circumstances against himself. The

(1) 1922 Patna. 158.

Code expressly forbids a Court of appeal to set aside a conviction on account of such flagrant illegalities as omission to frame a charge or disregard of the directions contained in S. 195 (which incidentally are no less explicit than those of S. 342) unless a failure of justice has been occasioned, and it would be absurd, in my opinion, to hold that in a case like the present a conviction must be set aside for no other reason than that the Magistrate has not subjected the appellant to a second examination after a second cross-examination of the prosecution witnesses.

Rulings relating to cases where the Magistrate has not questioned the accused at all in terms of S. 342 manifestly have nothing to do with the present case and need not be discussed.

When asked what particular questions the Magistrate should have put to the appellant after the second cross-examination the latter's learned counsel is unable to suggest anything the answer to which would have had any effect on the case for the defence and I am satisfied that no failure of justice has been occasioned by the omission to question a second time.

The result is that the convictions under the first two charges are maintained while the appeal is accepted to the extent that the conviction under the third charge is set aside.

I have heard the appellants learned Counsel on the question of sentence. I see no reason to remit any portion of the sentences of imprisonment. but, in view of the acquittal of the appellant on the third charge, the second sentence of Rs. 200 fine with three weeks rigorous imprisonment in default of payment is set aside and the amount if paid will be refunded.

Appeal allowed in part.

1924 LAHORE 89

LE ROSSIGNOL, J.

Ghasita—Petitioner.

v.

The Crown, through Municipal Committee, Sialkot—Respondent.

Criminal Rev. No. 1537 of 1922 Decided on 2nd February 1923 from the order of the Dt. Mag., Sialkot, D/-31st August 1922.

Punjab Municipal Act (II of 1911). S. 175—Tender of compensation should accompany notice.

The language of S. 175 indicates that the requisition open to the Municipality is subject to the payment of compensation, *i.e.*, the tender of compensation must accompany the notice. [P. 89 C. 2]

J. G. Sethi—for Petitioner.

Niaz Ali—for Respondent.

Judgment.—The petitioner was ordered by the Municipal Committee, Sialkot, to demolish a roof. The notice to him was issued under S. 175 of the Municipal Act of the Punjab which runs :—

"The Committee, may, subject to the payment of reasonable compensation, by notice require the owner—to remove, etc."

The petitioner has been convicted for failing to comply with this notice and urges that the conviction is bad inasmuch as no compensation was assessed far less paid before or simultaneously with the service of the notice.

In my opinion the contention has force. Respondent has referred to *Nauna Mal.* v. *Municipal Board of Hathrass* (1) and to *Chippal* v *The Municipal Committee of Sim'a* (2), but these authorities are not in *pari materia* and refer to other statutes, of which the language differs from that of the Municipal Act now under consideration.

The language of S. 175 indicates that the requisition open to the Municipality is subject to the payment of compensation *i e.*, the tender of compensation must accompany the notice

This procedure affords the persons concerned an opportunity for appealing to the Deputy Commissioner on the subject of the reasonableness of the tender and also for securing an assessment of the value of the obstruction before it ceases to exist.

I accept the petition and acquit the petitioner. The fine, if already recovered, shall be remitted.

Revision accepted.

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(1) (1913) 35 All. 375—11 A L.J. 486—14 Cr. L.J. 421—20 I.C. 405.

(2) (1890) 24 P.R. 1890. Cr.

1924 LAHORE 90

ZAFAR ALI, J.

Emperor—Petitioner.

v

Waryam Singh—Respondent.

Criminal Misc. Petition No. 11 of 1923, Decided on 4th June 1923, for sanction to prosecute.

(a) *Criminal P. C., Ss. 337 (4) & 537—Omission to record reasons does not vitiate.*

Omission to record reasons is neither an illegality nor an irregularity which vitiates the proceedings. 5 Cr. L. J. 142 Ref. [P 90 C 2]

(b) *Criminal P. C. Ss. 339 (3)—Contradictory statements made—Sanction will be granted unless undue influence proved.*

A witness, who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *locus penitentiæ* but where contradictory statements have been made on different occasions sanction cannot be refused unless there be something to show that the approver made the statement alleged to be false under undue influence. 11 A. L. J. 944 Ref. [P 91 C 2]

Jai Lal—for Petitioner.

Nand Lal—for Respondent.

Order.—[14th May, 1923.]—This is an application by the learned Government Advocate, under clause 3 of S. 339 of the Criminal Procedure Code, for sanction to prosecute for perjury one Waryam Singh, who, it is stated having accepted a tender of conditional pardon deposed to certain facts before the Magistrate, who tendered the pardon, and later on before the committing magistrate, but retracted before the Sessions Judge. Dr. Nand Lal on behalf of Waryam Singh raises two preliminary objections—(1) that the tender of pardon was bad in law because it was made without recording reasons therefor as required by clause 4 of S. 337 and (2) that as a matter of fact no tender of pardon was ever made to or accepted by the accused.

The learned Government Advocate's reply to (1) is that reasons for tendering the pardon were given in the note of the Superintendent of Police who moved for it, and that as the District Magistrate recorded his sanction just below the Superintendent's note, he should be presumed to have adopted the reasons stated by the latter. But according to clause 4, reasons must be given for tendering a pardon and not for sanction to tender a pardon and consequently the District Magistrate was not required by law to give any reasons for according his sanction. According to clause 1 of S. 337 no sanction is needed if the Magistrate tendering a pardon were a District Magistrate, a Presidency Magistrate or a Magistrate of the first class enquiring into the offence. But in the case of any other Magistrate sanction of the District Magistrate is essential, The reasons for tendering a pardon must be recorded by every Magistrate who is not a Presidency Magistrate. In the present case the District Magistrate sent the case to a Magistrate of the first class (Mr. Stephens) for necessary action (under S. 337 of the Criminal Procedure Code), and it was Mr. Stephens who had to tender a pardon and to record reasons for doing so. But he omitted to do so. As the idea of converting the accused into a witness did not originate with him and as he had to carry out the orders of the District Magistrate whether there were any reasons for it or not, it is difficult to see how he could be expected to state reasons for what he was ordered to do and had to do. However this may be, the omission to record reasons is neither an illegality nor an irregularity which vitiates the proceedings (see on this point 5 Cr.L. J. 142).

The second objection, however, is not so unimportant as the first. The learned Government Advocate states that the tender of pardon was made not by the District Magistrate but by Mr. Stephens who recorded Waryam Singh's statement. The note that the Magistrate recorded before writing down Waryam Singh's statement does not make it clear that a tender of pardon was made by him to the accused and was accepted by the latter. His note runs as below :—

"One Waryam Singh has been produced before me by the Police with the request that his statement may be recorded as an approver. I have seen the District Magistrate's order dated 3-3-1922 sanctioning the

tender of a pardon to the said Waryam Singh conditional on his making a full and true disclosure of all the facts within his knowledge in connection with the murder of Raghbir Singh of Harike Kalan."

"Having explained the law on the subject to Waryam Singh and the condition under which the pardon has been tendered to him I proceed to record the man's statement after removing the handcuffs from him and clearing the Court room of the police."

Counsel for the accused contends that the second paragraph of the note above indicates that the Magistrate was under the impression that the pardon had already been tendered to the accused by the District Magistrate. It is to be regretted that the Magistrate's note is so worded as to lend strength to this contention but I am of opinion that all the circumstances under which the accused's statement was recorded justify the legal presumption that the Magistrate fully observed the procedure laid down in S. 337 which he explained to the accused and that the latter accepted the tender of pardon and made a statement on solemn affirmation after doing so. He stated before the Sessions Judge that he was given pardon and did not state that he refused to accept it. I therefore overrule both the objections and will now hear arguments on the merits.

[4th June, 1923]—As stated in my order of the 14th May 1923 which disposes of two preliminary objections, this is an application by the Government Advocate under Clause (3) of S. 339, Criminal Procedure Code, for sanction to prosecute for perjury one Waryam Singh who having accepted a tender of conditional pardon, deposed to certain facts before the Magistrate, who tendered the pardon, and later on repeated the same before the committing Magistrate but retracted before the Sessions Judge. Counsel for Waryam Singh respondent urges that this is not a fit case for granting sanction because Waryam Singh's statement at first before Mr. Stephens and later on before the committing Magistrate was made under the undue influence of the police and that he reverted to the truth when he appeared in the Court of Session. He cites.

(1) 11 A.L.J. 944.
(2) 26 Mad., 110;
(3) 12 M.L.J., 392;
(4) 42 P.R, 1894, Cr. and
(5) 37 Cal. 250.

Of all these authorities No. 1 above relates to an application under S. 339 (3), Criminal Procedure Code, and enunciates the principle that a witness, who is in any way induced to make a false statement in connection with a capital charge, should be allowed every possible *locus penitentiae*. In the present case the statement believed to be false is the last one made before the Sessions Judge: but there can be no doubt that one of the contradictory statements is false. In a case like this where contradictory statements have been made on different occasions sanction cannot be refused unless there be something to show that the approver made the statement alleged to be false under undue influence.

I accordingly sanction the prosecution of Waryam Singh on the charge that he committed an offence punishable under S. 193 Indian Penal Code, in giving false evidence either before the two Magistrates on the 4th March 1922, 6th March 1922 and 28th April 1922 or before the Sessions Judge on the 24th October 1922. The portions of the statements underlined by the Government Advocate are the contradictory statements in respect of which sanction is granted.

Appeal dismissed.

✱ 1924 LAHORE 91

MARTINEAU, J.

Hakam and others—Petitioners.

v

Ralia Ram and *Sundar Das*—Complainants-Respondents.

Criminal Rev. No. 1201 of 1923 Decided on 2nd June 1923 from the Addl. S. J., Gujranwala D/- 20th July 1922.

Criminal P. C. S. 145 (1)—Failure to make initial order vitiates proceedings.

Under S. 145 (1) it is first of all essentinl that the Magistrate shold be satisfied that a dispute likely to cause a breach of the peace exists and that he should make an order in writing stating the grounds of his being satisfied. Omission to pass an order under sub-S. (1) is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section the proceedings are without jurisdiction and cannot be regarded as proceedings under S. 145. [P 92 C 2, P 93 C 1]

Sham Lal and *Aziz Ahmad*—for Petitioners.

G. C. Narang and *B. N. Kapur*—for Respondents.

Martineau, J.—This is a petition for revision of an order purporting to have been passed under S. 145, Criminal Procedure Code. The Magistrate omitted to make the initiatory order required by sub-s. (1) of that section, and this omission is the main ground on which the application is based.

Mr. Aziz Ahmad on behalf of the petitioners relies on *Abdulla Khan* v. *Gunda* (1), *Tara Chand* v. *Behari Lal* (2) and *Dewan Chand* v. *Queen-Empress* (3). In the first of those cases a copy of the initiatory order had not been served or published as required by sub-s. 3, and in the second case no initiatory order had been made, but in addition to this the Magistrate in both those cases had omitted to take the evidence of the witnesses of the parties, whereas there is no such omission in the present case. *Dewan Chand* v. *Queen-Empress* (3) is also not a case analogous to the present one.

Dr. G. C. Narang on behalf of the respondents has cited *Sukh Lal* v. *Tara Chand* (4), *Debi Prasad* v. *Sheolat Rai* (5). *In the matter of Chinnappudayan* (6), *Muhammad Sharif* v. *Dhanpat Rai* (7), *Nur Bakhsh* v. *Crown* (8) and *Sajad Hussain* v. *Nanak Chand* (9), but those cases also are not exactly in point. In the first the Magistrate had drawn up the initiatory order, but had only omitted to direct the publication of a copy of the order. In the second and third cases also the defects in the proceedings were different from that in the present case. In *Muhammad Sharif* v. *Dhanpat Rai* (7), although the Magistrate had omitted to record a preliminary order under sub-s. (1) of S. 145 he afterwards, in the presence of the parties, recorded an order which essentially complied with sub-s. (1), and it was for that reason held that the proceedings were not wholly without jurisdiction. The same was the case in *Sajad Hussain* v. *Nanak Chand* (9) and in *Nur Bakhsh* v *Crown* (8) Chevis J. merely followed *Muhammad Sharif* v. *Dhanpat Rai* (7).

In the present case, however, the initial defect in the proceedings was not remedied subsequently. It is true that at one hearing the Magistrate directed the petitioners to file a written statement, but this was not a sufficient compliance with the requirements of the law. Under S. 145 (1) it is first of all essential that the Magistrate should be satisfied that a dispute likely to cause a breach of the peace exists and that he should make an order in writing stating the grounds of his being so satisfied, whereas in this case no such order was passed at any stage of the proceedings. Under sub-s. 5 any person interested is entitled to show that no dispute likely to cause a breach of the peace exists, and in such a case the order passed under sub-s. (1) will be cancelled and all further proceedings thereon will be stayed.

(1) [1907] 7 P.R. 1907 Cr.
(2) [1916] 22 P R. 1916 Cr.—18 Cr. L.J. 36—36 I.C. 868.
(3) [1899] 2 P.R. 1899 Cr. (F B.)
(4) [1905] 33 Cal. 68—2 C.L.J 241—9 C. W. N. 1046—2 Cr. L. J. 618 (F.B.)
(5) [1907] 30 All. 41—4 A.L.J. 705—(1907) A.W.N. 265—6 Cr. L. J. 352.
(6) [1907] 30 Mad. 548—7 Cr. L. J. 28—3 M.L.T. 18.
(7) [1914] 68 P.L.R. 1914—15 P.W R. 1914 Cr.—15 Cr. L.J. 279—23 I.C. 487.
(8) [1917] 26 P.W.R. 1917 Cr.—18 Cr. L.J. 633—39 I C. 1001.
(9) [1917] 22 P.W.R. Cr. 1917—18 Cr. L.J. 461—39 I.C. 301.

It is clear therefore, that the omission to pass an order under sub S (1) is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section, the proceedings are in my opinion without jurisdiction and cannot be regarded as proceedings under S. 145 of the Criminal Procedure Code.

I hold accordingly that S. 435 (3) does not preclude this Court from entertaining the application for revision in the present case.

I accept the application, quash the Magistrate's proceedings as having been taken without jurisdiction, and set aside his order.

Revision accepted.

1924 LAHORE 93

BROADWAY AND ABDUL QADIR, JJ.

Nandoo Singh and others—Plaintiffs—Appellants.

v.

Baljit Singh and others—Defendants—Respondents.

F. A. No. 2750 of 1916, Decided on 29th March 1922 from the Senior Sub. J., Rohtak, D/-24th July 1916.

(a) *Civil P. C., O. 22 R. 9—Suit against collaterals—Death of two collaterals—Abatement is qua the deceased only.*

A suit by daughters against collaterals for declaration of right to succeed to father's estate, was dismissed. During pendancy of appeal two collaterals died and an application to bring their legal representatives on record was made out of time.

Held the appeal abated *qua* those collaterals only. 23 P. R. 1917 Foll. [P. 94 C. 2]

(b) *Custom (Punjab)—Succession - Daughters—Self acquired property - Riwaj-i-am—Value as evidence—Onus is on daughters.*

According to Art. 23 (2) of Rattigan's Customary Law, by the general Custom of the province a daughter succeeds to the self acquired property of a father in preference to his collaterals, but where the Riwaj-i am of the Rohtak District, of the year 1879, as well as of the year 1909 show a departure from this general rule, even in the case of the Rajputs to which the parties belonged.

Held: that the entry in the riwaj-i-am showing the alleged variation shifted on to the daughters the onus of proving that the entry in the Riwaj-i-am was wrong and that the custom by which the parties were governed was the general custom of the province [P. 96 C. 1]

Moti Sagar and *Shamair Chand*—for Appellants.

O'Connor for *Obbard* and *L. Debi Sahai*—for Respondents.

Broadway, J.—One Sheoji Singh, a sonless Rajput, possessed immoveable property in *Mzs*, Kutani, Lohat Kalan, Campbellgarh, Sheojipura and Nangla in the Rohtak District. He died some time in 1888 leaving him surviving a widow *Mt.* Jadu Kaur and three daughters *Mt.* Sundar Bas Kaur, *Mt.* Janak Raj Kaur and *Mt.* Uppurna Devi. *Mt.* Jadu Kaur as widow of Sheoji Singh came into possession of all the property left by her husband. She died on the 27th of January 1915 and on her death, a dispute arose between the daughters *Mt.* Sundar Bas Kaur and *Mt.* Janak Raj Kaur, and Sheoji Singh's collaterals Baljit Singh and others. The revenue authorities recognized the right of the collaterals with the result that the two ladies referred to, together with one Nandu Singh, instituted a suit on the 22nd of July 1915, against Baljit Singh and other collaterals asking for a declaration to the effect that they (the plaintiffs) were the owners of the property left by Sheoji Singh, Nandu Singh claiming to be the adopted son of *Mt.* Jadu Kaur. In the plaint it was averred that Sheoji Singh had on the 3rd of Ferhuary 1888, executed a will under which *Mt.* Jadu Kaur became the absolute owner of all the property in suit. Further, it was alleged that in 1913 *Mt.* Jadu Kaur adopted Nandu Singh and that in the following year, *i. e.* 1914, she made a will under which half of the property in suit was to be given to Nandu Singh and the other half to the daughters, (plaintiffs), with a reversion, on their demise to Nandu Singh. It was also alleged that under the customary law, by which the parties were bound, the daughters were entitled to succeed to their father's property, which it was alleged was self-acquired. The collaterals joined issue on all the points. They

denied the *factum*, and validity of the adoption set up and pleaded that the two wills propounded were forgeries. They also alleged that under the customary law of the Rohtak District the daughters had no right of succession to any property whatever, and that the property was ancestral.

The trial Court framed certain issues. It is, however, only necessary to refer to the following:—

1. Whether the property was acquired by Sheoji Singh?
2. Whether Sheoji Singh made a will in favour of Jadu Kaur and it is valid by custom?
3. Whether Jadu Kaur adopted Nandu Singh to her husband and she was competent to do so?
4. Whether Jadu Kaur made a will in favour of plaintiff and is this valid?
5. If Nos. (3) and (4) go against plaintiffs have daughters a better title to succession than defendants?

It came to the conclusion.—

1. That the property in suit was self acquired with the exception of that portion of it which is situate in Kutani village which was ancestral;
2. That the will said to have been executed by Sheoji Singh had not been proved;
3. That the adoption had not taken place, and was not valid in any way;
4. That the will propounded as having been executed by *Mt.* Jadu Kaur had not been proved; and
5. That under the customary law of the Rohtak District, the collaterals excluded the daughters in respect of both ancestral and non-ancestral property.

Against this decision the plaintiffs have come up to this Court in appeal and on their behalf we have heard Mr. Moti Sagar.

For the respondents Mr. O'Connor raised a preliminary question, It appears that Sheo Parshad and Hardhan Singh, two of the collaterals-respondents, have died, the former in October 1918, and the latter in October 1921. The appellants have in each case applied to have their legal representatives brought on to the record. In the case of Sheo Parshad this application was made on 6th of February 1920, and in the case of Hardhan Singh on the 1st of February 1922 Both these applications are belated and the reason for the delay has been stated to be ignorance of the *factum* of the death in both cases. After hearing counsel we were of opinion that although two of the plaintiffs are ladies and one is a minor, sufficient cause had not been shown to justify us in condoning the delay under rule (9) of order 22, Civil Procedure Code. We, therefore, hold that the appeal *qua* these two persons had abated.

It was next urged that inasmuch as the right and interest of all the collaterals were common, the appeal had abated in its entirety. *Zainab Bibi* v *Rohila* (1), however, is a case which is very similar to the present one. There the plaintiff had sued nine defendants, collaterals of her father, for possession of her father's landed property on the ground that it was self acquired and that she, as a daughter had a preferential right to the collaterals. Her suit having been dismissed, she preferred an appeal to the Chief Court and during the pendency of the appeal one of the defendants-respondents died. An application for substitution, under rule (9), Order 22. C. P. C., was made out of time. It was held that the appeal had abated *qua* the deceased collateral's share in the land but not as regards the shares of the other collaterals as each had a separate right to his ancestral share. In our opinion this case concludes the present controversy and we accordingly hold that the appeal had not abated in its entirety.

The first point argued by Mr. Moti Sagar was that the adoption of Nandu Singh had been proved. He took us through all the evidence on the record and after giving full cosideration to the testimony of the various witnesses we are in complete agreement with the view of the trial Court and hold that the adoption set up has not been proved. The finding as to the nature of the property in suit has not been contested by either side and we, therefore, accept it as correct. With regard to the two wills, Mr. Moti

(1) [1917] 23 P. R. 1917—35 I. C. 277.

Sagar frankly, and we think very properly, admitted that he was unable to urge that they had been proved to have been executed. The evidence with regard to the execution of these two wills and the manner in which they were produced leaves no doubt in our mind that they are both fictitious.

There remains the question as to whether by the customary law of the Rohtak District daughters succeed to the self-acquired property of their father in preference to his collaterals. Mr. Mot Sagar admitted that *qua* the ancestral property his clients have no right to succeed. In this connection our attention was drawn to a large number of authorities. Before dealing with them, however, we would note that according to Article 23 (2) of Rattigan's Customary Law, by the General custom of the province a daughter succeeds to the self-acquired property of a father in preference to his collaterals. The *Riwaj i-am* of the Rohtak District, of the year 1879, however, shows a departure from this general rule, for in answer to questions Nos. 18 and 19 all the tribes, including the *Rajputs* to which the parties belong, stated that a daughter did not inherit her father's estate. Again in the *Riwaj-i-am* of 1909, the same entry appears and is made more definite as is apparent from the answers to questions Nos. 56 and 57, *vide* pages 6 and 7 of the supplementary paper book.

We now turn to the authorities cited by Mr. Moti Sagar. The first of these is *Nidhu* v. *Ram Singh* (2). This case relates to *Hindu Rajputs* of the Kangra District and in it it was held that the collaterals had failed to prove a custom entitling them to succeed to the self-acquired property of a sonless proprietor in preference to his daughter.

Mt. Zainab Bibi v. *Badar-ud-din* (3) dealt with Arains of the Sharakpur Tahsil and held that the uncle of the last male owner on whom the burden of proof lay had failed to establish his right by custom to succeed to the self-acquired property of his nephew in preference to that nephew's daughter.

Mowaz v. *Gulab Jan* (4). This was a case relating to *Khattars* of the Attock District, and it was there held that daughters excluded collaterals in the case of succession to their father's self-acquired property.

Pala Singh v. *Mt. Lachhmi* (5). This case related to *Akali Nihangs* of the Amritsar District, and in it, it was held that a daughter succeeded to her father's self-acquired property in preference to collaterals.

Chhutan v. *Hizari Lall* (6) dealt with *Gaur Brahmans* of the Gurgaon District *Ghulam Jilani Khan* v. *Imdad Ali* (7), dealt with Muhammadan *Rajputs* of the Hoshiarpur District. *Lelu* v. *Ram Chand* (8) referred to *Brahmans* of the Hoshiarpur District. *Mt. Raj Kaur* v. *Talok Singh* (9) dealt with *Gill Jats* of the Ferozepore District. *Devi Ditta* v. *Mt. Indar Devi* (10) referred to *Jats* of the Ambala District and *Bhagwan Das* v. *Bilwanti* (11) related to the Jains of the Ambala District. In all of these cases it was held that collaterals were excluded by daughters from succession to self-acquired property.

In *Wazira* v. *Mt. Maryan* (12), a case relating to *Jats* of the Gujranwala District, it was held that daughters excluded collaterals in the case of the self-acquired property of

(2) [1909] 2 P.R. 1909—25 P.W.R. 1909—1 I.C. 457.
(3) [1912] 43 P.R. 1913—270 P.W.R. 1912—20 P.L.R. 1913-17 I.C. 187.
(4) [1914] 97 P.R. 1914—220 P.L.R 1914—121 P.W.R. 1914—24 I.C. 920.
(5) [1915] 105 P.R. 1915—192 P.W.R. 1915—32 I.C. 16.
(6) [1916] 7 P.R. 1916—46 P.L.R. 1916—129 P.W.R. 1915-30 I.C. 22.
(7) [1916] 13 P.R. 1916—196 P.W.R. 1915—33 I.C. 215.
(8) [1916] 23 P.R. 1916—174 P.W.R. 1915—31 I.C. 294.
(9) [1916] 38 P.R. 1916—99 P.W.R. 1916—33 I.C. 922.
(10) [1916] 56 P.R. 1916—160 P.L.R. 1916—35 I.C. 542.
(11) [1916] 74 P.R. 1916—173 P.W.R. 1916—30 P.L.R. 1917-36 I.C. 84.
(12) [1917] 84 P.R. 1917—151 P.W.R. 1917—3 P.L.R. 1918—42 I.C. 358.

their father. To the same effect are the decisions in *Mangal Singh* v. *Mt. Budho* (13) (*Jats* of the Lahore District); *Budhi Parkash* v. *Chanlar Bhan* (14), (*Brahmans* of the Montgomery District) *Ghulam Muhammad* v. *Mt. Gauhar Bibi* (15), (*Sipras* of the Shahpur District) and *Mt. Jainan* v. *Nur Muhammad* (16).

Now, all these authorities show that it has been recognised that Paragraph 23 of Rattigan's Digest lays down the general custom of the province which is to the effect that in the succession to the self-acquired property of a sonless proprietor his daughter excludes collaterals. It has also been pointed out in these same authorities that an entry in *Riwaj-i-am* unsupported by any instances is evidence carrying very little weight. Their Lordships of the Privy Council, however, have in *Beg* v. *Allah Ditta* (17) definitely laid down that an entry in a *riwaj-i-am* is a strong piece of evidence in support of the custom it propounds. This *dictum* of their Lordships of the Privy Council has been considered in the later rulings of this Court and has as far as we have been able to ascertain been given effect to.

After carefully considering all these authorities it seems to us that in the present case while in the first instance the *onus* lay on the collaterals to show that the general custom in favour of the daughter's succession had been varied the entry in the *riwaj-i-am* showing the alleged variation shifted on to the daughters the *onus* of proving that the entry in the *Riwaj-i am* was wrong and that the custom by which the parties were governed was the general custom of the province. We fully recognise that when self-acquired property is not specifically mentioned in *riwaj-i-am* the entries must *prima facie* be held to relate to ancestral property and this would apply to the entries in the *riwaj-i-am* of 1879. It seems to us, however, that the entries in the later settlement, *i. e.*, in the *riwaj-i-am* of 1909 distinctly bring out the question of succession to the self-acquired property of a sonless proprietor and that the answers as recorded show that the daughters are excluded from succession to such property by collaterals.

In *Shadi* v. *Richa Ram* (18) the *riwaj-i-am* of 1879 was under consideration, although on a point different to the one now before us. In the course of that judgment Rattigan and Lal Chand, JJ. say that throughout the Rohtak District and by the customs of all the tribes as recorded in the *riwaj-i-am* daughters are *not* recognised as heirs, and having regard to all the circumstances of this case, we consider that the *onus* lay on the appellants, to prove that the customs as set forth in the *riwaj-i-am* of 1909 did not represent the true state of affairs. With regard to this we have been taken through the evidence on the record by Mr. Moti Sagar, but we may say at once that this evidence proves no instance contrary to what was stated in the *riwaj-i-am*. On the other hand, there is the oral evidence of a number of respectable Rajputs of the District who have definitely and clearly stated that the custom is as entered in the *riwaj-i-am* and that collaterals exclude daughters from succession to the self-acquired property of a sonless proprietor. We think the testimony of these witnesses taken with the entry in the *riwaj-i-am* must be taken as establishing the custom claimed by the respondents to exist and that the appellants have failed to rebut that evidence.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

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(13) [1918] 4 P.R. 1918—46 I.C. 798,
(14) [1918] 123 P.R. 1918-48 I.C. 813.
(15) [1920] 1 Lah. 284—10 P.L.R. 1920—18 P.W.R. 1920—54 I.C. 419.
(16) [1920] 1 Lah. 365—2 L.L.J. 265—58 I.C. 793.
(17) [1917] 44 Cal. 749—44 I.A. 89—45 P.R. 1917—12 P.W.R. 1917—21 M.L.T. 210—32 M.L.J. 615—19 Bom. L.R. 388-15 A.L.J. 525-21 C.W.N. 842—26 C.L.J. 175—38 I.C. 354 (P.C.)

(18) [1907] 24 P.W.R. 1907.

✱ 1924 LAHORE 97

MOTI SAGAR, J.

Jawahar Singh and others—Defendants—Appellants.

v.

Sewa Singh and others—Plaintiffs—Respondents.

S. A. No. 2022 of 1922, Decided on 30th May 1923, from the decree of the D. J. Rawalpindi, D/-6th June 1922.

(a) *Civil P. C., O. 32 R. 4 (3)—Consent may be implied.*

The consent may be implied and is not necessarily to be expressed in any document on record. Where notice was not issued because the guardian happened to be present in Court when his appointment was made, and in another case notice did really issue, though the guardian did not give any express consent but none of the two guardians refused to accept the appointment but remained silent and they were appointed as guardians and where they themselves were parties to the suit as defendants and were members of the same family and their interest in the suit was identical with that of the minors.

Held, that there was no defect in the appointment of the guardians. 59 I. C. 691 Foll.

[P 98 C 1]

(b) *Easement—Obstruction to light and air—Injunction is proper relief.*

There can be no doubt that any act by the defendants which results in obstructing the free access of the light and air to which the plaintiff is entitled is *prima facie* an injury of a serious character for which compensation in money would hardly be an adequate relief. In cases of this nature injunction is the rule and damages the exception. 9 I. C. 417 Foll.

[P 98 C 2 & 99 C 1]

Sheo Narain—for Appellants.

Shamair Chand—for Respondents.

Judgment.—The facts of the case out of which this second appeal has arisen are few and simple and may shortly be stated as follows :—

The plaintiff owns certain property which adjoins the property owned by the defendants. In the northern wall of the plaintiff's house there were certain ventilators and windows which opened into the courtyard of the defendants. Shortly before the institution of this suit the defendants erected certain buildings in this courtyard which enclosed these windows and ventilators and had the effect of obstructing the free access of light and air which it is alleged had been enjoyed by the plaintiff as of right without iterruption and as an easement for more than 20 years. Therefore the plaintiff instituted a suit for a mandatory injunction praying that the defendants be ordered to remove these buildings and restrained from obstructing the interrupted access of light and air. It was further alleged that the defendants had constructed two kitchens in the first and second storeys respectively and that they were allowing the smoke of the kitchens to pass into the plaintiff's house through the ventilators and the windows which had been enclosed by these constructions. It was prayed that an injunction be issued to the defendants restraining them from doing so. Another allegation made in the plaint was that in making these constructions the defendants had built right up to the northern wall of the plaintiff and that they were using this wall as a literal support to their house. The plaintiff feared that by using the wall in this manner the defendants would acquire a right of easement after the lapse of 20 years to which they had no right whatsoever. It was accordingly prayed that the defendant be ordered to push back their wall so as not to touch the plaintiff's wall. The defendants denied the claim and contended that the plaintiff had not acquired a right of easement qua the ventilators and the windows, they further alleged that the intervening wall does not belong exclusively to the plaintiff and that it was the joint property of the plaintiff and the defendant. The plaintiff's right to maintain a suit for injunction was also denied, and it was alleged that the plaintiff had been guilty of inordinate delay in instituting the suit.

The trial Court found that the windows and the ventilators had existed for more than 20 years prior to the institution of the suit, that the intervening wall belonged exclusively to the plaintiff and that he was entitled to maintain a suit for injunction. A decree was accordingly granted to the plaintiff in the terms prayed for. The defendants preferred an appeal to the District Judge which was dismissed.

They have now come up to this Court in second appeal through Sheo Narain, and the following contentions

have been raised by him before me on their behalf. Firstly it is contended that there were certain minor defendants in the case who were not properly represented, and that the decree is therefore not binding on them. It is pointed out that Surjah Singh defendant was appointed guardian-*ad-litem* of Dyal Singh and Autar Singh minors, but that no notice of the appointment was served upon him as required by order 32 rule 3 (4) of the Civil Procedure Code, that the guardian never gave his consent to the appointment and that the appointment under these circumstances must be considered to be invalid. As regards Jawahir Singh who was appointed guardian-*ad-item* of Narain Singh minor, it is urged that a formal order of his appointment was never made, that he never expressed his willingness to act as guardian and that the interests of the minor were left entirely unprotected. This contention in my view is wholly untenable Consent may be implied and is not necessarily to be expressed in any document on record. The fact of the matter appears to be that in one case notice was not issued because the guardian happened to be present in Court when his appointment was made, while in the other case notice did really issue, though the guardian did not give any express consent. None of the two guardians, however refused to accept the appointment but remained silent, they were appointed guardians and were themselves parties to the suit as defendants. They were members of the same family and their interest in the suit was indentical with that of the minors. The suit was hotly contested and though a formal order of appointment was not made in one case, there is no reason to suppose that the interests of the minors were not properly looked after. In 59 I. C. 671 it has been held by the Allahabad High Court that "it is not necessary that the consent of the person to be appointed guardian, under Order 32 rule 4 (3) of the Civil Procedure Code, should be expressed ; it may be implied from conduct, as, where notice is served on a person to show cause why he should not be appointed guardian, and he does not appear in answer to the notice appointing him guardian. It has further been held in that case that in the absence of anything to suggest that the interests of a minor have not been duly protected in a suit, and that he has been prejudiced by the appointment of a guardian, an irregularity in the appointment is not a sufficient ground for setting aside the proceedings at the instance of the minor." Following this decision and having regard to the fact that no prejudice was caused to the defendant minors, I hold that there was no defect in the appointment of the guardians and that the minors are bound by the latter's actions. I overrule the contention.

Next it is contended that on the facts of this particular case the plaintiff is not entitled to a decree for a mandatory injunction and to have the buildings constructed by the defendants pulled down. It is urged that though the buildings were being constructed to the knowledge of the plaintiff, he kept silent and did not object, and instituted the suit long after the buildings had been completed. The argument is that though the plaintiff may have been entitled to an injunction in the first instance, he has lost the right to obtain that relief by his laches and that he should be given a decree for damages only if he is at all held entitled to a decree. With this contention, I am unable to agree. It appears from the records that on the 29th of November 1919 the plaintiff applied to the Health Officer that the defendants were threatening to obliterate the windows and ventilators and that this action on their part would render the plaintiff's house altogether uninhabitable. In January 1920 the building was commenced and the suit was instituted on the 19th of February 1920,

I do not think there was such inordinate delay in instituting the suit as would disentitle the plaintiff to obtain a relief by way of injunction. There can be no doubt that any act by the defendants which results in obstructing the free access of light and air to which the plaintiff is entitled is *prima faice* an injury of a serious character, for which compensation in

money would hardly be an adequate relief. In 9 I. C. page 417 it was held by their Lordships of the Madras High Court that in cases of this nature injunction was the rule and damages the exception. The Plaintiff's right to an easement whereby he was entitled to have uninterrupted access of light and air through his windows and ventilators not having been contested in this appeal he is *prima facie* entitled to insist that he should be maintained in his enjoyment of the easement. Moreover there is ample authority for holding that the grant of an injunction is purely a discretionary matter. There being no allegation in this case that the discretion was not exercised in a judicial manner I do not see how I can interfere with the orders of the Courts below which under the circumstances appear to me to be quite fair and reasonable.

Pandit Sheo Narain's next contention is that the decree of the learned District Judge is not in conformity with his judgment and that the buildings constructed by defendants should not be ordered to be pulled down in their entirety. It is pointed out that the finding as given in the judgment was to the effect that the kitchen in the lower storey should be demolished at least so as to bring the roof below the plaintiff's ventilator C W.I. the decree on the contrary, is an absolute decree for demolition without any reservation. It is admitted in arguments that the kitchen in the second storey must come down if the roof of the kitchen in the first story is to be lowered, but it is contended that, in order to provide free access of light and air to the plaintiff's house, it is necessary that the kitchen in the lower storey should be demolished as a whole. It is urged that this object can be gained by lowering the roof of the kitchen by a few feet. Mr. Tek Chand for the respondent does not object to this course being adopted and is agreeable to the necessary alterations being made in the decree. I accordingly modify the decree of the Court below and direct that, instead of plaintiff being awarded an absolute decree for the demolition of the kitchen in the first storey he should be awarded a decree for an injunction to the effect that the defendants should lower the roof of the kitchen in that storey so as to bring it below the plaintiff's ventilators C. W. 1. As to the room which adjoins the kitchen in the second storey, it should be pushed back to the extent of 8 feet from the plaintiff's wall which I think would be quite sufficient to allow free admission of light and air into the plaintiffs house through his window A and the ventilator C. W. 2. Lastly, it is contended that the defendants in building their room right up to the plaintiff's wall in the first storey have not encroached upon the plaintiff's rights in any way whatever and that the contemplated injury is more imaginary than real. It is unnecessary, however, to give any finding upon this point as it is agreed before me by the parties that the plaintiff should be given a declaration to the effect that the defendants should not by mere lapse of time acquire an easement of literal support to their buildings by reason of the fact that their walls touch the walls of the plaintiff. The decree of the lower Court should accordingly be modified and, instead of the defendants being required to push back their room in the 1st storey, the plaintiff would be given a declaration as above indicated.

No other point is urged before me in arguments. The result is that the appeal substantially fails and is dismissed except in regard to the three points mentioned above. Parties should bear their own costs in this Court.

Decree modified.

1924 LAHORE 99

HARRISON, J.

Mt. Hamiri—Petitioner.

v

The Crown—Respondent.

Criminal Rev. No. 1044 of 1922, Decided on 27th October 1922, from the S. J. Karnal, No 1325 of 1922 D/- 12th July 1922.

Opium Act, (1 of 1878) S. 9—Preparation and Admixture—Meaning.

The word "preparation" designates a completed or manufactured article and not an article in process of manufacture, the test being whether the stage has been reached at which it can be used. The word "admixture" refers only to a completed article and can only be applied after the mixing has been finished, and not earlier. The articles designated by both words only come within the scope of their respective definitions when they have been prepared or mixed as the case may be.

[P 101 C 1]

Nemo—for Petitioner.

Dilip Singh—for Respondent.

Reference.—The accused on conviction by Sardar Gurpartab Singh exercising the powers of a Magistrate of the 1st Class in the Karnal District, was sentenced, by order, dated 2nd May, 1922 under S. 9, Opium Act (of 1878), to a fine of Rs. 25, or in default to two months' rigorous imprisonment. (The fine has been paid).

The facts of this case are as follows :—

Mt. Hamiri has been convicted under S. 9 of the Opium Act (of 1878) and sentenced to Rs. 25 fine. She was found in possession of a solution of opium in water weighing 5 tolas and the Magistrate has found that this is a "preparation of opium. As the weight exceeds the premitted limit of 2 tolas it amounts in his opinion to a breach of rule 37 (d) of the rules framed under the Act.

There is complete agreement as to the facts. *Mt.* Hamiri was making a preparation of opium called *madhak* which is made by placing a small quantity of opium together with barley husks in water and causing the water to evaporate. The *madhak* when dried is smoked. The quantity of opium in the water was very small, according to *Mt.* Hamiri as much as would go on a two anna bit, while the Magistrate says 4 or 5 *rattis*. Admittedly the amount of opium, of which Hamiri was found in possession was within the legal limit and equally the *madhak* when prepared would have also been within the legal limit. The conviction is based upon the fact that the weight of the solution exceeds the legal limit of a preparation of opium.

The proceedings are forwarded for revision on the following grounds :—

The rule runs as follows : 37—Any person may without a license at any one time have in his possession.—

(*d*) preparations or admixtures of pure opium, other than those used for smoking in any quantity not exceeding in the aggregate two *tolas*.

The word "preparation" has two meanings, (1) abstract, the act of preparing, (2) concrete, the thing prepared. It is in the latter sense that the word is used in rule 37 (*d*). The substance prepared or preparation in this case is the *madhak* and the stage at which the mixture of opium, barley husks and water was seized is not a preparation, *i.e.*, not the finished article, but something in course of preparation, not yet prepared.

The word "admixture" does not help because what was found was a solution. If the weight of the water be excluded, the weight of the admixture is well within the legal limit.

If it is not an offence to possess a certain quantity of opium, it is hard to see why it is an offence to possess the same quantity dissolved in water.

The Public Prosecutor referred by way of analogy to paragraph 139 of the Punjab Excise Manual, which says "It is possible that the decoctions made from two seers of poppy-heads would be more than three *tolas*. Thus a man would be guilty of illegal possession of *post* made from poppy-heads legally possessed. As however, the *post* would probably be drunk as soon as it was made, the anomaly is, in practice, negligible.

As to this the *post* is the completed preparation or decoction from the poppy-heads, and the point I am considering does not arise that the legal limit of possession is only exceeded at an intermediate stage when the opium cannot possibly be consumed.

I therefore recommend that the conviction be set aside.

In case it be held that the solution comes within the wording of the rule, I think the fine should be reduced to a nominal one. The Magistrate was of opinion that it was doubtful whether the term preparation or admixture would apply to the solution.

If he were doubtful he should have given the accused the benefit of

the doubt. He also said quite correctly that the case was merely a technical one. He ought not to have inflicted a substantial fine.

Judgment.

Harrison, J.—Mr. Dalip Singh has put both sides of the case before me and has discussed the various meanings which can be put on the words "preparation" and "admixture."

As to the word "preparation" I agree with the view taken by the learned Sessions Judge, and hold that here it designates a completed or manufactured article and not an article in process of manufacture, the test being whether the stage has been reached at which it can be used.

So also the word "admixture" in my opinion refers only to a completed article and can only be applied after the mixing has been finished, and not earlier. It is unnecessay to define the precise difference between an "admixture" and a "preparation." There is a difference, but the articles designated by both words only come within the scope of their respective definitions when they have been prepared or mixed as the case may be. In the intermediate stages an offence has only been committed if the amount of opium used in the manufacture is more than that permitted by law. I, therefore, accept the application for revision and acquit *Mt.* Hamiri. The fine will be refunded.

Revision accepte l.

✱ 1924 LAHORE 101

SCOTT-SMITH, J.

Khan Muhammad—Petitioner.

v.

The Crown—Opposite Party.

Criminal Rev. No. 1687 of 1922, Decided on 2nd December 1922, from the S. J. Jhelum, D/- 21st June 1922.

Criminal P. C., S. 476—'Court' includes successor of the Judge before whom offence was committed.

The word 'Court' in S. 476, Criminal Procedure Code includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. 37 Cal. 642 F. B. Fol. 34 A. 393; 32 B. 184 Appr. 6 P. R. Cr. 1909 Dissent.

[P. 101, C. 2.]

B. D. Kureshi—for Petitioner.

Nemo—for Opposite Party.

Judgment.—This has been filed as an appeal but has been treated as an application for revision as no appeal lies from the order complained of. The order in question which was passed by Mr. Malan, Sessions Judge of Jhelum, on the 21st of June last directed under S. 476, Criminal Procedure Code, the prosecution of one Khan Muhammad for an offence under S. 193, Indian Penal Code. The facts which gave rise to the order of the learned Sessions Judge are fully stated therein and interference is sought on the ground that the alleged false evidence was given before Mr. Malan's predecessor and that, therefore, he had no jurisdiction to direct the prosecution under S. 476, Criminal Procedure Code.

In support of this contention counsel for the applicant refers to *Crown* v. *Mt. Dauli* (1), in which it was held that it is only the individual Magistrate before whom the offence was committed in Court who can take action under S. 476, Criminal Procedure Code. The learned Judge who decided that case followed *Begu Singh* v. *Emperor* (2), and *Kartik Ram* v. *Emperor* (3) but those authorities were subsequently rendered of no effect by reason of the full Bench judgment of seven Judges of the High Court of Calcutta reported in *Bahadur* v. *Eradatullah Mallick* (4), wherein it was held that the word "Court" in S. 476, Criminal Procedure Code, includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. The same view was taken in *In the matter of the petition of Nawal Singh* (5) *In re*

(1) [1909] 6 P.R. 1909 Cr.-12 P.W.R. 1909 Cr.—104 P.L.R. 1909—10 Cr.L.J. 158—2 I.C. 812.
(2) [1907] 34 Cal. 551—5 C.L.J. 508—11 C.W.N. 568—5 Cr.L.J. 398—2 M.L.T. 298 (F.B.)
(3) [1908] 35 Cal. 114—7 Cr.L.J. 134.
(4) [1910] 37 Cal. 642—14 C.W.N. 799—12 C.L.J. 45—11 Cr.L.J. 407—6 I.C. 801 (F.B.)
(5) [1912] 34 All. 393—9 A.L.J. 481—13 Cr.L.J. 302—14 I.C. 766.

Lakshmi Das Lalji (6), and *Ranga Ayyar* v. *Emperor* (7). Under these circumstances I consider that I am not bound to follow the decision in *Crown* v. *Mt. Dauli* (1) with which I disagree. I fully agree with the views expressed by the Calcutta High Court in *Bahadur* v. *Eradatullah Mallick* (4).

The Court to whose notice the commission of the alleged offence was brought in the course of a judicial proceeding was that of Lala Topan Ram, Additional Sessions Judge of Jhelum, and Mr. Malan who passed the order complained of was his successor.

The next objection urged by counsel is that the order was passed three months after the conclusion of the trial by the Additional Sessions Judge and that this should not have been done having regard to the decision of the Madras High Court in *Aiya Kannu Pillai* v. *Emperor* (8) wherein it was stated that the power conferred by S. 476, Criminal Procedure Code, can be exercised by the Court only in the course of a judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence was committed. In the present case there was no delay. Lala Topan Ram called upon Khan Muhammad to show cause against his prosecution on the 27th March 1922, *i.e.*, one day before he decided the case in which Khan Muhammad gave his evidence. Proceedings were subsequently stayed pending the decision of the appeal of the accused persons by the High Court and within a few days after the decision of the appeal Mr. Malan passed the order complained of. I, therefore, see no force in either of counsel's contentions and I reject the application.

Application rejected.

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(6) [1907] 32 Bom. 184—10 Bom.L.R. 28—3 M.L.T. 116—7 Cr.L.J. 35.
(7) [1905] 29 Mad. 331—4 Cr.L.J. 175.
(8) [1908] 32 Mad. 49—19 M.L.J. 42—4 M.L.T. 404—9 Cr.L.J. 41 (F.B.)

1924 LAHORE 102

MARTINEAU AND MOTI SAGAR, JJ

Kala and others—Plaintiffs—Appellants.

v.

Mam Chand and others—Defendants—Respondents.

S. A. No. 3078 of 1922, Decided on 19th April 1923, from the decree of the Dt. J., Delhi, D/- 15th March 1922.

Custom (Punjab)— Alienation—Sonless proprietor has wide powers of alienation—Rohtak district.

In the Rohtak Dt. a sonless proprietor has wide powers of alienation and the onus of proving that his power of alienation over ancestral property is restricted lies on the person alleging it. [P. 102 C. 2]

Shamair Chand—for Appellants.

Bhajan Lal—for Respondents.

Judgment.—The land in suit, which was the ancestral property of Hira, a *Gujar* of the Rohtak Tahsil, was sold by him to defendants 1 and 2. Some of his collaterals sue for possession of the land, contending that the sale is invalid for want of necessity. The lower appellate Court has dismissed the suit, holding that Hira had an unrestricted power of alienation, and the only question in this second appeal is whether that decision is correct.

The late Mr. Clifford, Divisional Judge of Delhi in a number of cases took the view that in the Rohtak District a proprietor had wide powers of alienation and that the onus of proving that his power of alienating ancestral property was restricted lay on the person alleging it. This view was followed in the Chief Court in several cases to which the learned District Judge has referred. The entry in the *riwaz-i-am* of 1879 was to the effect that reversioners could not object to alienations, and in the current *riwaz-i-am* compiled by Mr. Joseph it was definitely stated that a sonless proprietor has full power to alienate his property even without necessity. The appellants rely on 76 P. R. 1914, in which it was held by a Division Bench that it was not proved that by custom an agricultural proprietor of the Rohtak District can dispose of at pleasure his ancestral

land. But the previous rulings to the contrary were not considered in that case, and the decision has not been followed in more recent judgments, namely, 64, I.C. 549 and 71 I.C. 829. In 71 I.C. 829 Campbell J. pointed out that 76 P.R. 1914 dealt with land in another *tahsil*, and also that in that case the *riwaj-i-am* was not before the Court, and he observed that that judgment must be read subject to what was laid down regarding the *riwaj-i-am* by the Privy Council in 45 P.R. 1917. He decided therefore that a sonless proprietor of the Rohtak Tahsil of the Rohtak District had unrestricted powers of alienation in respect of ancestral land. An appeal from his decree under the Letters Patent was dismissed, the Division Bench agreeing with his conclusions. This finally sets the matter at rest, and we accordingly agree with the decision of the lower appellate Court and dismiss this appeal with costs.

Appeal dismissed.

✱ 1924 LAHORE 103

SHADI LAL, C. J. AND LUMSDEN, J.

Ishar Singh and others—Plaintiffs—Appellants.

v.

Surat Singh and another — Defendants—Respondents.

S. A. No. 2340 of 1920, Decided on 9th May 1923, from the decree of the Dt. J. Amritsar, D/- 3rd July 1920,

Hindu Law — Adoption — Adoption proved invalid—Gift or will to take effect if so mentioned.

Where a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. 9 C. 463 and 38 All. 488 Ref.

But this is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son. If the instrument however, does not mention any gift *inter vivos* to the adopted son or any testamentary disposition in his favour, the deed cannot be treated as a deed of gift. 63 P. R. 1912 Dist.

[P. 103, C. 2]

Ramchand Manchanda and *Badri Das*—for Appellants.

Sheo Narain—for Respondents.

Judgment.—On the 2nd September 1913, Ganda Singh, a Jat of the village Khutrai Khurdin the District of Amritsar, executed a deed of adoption in favour of the defendant Surat Singh. The plaintiffs, who are Ganda Singh's collaterals, have brought the present action for a declaration that the deed of adoption is a fictitious document and shall not affect their rights to succeed to the estate of Ganda Singh. Now, the District Judge concurring with the trial Court holds that Surat Singh was never actually adopted by Ganda Singh, and that the alleged adoption was a mere paper transaction. The learned Judge has, however, treated the deed of adoption as a deed of gift and has granted a declaratory decree in favour of Surat Singh's right to succeed to the estate of Ganda Singh, since the property held by the latter has not been proved to be ancestral *qua* the plaintiffs.

Now, it has been repeatedly held, vide *inter alia*, 11 Cal. 463 and 28 All. 488, that where a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son. The instrument before us, however, does not mention any gift *inter vivos* to Surat Singh or any testamentary disposition in his favour. It contains merely a declaration of adoption, which declaration has been found to be incorrect, and does not even remotely refer to any property held by Ganda Singh. We fail to understand how such a deed can be treated as a deed of gift.

The learned District Judge has relied upon a judgment of the Punjab Chief Court in *Sant Singh* v. *Sadha* (1) where the adoption was found to have taken place but according to the custom governing the parties it was held to be invalid. The property affected by the adoption was however, not-ancestral, and the learned Judges consequently held that as the adoptor was entitled to transfer his non-ancestral property to the adopted son without the consent of his collaterals, the adoption, though invalid by custom, should be viewed as a gift to the adopted son to take effect after his death. It is unnecessary to decide whether the rule laid down in that judgment can be regarded as a correct exposition of the law on the subject because the present case is distinguishable from that case. As pointed out above, even the *factum* of adoption has not been proved in the case before us, and there is, therefore, nothing in the deed which could by any stretch of reasoning be treated as a gift or a testamentary disposition in favour of Surat Singh.

The result is that we accept the appeal and reversing the decree of the District Judge restore that of the Court of first instance. The plaintiffs shall recover from Surat Singh the costs incurred by them in this Court as well as in the District Court.

Appeal allowed.

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(1) [1912] 63 P.R. 1912—222 P.W.R. 1912—14 I.C. 23.

✱ 1924 LAHORE 104

BROADWAY AND FFORDE, JJ.

Allu and others — Convicts—Appellants.

v.

The Emperor—Respondent.

Criminal App. No. 238 of 1923, Decided on 5th June, 1923, from the order of the S. J., Montgomery, D/- 20th January, 1923.

Criminal P. C., S. 537 — Infringement of statute is not covered by S. 537.

S. 537 of the Code does not apply to an infringement of statutory requirement. It only applies to errors omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute 25 Mad. 98 Foll. [P. 106, C. 2, P. 107, C. 1]

Where two cross cases were tried together and the accused in each case replied that the prosecution evidence in one be considered as defence evidence in the other and it was so considered.

Held; that the procedure was illegal and this is not curable by S. 537.

Abdul Aziz and *Chowdhuri Shahab-ud-din*—for Appellants.

Des Raj Sawhney—for the Crown.

Judgment.—Two sets of appeals are before us, one on behalf of Alu and other persons, and the other on behalf of three persons Saadullah, Agra and Ibrahim, from the convictions and sentences of the Sessions Judge of Lahore under Ss. 302 and 147, Indian Penal Code, in cross cases of riot.

We have been asked to hear the two sets of appeals together, but at the opening of the case counsel for both sets of appellants have raised the preliminary odjection that the trials out of which these appeals have arisen have been conducted in a manner which is not in accordance with law. Before, going into the merits of the case we, therefore. have to consider whether or not this objection is well founded and if so, what course we should take in regard to the convictions and sentences of the trial Court.

The facts of the case are briefly these:—

On the 16th July 1922 a serious fight took place between two parties of Muhammadan Jats, the Wahniwals and the Baghelas, resulting in the death of one person and injuries to several others. Of the Wahniwal faction seven persons, namely, Alu, Naman, Alia, Garu, Farid, Basra and Gahru, and of the Baghela faction four persons, namely, Hasta, Saadullah, Agra and Ibrahim have been brought to trial. With the exception of Hasta, all have been convicted, Alu and Farid have been sentenced to death under S. 302 of the Indian Penal Code and the remainder have been sentenced under S. 147, Indian Penal Code, to two years' rigorous imprisonment each. The mode in which the trials were conducted was as follows:—

The trial of Alu's party before the Sessions Judge commenced on the 16th January 1923. Witnesses for the prosecution were examined on the 16th 17th and 18th, two of these witnesses, namely, Agra and Hasta, being persons returned for trial in the cross case.

On the 18th January at the conclusion of the prosecution case, Alu was asked by the Sessions Judge whether he wished to produce any evidence in defence, to which he replied :—

" I give up my defence witnesses in this case but I want the prosecution witnesses in the cross case to be treated as defence witnesses in this case.

The same question was put to each of the remaining accused of the Alu faction, and the reply to this question in each case was " I say the same as Alu."

Counsel for the seven accused addressing the Court then said. " I close my case and do not call any defence witnesses in this case. But I would like the prosecution witnesses in the cross case to be treated as defence witnesses in this case. I would also ask that the assessors should not give their opinion in this case until they have heard the cross case.

Having arrived at this stage on the 18th January, the Sessions Judge then proceeded on the same day to take the evidence in the case of Hasta and others. As in the previous case, witnesses for the prosecution only were called, consisting of the seven already tried and some twelve others who were not among the accused of either party. These witnesses were all examined on the one day, viz., the 18th January, and at the close of the evidence for the prosecution the Sessions Judge asked Hasta, if he had any defence witnesses. The answer was. " No, except that I want the evidence of Waryam. Sadara and Balanda prosecution witnesses in the cross-case to be treated as defence witnesses in this case." Each of the remaining three prisoners on being asked the same question, replied. " No, I say the same as Hasta." No statement was made by counsel for the accused such as was made in the former case, and the defence was tacitly closed. It is important to note that of the three witnesses referred to by Hasta, only the first two had actually given evidence ; the third, Balanda, not having been examined at all.

Nothing further in the way of examining witnesses or recording evidence was done in either of the cases, but on the following day, the 19th January, speeches by counsel for the prosecution and for the defence were delivered in both the cases. At the conclusion of the address by counsel, the assessors were asked by the Court to give their opinions as regards the innocence or guilt of all the accused and their opinions were recorded on the 19th. On the 20th January the judgment of the Court was delivered and sentences passed.

Now it is quite obvious to any one with any practical knowledge of the mode in which a criminal trial should be conducted, that the procedure adopted in these cases was a serious departure from the usual and proper course. The fact that prisoners and their counsel have consented to this course being adopted cannot give it a legal sanction, for it is a well established principle of Criminal Law that a prisoner can consent to nothing. Nor can the consent of counsel for an accused person validate a course of procedure which the law does not authorize.

It is urged by counsel for the Crown that although the procedure adopted in these cases was irregular, such an irregularity is covered by S. 537 (a) of the Code of Criminal Procedure, which provides that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any enquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice. In my opinion this contention is not sustainable. This

section only applies to errors omissions or irregularities of a formal nature, and does not cover a substantial departure from the mode of conducting criminal trial laid down by law. This seems to be clear from the illustration given at the foot of the section, which shows the class of irregularity contemplated.

In my opinion the procedure adopted in the cases before us is wholly unathorized by law in several particulars. In the first place, though the two sets of accused were intended to have been tried separately as in law they were bound to be the mode in which they were actually tried was in substance a joint trial. Only prosecution evidence appears on each record; speeches of Counsel were reserved till the close of both cases, the assessors were not asked to give their findings until both cases had been closed, and only one set of findings was recorded in respect of both, and, finally, one composite judgment was delivered. In fact the first two paragraphs of the judgment show conclusively that the whole matter was in substance dealt with as a single trial.

A still graver objection to the mode in which these cases were dealt with by the trial Court lies in the manner in which the Court dealt with the evidence for the defence. In th case of Alu and others, the Court acquiesced in the request by the prisoners on trial that witnesses who had not yet given evidence, but who were to be examined as witnesses for the prosecution in the cross-case, should be treated as witnesses for the defence in the case at hearing. If this request had in fact been given effect to, the result would have been that the evidence of each prisoner, and of each of his co-accused would have appeared subsequently on the record as evidence in his defence. In other words, each of a number of prisoners jointly tried would have been treated as a competent witness for his co-accused and also as a competent witness on his own behalf. Moreover, the only way in which the evidence could legally be given, assuming the witnesses to be competent, would be to put each witness in the box and examine him orally at the close of the prosecution case. This, needless to say, was not done. What was in fact done was to take the written record of the prosecution evidence in Hasta's case and treat it without further formality as evidence for the defence in Alu's case after both cases had been concluded. In the case of Hasta and his co-accused, the matter was somewhat different. Here the accused asked that three specific persons, Waryam, Sadara and Balanda, who were described as prosecution witnesses in Alu's case, should be treated as defence witnesses for Hasta and his fellow prisoners. That is to say, the statements given in evidence by Waryam, Sadara and Balanda for the Crown at the prosecution of Alu and others, were without any further formality to be regarded as evidence duly recorded on behalf of Hasta and his co-accused. Not only is such a method of recording evidence hopelessly and entirely illegal, but in fact it resulted in one witness for the defence in the Hasta case being omitted altogether, as Balanda did not appear as a witness at all at any stage of the proceedings.

A further objection to the method adopted for dealing with defence evidence, is this:—Such evidence apart from all other infirmities, would be evidence given in the absence of the accused. This is in violation of the provisions of S. 353 of the Criminal Procedure Code, and is, therefore, not only irregular but illegal.

It is unnecessary to multiply reasons why the various infringements of the law governing criminal trials which have occurred in these cases should not be countenanced.

In all penal matters the utmost strictness in procedure must be observed. Where the mode in which a Criminal trial is to be conducted is, as it is in India, regulated by statute, a departure from the authorized procedure can itself only be sanctioned by a statutory provision. There is no such sanction for any of the illegalities which have taken place in the course of the trial of these two cases. S. 537 of the Code of Criminal Procedure does not apply to an infringement of statutory requirements.

It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute. To use the words of the Lord Chancellor in delivering the judgment of the Privy Council in *Subramania Ayyar* v. *King Emperor* (1).

"These trials were prohibited in the mode in which they were conducted," and were, therefore, illegal."

For the reasons given above I am of opinion that these appeals must be accepted and the convictions and sentences of the Court below should be set aside, and new trials ordered.

Broadway, J.—I concur in the proposed order. The appeals are accepted, the convictions and sentences are set aside and the cases are returned to the Court of Sessions to be retried in accordance with law.

Appeals allowed.

Retrial ordered.

(1) [1900] 25 Mad. 61—28 I.A. 257—11 M.L.J. 233—3 Bom. L.R. 540—5 C.W.N. 866—10 M.L.J. 147 (P.C.)

✱ 1924 LAHORE 107

HARRISON AND ZAFAR ALI, JJ.

Harji Mal and another—Defendants-Appellants.

v.

Devi Ditta Mal and others—Plaintiffs—Respondents.

S. A. No. 2309 of 1922, Decided on 12th May 1923, from the decree of the Addl. Judge, Lahore, D/-23rd May 1922.

Civil P. C., S. 92—Managers putting forth absolute and adverse title in themselves must be removed.

Where the managers vigorously contested the suit and put forward and tried to establish their own adverse and absolute title to the waqf property they were held liable to be removed from the management of the waqf.

[P. 108 C. 2]

G. C. Narang, Jagan Nath and Tek Chand—for Appellants.

Badri Das—for Respondents.

Judgment.—In this second appeal the first point raised by counsel is that the Senior Sub-Judge who disposed of the case and wrote the judgment did not actually hear oral arguments although written arguments were before him, and reliance has been placed on 57 I. C. 34 and 91 P. R. 1904, as authorities to show that under these circumstances the judgment is a nullity and the case must be remanded to the trial Court.

The facts are that Mr. Muhammad Shah, the Sub-Judge, who heard the case fixed the 10th of November, for arguments. On that date Counsel appeared and stated that they were not ready to argue and asked for an adjournment, which he did not allow but directed them to put in written arguments, if they wished to do so. They, therefore failed to avail themselves of the opportunity given them to argue the case before the Judge who had tried it. Further adjournments were given for written arguments and these were finally submitted on the 10th December. The Sub-Judge then came to the conclusion that it was necessary to inspect the spot, though what advantage exactly was to be obtained from this inspection is not clear. He was transferred before he carried out his inspection leaving the judgment unwritten and on the 22nd of January the parties appeared before Mr. Strickland, his successor, who fixed the 5th February for inspection. Later the Counsel for the defendants, who are now the appellants, appeared before him and asked for an adjournment which he granted. He eventually carried out the inspection in the presence of the parties and then gave judgment. Now 91 P. R. 1904 is to be distinguished as being the case of a first appeal and in 57 I. C. 34 it is clear that the parties had no opportunity to argue the case before the successor. Here they had ample opportunity before both Sub-Judges. In Order 18, rule 2, an option is given to the parties to argue their case when the evidence is conducted and it is for them to decide whether they will avail themselves of this privilege. Here they were given a further opportunity at a later date, the 10th November, and failed

to make use of it. It is contended that even so they were entitled to an opportunity before the successor of Muhammad Shah who was not in the same advantageous position as he was, inasmuch as he had not heard the evidence. Even so they certainly had more than one opportunity when they appeared before Mr Trickland. It was for them to argue the case if they wished to do so. They did not do so and the only construction which can be put upon the events is that they deliberately failed to avail themselves of such opportunity and left the case in his hands knowing that the written arguments were before him. Under these circumstances we find that it was quite unnecessary for Mr. Trickland to attempt to insist on their availing themselves of the privilege and indeed it would have been futile for him to do so. In the grounds of appeal various points are raised which are not dealt with in the judgment of the learned District Judge. There were four issues in the trial Court regarding two of which the judgment of the District Judge is silent. After disposing of two preliminary issues which had not been decided by the trial Court the District Judge says in his judgment the first point for determination is * * *" and having dealt with this point he proceeds: "Lastly the objection is taken * * * * *." Now the presumption is that a District Judge deals with the arguments put before him and if the form of the judgment shows clearly, as it does in this case, that the only points presented were those two with which he has dealt, the only inference which we can draw, more especially in the absence of an affidavit to the contrary by the Counsel who appeared before him, is that the remaining points were not urged and were definitely abandoned.

On the merits there are only two points in this case:—

(1) Whether the property in question is or is not *waqf* in the sense that it has been dedicated to use of the public; and

(2) Whether if it be held that the property is *waqf* in this sense, the defendants should be removed from the management.

We have been taken through the whole of the record and we find that it is clearly established by the evidence and by the history of the land and building in suit that from 1856 onwards this property has been dedicated to the use of the public as a *Dharamsala*. At one time in the year 1883 the man, entered as in possession, sold it to two Muhammadans. A suit was brought for cancellation of the sale on the ground that the property was to be treated as *waqf* and this was compromised by a sale for less than half of the value shown in the original deed on the clear understanding entered in the compromise that it was to be used as *waqf* property for religious purpose. Since then it has been transferred in the first place between the two persons who succeeded in that suit and subsequently by a will in favour of the nephew of one of them. We find that it is fully established by evidence and the history of the land and building that there had been a complete dedication by user. As to whether the defendants should be removed from the management; they have vigorously contested this suit and have put forward and tried to establish their own adverse and absolute title and, under these circumstances, it is in our opinion clear that they must be removed from the management. The trial Court after coming to the above findings appointed the *Singh Sabha* of Lahore as manager. It is contended that this society is not acceptable to all shades of Sikh opinion, but, until the date of hearing the defendants did not suggest any alternative and even now have only proposed at the hearing a gentleman whom they have not consulted to act together with Secretary, Chief Khalsa Diwan, who has also not been consulted. No sufficient reason has been shown in our opinion why the *Singh Sabha* should not discharge the duties of management for the good of the public in a satisfactory manner and we decline to interfere with the order of the trial Court.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

✱ 1924 LAHORE 109

SHADI LAL, C. J. AND CAMPBELL, J.

Wallu—Convict—Appellant.

v.

The Emperor—Respondent.

Criminal App. No. 30 of 1923, Decided on 31st May 1923, from the order of the S. J. Ferozepore, D/- 14th October 1922.

(a) *Penal Code, S. 302—Evidence sufficient for robbery is not sufficient for murder.*

In a case of murder the following facts were found:—The accused found the deceased playing with three other companions, gave him a melon and took him away on the promise of giving him more. The accused and deceased were afterwards seen together near the canal by one witness and after that deceased was never seen alive again. The medical man who conducted the *post-morten* examination was unable to give any opinion as to the cause of death because putrefaction was too far advanced. Melon seeds were found in the deceased's stomach at the *post mortem* examination. The accused's shoes were found near the canal bridge hidden in some reeds, Deceased when taken away by the accused was wearing 3 ornaments and these were not on his dead body. The appellant subsequently had knowledge of the place in which these ornaments were concealed and himself dug them up during the police investigation.

Held: that assuming these findings to be correct they do not exclude every reasonable hypothesis other than that the deceased's death was caused by the accused. If the accused can be held to have robbed the deceased it does not follow necessarily that he afterwards killed him. [P. 109 C. 2]

(b) *Criminal P. C., Ss. 237 and 238—Charge of murder—Facts found indicating robbery—Conviction cannot be altered.*

A charge of murder cannot be converted into one of robbery. The essentials of the two offences are so widely different that neither S. 237 (1) nor S. 238 (3) can be applied. 20 All, 107 Ref. [P. 110 C. 1]

B. A. Cooper—for Appellant.

Des Raj Sawhney—for Respondent.

Judgment.—The appellant Wallu has been convicted under S. 302 of the Indian Penal Code of the murder of a boy named Haku and has been sentenced to transportation for life.

The offence is alleged to have been committed on the 2nd July 1922, on which day Haku was last seen alive. His body was discovered in the canal on the 3rd July at a place about 3 miles from Mohanke village where he and the appellant lived. The medical man who conducted the *post mortem* examination was unable to give any opinion as to the cause of death because putrefaction was too far advanced. He deposed that there were a faint blue mark on the right side of the neck, 2 slight bruises on the left side of the face, a scratch on the right ear and another blue mark on the front of the chest and he said that as the above marks on the body indicated violence and struggle, death might have been due to suffocation or strangulation. This, however, the deposition of the witness made clear, was a mere guess. The final conclusion was as stated above that owing to advanced putrefaction no opinion could be formed about the cause of death.

The learned Sessions Judge has held the following facts to be proved:—

1. The appellant found the deceased Haku playing with 3 other companions, gave him a melon and took him away on the promise of giving him more.

2. The appellant and Haku were afterwards seen together near the canal by one Sunder and after that Haku was never seen alive again.

3. Melon seeds were found in the deceased Haku's stomach at the *post mortem* examination.

4. The appellant's shoes were found near the canal bridge hidden in some reeds.

5. Haku when taken away by the appellant was wearing 3 ornaments; and these were not on his dead body.

6. The appellant subsequently had knowledge of the place in which these ornaments were concealed and himself dug them up during the police investigation at a hut where he and some of his family lived.

We express no opinion on these findings, but assuming them to be correct we do not think that they exclude every reasonable hypothesis other than that Haku's death was caused by the appellant. If the appellant can be held to have robbed the deceased it does not follow necessarily that he afterwards killed him. It is not impossible that the deceased fell into canal without the agency of the appellant, and there is no evidence of the actual cause of death.

The sole charge framed against the appellant was one uder S. 302 of the Indian Penal Code and it would not, in our opinion, be open to us to alter the conviction under S. 302 to a conviction under one of the sections dealing with offences against property. The appellant might perhaps have been charged under S. 236, Code of Criminal Procedure, with the offence of robbery as well as with the offence of murder, but he was not so charged, and the essentials of the two offences are so widely different that we do not think that S. 237 (1), and still less S. 238 (2), could be applied. In this view we are supported by the decision of the Allahabad High Court in 20 All. 107.

Whether the appellant is to be retried on another charge is a question which must be decided by the District Magistrate of his district. We say no more than that our present order of acquittal on the charge of murder shall not prevent another trial upon a charge under one of the sections of Chapter XVII, Indian Penal Code.

We accept the present appeal, set aside the conviction and sentence, and acquit the appellant of the charge under S. 302, Indian Penal Code.

Appeal allowed.

✱ 1924 LAHORE 110

MOTI SAGAR, J.

Sher and others—Convicts—Appellants.

v.

The Crown—Opposite Party.

S. A. No. 535 of 1923, Decided on 6th July 1923, from the order of the first class Magistrate Mianwali, D/- 21st April 1923.

Penal Code, S. 366—Guardian not quite opposed to the marriage - Offence less serious.

Where a girl of 18, was abducted from the custody of her mother and married to one of the accused who were her near relations & the report made by the mother to the police was to the effect that the accused being the nearest paternal relations had certainly superior right to the possession of the girl but that they had no right to take her away forcibly without paying the mother some compenstion for the trouble and expense that she had incurred in bringing up the girl,

Held that an offence was technically committed and accused was guilty under S. 366, but having regard to the fact that the parties are very close relations and that the mother herself did not take a very serious view of the matter when she lodged the first information report, a nominal sentence was sufficient

[P. 111 C. 2]

M. L. Puri—for Appellants.

Nemo—for the Crown.

Judgment.—This is an appeal from certain convictions under S. 366 of the Indian Penal Code. The complainant is one *Mt.* Sher Bano, and the girl alleged to have been kidnapped from lawful guardianship is her daughter *Mt.* Khatun. The accused are closely related to each other, and were ten in number. Out of these ten accused *Mt.* Bano, widow of Umari and mother of accused Nos.1 to 3 was not proceeded against and her name was struck off from the list of the accused from the very beginning. Ahmad, accused No. 2, and Ghulam Ahmad, accused No. 9, were discharged. The remaining seven accused were found guilty and sentenced, Sher to five years' rigorous imprisonment and the others to three years' rigorous imprisonment each. The story for the prosecution which is set out in the judgment of the learned Magistrate is very simple, and may briefly be stated as follows.-

On the 8th of August 1922 *Mt.* Alam Khatun, the girl abducted, had taken food for her step father Sultan in the fields. While she was returning home in the evening she was waylaid by the accused and carried away with intent that she may be forced into a marriage with Sher. accused No. 1. The abduction was witnessed by Muhammad *Chowkidar* who gave information of this fact to the mother in the evening. This fact, was however, subsequently denied by this man when he appeared as a witness in the case and he stated that he had given no such information to the mother. The matter was immediately reported to the police, but the latter refused to take any action and directed the complianant to take civil proceedings against the accused. *Mt.* Sher Bano then instituted the present complaint under S. 366 Indian Penal Code, and succeeded in obtaining an order for the issue of warrants against all the

accused. Sher had absconded and proceedings were taken against him under S. 512 of the Criminal Procedure Code. The others after having been arrested appeared in Court, and denied that they had taken any part in the alleged abduction. After some time Sher was also arrested by the Bannu police along with the girl and brought to Mianwali to take his trial under S. 366 Indian Penal Code, along with the other accused. *Mt.* Khatun was produced as a witness in the case, and stated that she had been forcibly abducted by all the accused and forced into a marriage with Sher accused No. 1 in this case. Some other witnesses were also produced who stated that they saw the party taking away the girl by force and that they had been implored by the latter to rescue her.

All the accused pleaded not guilty. The defence of Sher, accused No. 1 was that the girl had been given to him by her father and that she had voluntarily accompanied him. He further stated that he subsequently married the girl with her consent. It has been found by the Court that the girl was not below 16 years of age, and from certain documents in the guardianship record, to which reference has been made in arguments by the learned counsel for the appellants, it is indeed clear that the girl must have been between 18 and 20 years of age at the time when she had been abducted. The other accused pleaded an *alibi* and produced some witnesses in support thereof. The learned Magistrate, who tried the accused, did not put any reliance upon the statements of these witnesses, and after carefully going through their evidence I have no hesitation in holding that the witnesses were utterly false. It has been argued that the evidence with regard to abduction is not very satisfactory and that the accused are entitled to an acquittal. I am not inclined to agree with this contention. There is no reason why the girl and the other persons who have come forward as witnesses, should be giving a false statement, and I am of opinion that the accused have entirely failed to establish that the girl accompanied them voluntarily and that she had been given in marriage by her father Sultan to Sher, accused No. 1. At the same time it appears to me that this was not a case in which a very serious view of the crime alleged to have been committed should have been taken. There is no doubt that an offence was technically committed and that the accused was guilty under S. 366 Indian Penal Code, but having regard to the fact that the parties are very close relations and that the mother herself did not take a very serious view of the matter when she lodged the first information report, a nominal sentence would have been quite sufficient to meet the ends of justice. The report made by the mother to the police was to the effect that the accused being the nearest paternal relations had certainly a superior right to the possession of the girl but that they had no right to take her away forcibly without paying the mother some compensation for the trouble and expense that she had incurred in bringing up the girl. This clearly shows that even according to the complainant the matter was not very serious. It is also clear that the girl had not been abducted with the object that she may be seduced to illicit intercourse but with the object that she may be lawfully married to Sher who is the brother of Nur Khan, the husband of *Mt.* Alam Khatuns' own sister *Mt.* Kali. Having regard to all these facts and the fact that the girl was actually married to Sher I am inclined to take somewhat lenient view of the matter and maintaining the convictions I reduce the sentence of Sher from one of five years' rigorous imprisonment to one of six months' rigorous imprisonment only. The sentences of the other accused are also reduced to those of three months' rigorous imprisonment each

Sentences reduced.

✱ 1924 LAHORE 112

ABDUL RAOOF AND ABDUL QADIR, JJ.

Walaiti Ram and others—Defendants—Appellants.

v

Ram Kishan and others—Plaintiffs—Respondents.

Civil Appeal No. 1121 of 1917. Decided on 8th May 1922, from an order of D. J., Amritsar, D/-4-4-1917, reversing that of the Sub J., Amritsar D/-15-5-1916.

Limitation Act, Art. 61—Applies to suit for contribution by one partner for excess debt paid by him.

Article 61, is applicable to a suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners. 19 A. 244 Ref. [P 114 C 1]

R. B. Pandit Sheo Narain,—for Appellants.

G. C. Narang — for Respondents.

Judgment.—This is a second appeal arising out of the following facts. Khairati Mal, defendant No. 1, and Kidar Nath, defendant No. 6, started a firm on the 4th April 1906, under the style of "Khairati Mal-Kidar Nath" in which they had equal shares. This firm was dissolved on the 2nd April 1909 when a deed of release was executed. Kidar Nath then started another firm under the name of Kidar Nath-Durga Dass. This second firm continued up to the 17th of December 1909, when by an agreement between the creditors of the firm and the owners thereof one Raja Ram was appointed a trustee to administer its assets. On the 14th September 1914 Raja Ram sold the outstanding debts of the firm Kidar Nath-Durga Das to the plaintiffs for Rs. 550, under the deed of release relating to the firm "Khairati Mal-Kidar Nath" the assets of the dissolved firm were handed over to Kidar Nath and he was made liable to pay all the debts with the exception of Rs. 3,000 which was made payable by Khairati Mal. It was provided that Khairati Mal was to pay to the creditors of the firm Rs. 3,000 or to Kidar Nath. Liberty was also given to him to either pay to the creditors in cash or adjust the debt by executing in their favour singly or jointly with Kidar Nath a document. Khairati Mal neither paid the sum to the creditors nor to Kidar Nath, nor did he compound the debt with the creditors by executing any document. Kidar Nath, therefore, had to meet the claims of the creditors of the firm singly and had to pay off the debts. He paid off the debts in the year 1909. The first payment was made by him on the 11th April 1909, and the last item was paid on the 24th July 1909. At page 5 of the records is to be found a list of these payments which was filed by the plaintiffs in this case as directed by Court. Under ordinary conditions Kidar Nath would be entitled to claim contribution from Khairati Mal in respect of all the debts paid by him, but it appears by arrangement arrived at in the deed of dissolution or release dated the 2nd of April 1909, the liability of Khairati Mal was limited to the payment of Rs. 30,00 only. It further appears that Khairati Mal was indebted to the firm to the extent of Rs. 3,000 and apparently he was made liable to pay the debts of the creditors to the extent of Rs. 3,000 for this very reason. One of the conditions entered in the deed of dissolution was that if Khairati Mal paid Rs. 3,000 within eleven months he would be entitled to realize interest for the period from the 2nd April 1909 at the rate of ten annas per cent. per mensem from Kidar Nath, but if Khairati Mal did not pay this sum within eleven months he would have to pay subsequent interest at the same rate, *i. e.*, ten annas per cent. per mensem. As stated above, Khairati Mal failed to pay this sum to the creditors and Kidar Nath had to clear off all the debts. Thus, Khairati Mal failed to contribute towards the payment of the debts of the firm even to the limited extent provided in the deed. Kidar Nath, therefore, became entitled to recover this amount from him. It is an admitted fact that this sum was entered in the account-book of the firm of Kidar Nath-Durga Das

as being due to Kidar Nath from Khairati Mal. While administering the affairs of this latter firm the trustee along with other outstanding debts due to Kidar Nath and Durga Dass transferred this item of Rs. 3,000 also to the plaintiffs. The present suit was instituted by the plaintiffs on the 1st April 1915. After giving a summary of the facts as above stated, the plaintiffs claimed Rs. 4,143-12 from the defendants on account of principal and interest and put their cause of action in the plaint thus: "Kidar Nath's business failed, and Raja Ram was appointed a trustee to settle his debts, etc., Raja Ram sold the outstanding debts, including the claim in suit, to the plaintiffs who are entitled to realize Rs. 3,000 principal and Rs. 1,143 interest, *viz.*, Rs. 4,143-12 in all, from defendants Nos. 1 to 5 who are members of a joint Hindu family, of which Khairati Mal was the manager."

The suit was resisted by defendants Nos. 1 to 5 upon various grounds which are summarised in the judgment of the Trial Court. It was pleaded (*i*) that the suit was barred by time; (*ii*) that Khairati Mal was not liable to pay Rs. 3,000 to Kidar Nath but to the creditors of the firm and that Khairati Mal had never authorised Kidar Nath to pay to the creditors on his behalf; (*iii*) that the plaintiffs, being the purchasers of the outstanding debts of the firm of Kidar Nath- Durga Dass only, had no *locus standi* to make the present claim which relates to the dealings of the firm "*Khairati Mal-Kidar Nath*"; (*iv*) that Khairati Mal had discharged his liability, if any, by paying off debts for more than Rs. 3,000.

On the question of *locus standi* of the plaintiff to maintain the suit the trial Court found in favour of the plaintiffs. The question of limitation was left undetermined. On the merits, however, the Court found against the plaintiffs and dismissed their suit.

An appeal was preferred to the Lower Appellate Court with the result that their claim was partially allowed and a decree for Rs. 2,504-2-9 with proportionate costs was passed in their favour against the defendants Nos. 1 to 5.

The defendants have accordingly preferred this second appeal. The principal question to be decided in this appeal is as to the nature of the claim. Upon this will depend the decision of the question of limitation and as well as that of the *locus standi* of the plaintiffs to maintain the suit. The Lower Appellate Court has treated the suit as one for money payable for money lent and has applied Art. 57 of the Limitation Act, and has expressed an opinion that the debt became due by Khairati Mal to Kidar Nath when the partnership between them was dissolved. The suit being within six years from that date the Court held that it was within time having regard to the provisions of the Punjab Limitation Act. We are not inclined to agree with the learned Judge of the Court below as to the applicability of Art. 57. This was not a claim for money payable for money lent. The money was borrowed by Khairati Mal from the firm of Khairati Mal-Kidar Nath. The suit has not been brought by the plaintiffs as the assignees of the debt due from Khairati Mal. Khairati Mal has been sued as a partner of the dissolved firm for contribution on the ground that his partner Kidar Nath had paid off all the debts. It is merely a coincidence that he is not liable to contribute to the whole extent of the debts discharged by Kidar Nath, and this is due to the circumstance that by mutual agreement his liability to pay the debts had been limited to Rs. 3,000 only but nonetheless the claim of Kidar Nath to recover the sum from Khairati Mal was based on his right to demand contribution. The plaintiffs' suit, therefore, as the assignees of the claim of Kidar Nath must be treated as a suit for contribution. Various Articles of the Limitation Act have been suggested at the argument as being applicable to the suit. Pandit Sheo Narain has contended that either this is a suit upon a contract to indemnify and is governed by Art. 83 or it is one for compensation for the breach of a

contract not in writing registered and comes under Art. 115. He has also suggested Art. 91 which is applicable to a suit for contribution. The two first mentioned Articles cannot apply, because the suit is neither based upon a contract to indemnify, nor is it a suit for compensation for the breach of a contract. The last mentioned Article cannot apply, because it is not a suit by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who paid the whole or more than his share of the amount of revenue due from himself and his co-sharers. No Article has been pointed out which may be specifically applicable to a suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners. In our opinion Art. 61 would apply to a suit for contribution between co-debtors and must be applied to this case. See *Sri Raman Lalji Maharaj* v. *Gopal Lalji Maharaj* (1). This Article in among those is respect of which the period of limitation has been extended to six years under the Punjab Limitation Act All the payments made by Kidar Nath being within six years, the suit is clearly within time.

The argument relating to the question of the plaintiff's *locus standi* to maintain the suit put forward on behalf of the appellants is that the plaintiffs, having purchased the outstanding debts of the firm "Kidar Nath-Durga Dass," are not entitled to claim the amount of Rs. 3,000 together with interest, because the claim related to the dissolved firm "Khairati Mal-Kidar Nath," but we have already indicated above that this sum had been brought into the account books of the firm "Kidar Nath-Durga Dass", and had been entered as being due from Khairati Mal to Kidar Nath. The plaintiffs being the assignees of the outstanding debts due to Kidar Nath were entitled to claim the amount. It was further contended in the alternative that the plaintiffs' claim cannot succeed, because Khairati Mal had discharged his liability by paying off certain debts, the aggregate amount of which is more than the amount claimed. In support of this argument it has been pointed out that the firm "Daulat Ram-Kishor Chand" had a claim of Rs. 4,541-1-6 against the firm of "Khairati Mal-Kidar Nath" in the settlement of which Khairati Mal had taken part and that he was, therefore, entitled to receive credit for half of that amount. It has however, been found that the claim of Daulat Ram and Kishor Chand was settled by a compromise under which Khairati Mal and Kidar Nath had to pay Rs. 1,000 each. Thus, it is clear that the only amount contributed by Khairati Mal in respect of this debt was Rs. 1,000 and he has been allowed credit for this sum. Khairati Mal claimed credit for another sum of Rs. 1,300 which he claimed to have paid for the redemption of certain pawned ornaments belonging both to Kidar Nath and to himself. On this account he has been held to be entitled to be credited with Rs. 608-6-0 and in this finding both the Courts below have concurred. There is no force in the appeal and it must be dismissed.

The plaintiffs-respondents have filed certain cross-objections, objecting to the deduction allowed in favour of the defendants. In the first place, it has been contended on their behalf that the claim of Daulat Ram and Kishor Chand was not on account of any debt due from the firm of "Khairati Mal-Kidar Nath," and that, therefore, the sum of Rs 1,000 paid by Khairati Mal on account of this independent debt ought not to have been deducted from the amount claimed. It has, however, been found as a fact by the Lower Appellate Court that the claim was brought by Daulat Ram and Kishor Chand for a debt due by the firm and this finding cannot be questioned in second appeal.

The second contention put forward on behalf of the respondents was that the debt of Rs. 1,300 had been liquidated by the sale of the ornaments and that Khairati Mal had

(1) [1896] 19 All. 244—(1897) A.W.N. 43.

not paid anything out of his own pocket for the redemption thereof, and that therefore, he was not entitled to be credited with the sum of Rs. 608-6. It was, however, admitted by the plaintiffs in the Court below that Khairati Mal was entitled to be credited with Rs. 583-14 on this account and the only dispute was as to interest to which Khairati Mal was clearly entitled, as Haidar Nath had failed to redeem the ornaments which, under the terms of the deed of dissolution, he had undertaken to do. The cross-objections also, therefore. have no force.

The result is that both the appeal and the cross-objections fail and are dismissed with costs.

Appeal and cross-objections dismissed.

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HARRISON AND ZAFAR ALI, JJ.

Asad Ullah Khan and another—Defendants—Appellants,

v.

Karam Chand and another—Plaintiffs—Respondents.

Civil Mis. S. A. No. 2449 of 1921, Decided on 8th May, 1923, from the order of the Dt. J., Multan, D/-11th July, 1921.

Civil P. C., S. 47, and O. 21, R. 91—Auction purchaser dispossessed—Suit for purchase money is maintainable.

An auction purchaser, who has paid the full price can bring a suit to recover that money on being dispossessed of the property by a successful claimant, who had lodged an unsuccessful objection under O 21 R. 58 and subsequently brought a suit and established his right to the property. 36 C. L. J. 205 Foll.

[P 115 C. 2]

Niaz Ali—for Appellants.

Hargopal—for Respondents.

Judgment.—The only point which arises in this second appeal is whether an auction purchaser, who has paid the full price can bring a suit to recover that money on being dispossessed of the property by a successful claimant, who had lodged an unsuccessful objection under rule 58 and subsequently brought a suit and established his right to the property. The trial Court held that the suit did not lie. The learned District Judge has held that it does. Counsel for the appellants relies on 43 All. 60 and an earlier ruling of the Allahabad High Court quoted therein (39 All. 114). He also cites 52 P. R. 1919 which is not in point as there the question was of a defective and not of a wholly non-existent title in the judgment debtor. Counsel for the respondents on the other hand quotes 36 C. L. J. 205, 35 Bom. 29 and 21 A. L. J. 228 more especially the portion at the end of page 230. The position taken up by Counsel for the appellants is that the procedure laid down in rules 91, 92 and 93 of Order 21 is exhaustive and excludes a suit. He concedes that once the month has expired and the sale has been confirmed, the question cannot be reopened under Order 21 as no application lies under rule 91, and he contends that where, as here, an objector makes a claim under rule 58, which is decided against him, the sale then takes place, and the purchaser, fortified by the failure of the unsuccessful objection pays his money and has the sale confirmed, he is debarred from seeking any sort of remedy if in a subsequent suit the same objector succeeds in establishing his title. This view is supported by 43 All. 60 which lays down that the only remedy open to the auction purchaser is an application under Order 21 and, if in ignorance of the true facts, he fails to make such an application within time he must take the consequences and the judgment debtor is entitled to take credit for the price of property not belonging to him. With this view we do not agree. We find ourselves in complete accord with that expressed in 36 C. L. J. 205 and the authorities there cited and we are of opinion that the suit by the auction purchaser lies.

The summary remedy prescribed in Order 21 does not exclude a suit of this nature where there has been a complete failure of consideration and this more especially where there has been an adjudication though not a final adjudication in favour of the title of the judgment-debtor.

The appeal is therefore dismissed with costs.

Appeal dismissed.

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ABDUL RAOOF AND CAMPBELL, JJ.

Ram Narain and another—Plaintiffs —Appellants.

v.

Mst. Har Narinjan Kaur and another —Defendants—Respondents.

Civ. A. No. 892 of 1918, Decided on 10th March, 1923, from the decree of Sub. J., Rawalpindi, D/- 20 h December, 1917.

(a) *Custom—Proof — Burden of proving— Custom opposed to Hindu Law and agricultural custom is heavy —Custom modifying Law must be ancient and invariable.*

Where the custom set up by the plaintiffs is most unusual as being opposed both to the Hindu Law and general agricultural custom the burden of proving the alleged special family custom, lies very heavily upon the plaintiffs. (1872) 14 Moo. I. A. 570, 585 (P. C.) Foll

It is of the essence of special usages modifying the ordinary law of succession, that they should be anceient and invariable ; and it is further essential that they should be established so by clear and unambiguous evidence. 85 P. R. 1901 Foll. [P. 120 C. 1]

(b) *Custom—Punjab — Widow — Custom of excluding separate proprietor's widow from share in sodhi family was not proved of Anandtpu,*

A special custom does not obtain among members of the Sodhi family of Anandpur by which the widow of a deceased proprietor is entitled merely to maintenance and not to a life estate according to the Hindu Law. [P. 123 C. 1]

M. S. Bhagat and Amin Chand—for Appellants.

Tirath Ram—for Respondents.

Judgment.—The parties to this suit belong to the well-known *Sodhi* family of Anandpur, Tahasil Una, District Hoshiarpur The facts of the case and the question to be decided in this appeal are few and simple. They are so fully given in the judgment of the Court below that it is not necessary to state them in full detail for the purposes of this appeal. Originally the suit was instituted by *Tika* Ram Narain Singh against *Mt.* Har Narinjan Kaur, widow of *Sodhi* Gurbachan Singh and *Sardar* Kishen Singh making *Sodhi* Moti Singh a *pro forma* defendant. Later on *Sodhi* Moti Singh also joined as a co-plaintiff.

In order to understand the history of the case and the points arising for decision on the arguments of the counsel for the parties it is necessary to supplement the pedigree-table given in the judgment of the Court below. [vide page 117]

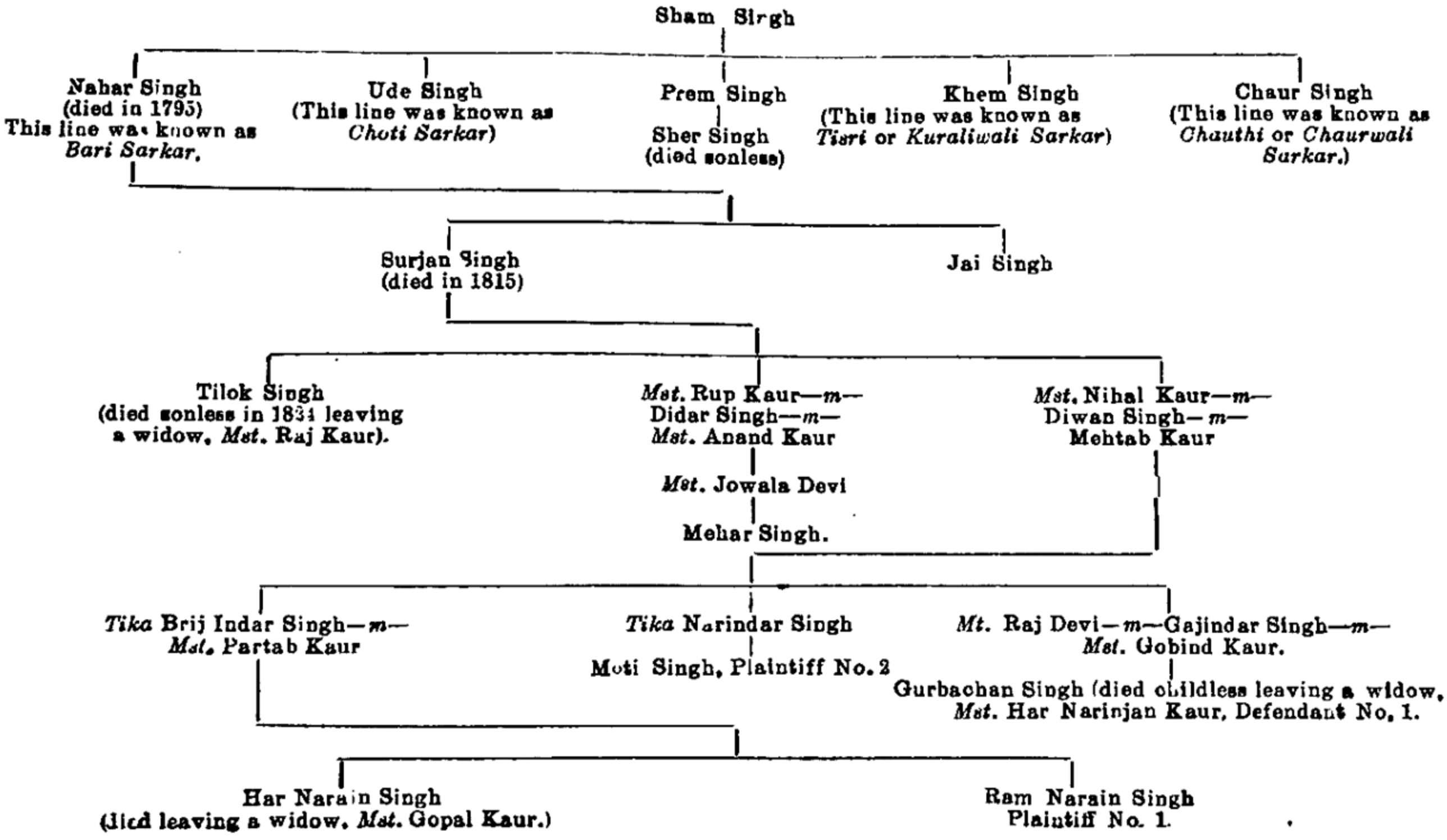
The case as set out in the plaint was that *Sodhi* Gurbachan Singh died leaving, besides moveable property such as cash, ornaments, clothes etc., immoveable property (a detail of which is given in paragraph 4 of the amended plaint, printed at pages 227-234 of the paper book) to which the plaintiffs were entitled by right of inheritance and that, according to the special family custom governing the line of *Sodhi* Surjan Singh, his widow, defendant No. 1, was entitled merely to a reasonable maintenance and right of residence in the residential houses during her lifetime. The cause of action is thus stated in paragraph 6 of the plaint :—

" Contrary to the custom prevailing in the *Bari Sarkar* family, defendant No. 1, instead of getting only a reasonable maintenance allowance which is proposed by the Government to be fixed at Rs. 300 *per annum*, has unlawfully taken possession, merely to prejudice the plaintiff, of the entire property left by the deceased and this gives to the plaintiff a right to sue for relief ..... "

The various reliefs claimed by the plaintiffs are detailed in paragraph 9 of the plaint.

The suit was resisted mainly on the ground that neither under the Hindu Law nor according to the general custom prevailing in the Punjab the plaintiffs had any right to *Sodhi* Gurbachan Singh's property during the lifetime of his widow and his mother. It was further pleaded that the parties were governed by the Hindu Law and that a very large portion of the property of *Sodhi* Gurbachan Singh, such as squares, lands shops, etc., was acquired by him or his father, and that a very small portion of the property left by him was ancestral property. On the 13th of January 1915, the following statement was made by Lala Ram Chand, Pleader for the plaintiff, *Tika* Ram Narain Singh.

The Anandpur *Sodhis* are admittedly descended from *Guru* Ram Dasji. One of his descendants in the sixth degree was one Sham Singh :



"*Sodhi* Gurbachan Singh's mother is alive. The plaintiff's father and *Sodhi* Gajindar Singh, father in-law of defendant No. 1, separated 40 or 45 years ago though a good deal of the property is still held jointly. The custom prevailing in the family of the parties is that the widow of a man who died without a male issue is entitled to maintenance only. This custom applies to all the property left by the deceased whether ancestral or self-acquired."

"All the immoveable property except the squares and the land in *Mauza* Sahuta is ancestral. The squares were acquired by *Sodhi* Gajindar Singh."

The following issues were framed:—

(1) Whether a custom prevails in the family of the parties, by virtue of which *Mt.* Har Narinjan Kaur is entitled to maintenance only?

(2) If so, what is the maintenance to which she is entitled?

(3) Can plaintiff sue for the share of Moti Singh, defendant, when he and his sons are alive?

(4) Does not a suit lie in a Civil Court for share of the *puja* income?

On the first issue relating to the custom set up in the plaint the trial Court found against the plaintiffs and dismissed the suit.

The plaintiffs have accordinlgy preferred this appeal The simple question which is to be decided by us is whether the plaintiffs have succeeded in establishing the custom relied upon by them. A good deal of argument has been addressed on the point that the family to which the parties belong occupies an exceptionally exalted position among the *Sodhis* of Anandpur, and that in fact the plaintiff, Ram Narain Singh, is included in the list of the Punjab Chiefs. It has, therefore, been contended that this family, descended from Surjan Singh, has a special custom of its own different in essential particulars from the customs governing inferior men among the *Sodhis*. This exceptional position of the family is claimed on the following additional grounds:—

(1) That the *gaddinashin* is usually in possession of the *manjhi*. It is, however, clear that the *manjhi* has been held from time to time by Gulab Rai, Sham Singh, Naehar Singh by turns. Surjan Singh was not the first who possessed the *manjhi*. All the descendants of the persons abovenamed must also be said to possess the importance which is claimed on this ground.

(2) That *pahul* was administered to the *Rajas* of Patiala and Kapurthala by Har Narain Singh, but it appears that *pahul* had been administered by Birjinder Singh, the plaintiff's father, so that if there was any religious efficacy, it had commenced since the time of Birjinder Singh.

(3) It is claimed that they are *gurus*, but admittedly neither the plaintiffs nor others who were called *gurus* after the 10th *guru* are *gurus* in the real sense. Indar Singh (P. W. 12) at page 270, line 33, of the paper book says that the other *Sodhis* of Anandpur were also called *gurus*. *Sodhi* Balwant Singh (page 289, line 9, of the paper book) says that all the *Sodhis* are entitled to be called *gurus*.

(4) That the members of this family held the position of *Darbaris*. According to 'Punjab Chiefs' by Sir Lepel H. Griffin, page 126, some of the representatives of the third and fourth families from Sham Singh were also *Darbaris*, and the representatives of all the four branches held *Jagirs*. On this ground also no exceptional position can be claimed.

Then again, having regard to the position of the family in later times, it is futile to claim any importance or greatness. According to the abovementioned book ('Punjab Chiefs') the family had dwindled down, and in fact for its support the Government had to provide means by granting pensions and *jagirs*. At the time of Birjinder Singh there was practically no land possessed by the family. *Diwan* Devi Ditta Mal, P W. 31, had made the following significant statement on the subject:—

"* * * At the time when *Sodhi* Birjinder Sing died, he had no land and he used to receive only Government pension and *jagir* from the Patiala State. There was some income from the *Manji Sahib* at Anandpur and the *gurdwara* at Kiratpur. At

the time of the death of *Sodhi* Birjinder Singh Rs. 400 or Rs. 500 were due from him as debt* * * * * (see page 340; line 2 , of the paper book)".

Thus if there was any greatness or importance, it had departed. Granting that the family did occupy a position of importance once and tried to occupy that of Ruling Cheifs can it be said that they adopted the custom obtaining among the Chiefs?

From the course of descent among the *Sodhis* of Anandpur it is clear that the rule of primogeniture was never adopted. On the contrary, all the brothers and sons have been inheriting without any regard to the rule of primogeniture and impartibility of the estate; even the income derived from the *puja* was divided among brothers. The plaintiff, Ram Narain Singh, has claimed that *Bari Sarkar* means the descendants of Surjan Singh. But Moti Singh, the other plaintiff, has stated that by *Bari Sarkar* is meant the descendants of Nahar Singh (see page 408, line 18, of the paper book). Telu Mal (page 310, line 16, of the paper book) states that the *Bari Sirkar* are the descendants of those who held the *gadi*. If this is true, the descendants of Nahar Singh and Sham Singh will also be called *Bari Sarkar*, because both these also held the *gadi*. *Bawa* Ram Singh witness, at page 359, line 5, of the paper book, also states that Sham Singh was *gaddinashin*. Bikarman Singh (P. W. 6), at page 254, line 29, of the paper book also has stated that Surjan Singh's father, Nahar Singh, was called *Bari Sarkar*.

Thus, in this state of contradiction it is not possible to hold that Surjan Singh's famly was only entitled to the title of *Bari Sarkar*. *Bari Sarkar* either applies to all the descendants of the *Tikas* or it applies to the *Tika* for the time being. According to "Punjab Chiefs" and the Gazetteer of the Hoshiarpur District also it is clear that all the descendants of Nahar Singh are *Sarkars*. It is for the first time that Surjan Singh's family is said to have a special and separate custom from the rest of the *Sodhis*. Before 1914 there is not a single instance in which this claim to a special family custom was put forward. The pedigree table, Exhibit P. 123, dated the 4th of September 1911, printed at pages 107-190, is headed thus:—

"*Surat hal wa shajra-i-nasab khandan Sodhi sahiban, Anandpur, District Hoshiarpur.*"

All the customs relating to the *Sodhis* are detailed at the foot of the *shajra* and apparently are applicable to all of them. No statement is appended showing that the family of Surjan Singh had any special custom of its own. This *shajra* was prepared at the instance of *Tika* Ram Narain Singh (see the evidence of Hukam Singh, P. W. 21, at page 29 of the printed paper book). This witness has further stated (see page 293) that all the *Sodhis* of Anandpur, including *Tikas*, are governed by one and the same custom. This witness belongs to the *Chowali* branch. Before deciding what the precise custom is by which the parties are governed let us take into consideration the question whether the family of Surjan Singh is governed by a special custom of its own or is it governed by the same custom by which the other *Sodhis* of Anandpur are governed [His Lordship after dealing with oral evidence proceeded as follows.—]

From the above summary of the evidence given by the plaintiffs' own witnesses it is clear that the custom prevailing in the family of *Bari Sarkar*, whatever it may be, is not in any way different from that prevailing in the other families of the Anandpur *Sodhis*.

Now, the custom set up by the plaintiffs in this case is most unusual as it is opposed both to the Hindu Law and the general agricultural custom in this province. The plaintiff himself, in his statement at page 413 line 26, of the paper book, admits that in matters of succession his family follows the Hindu Law. But, of course, he pleads that in the *Bari Sarkar* family in the matter of succession by widows there is a special custom. Plaintiff No. 2, *Sodhi* Moit Singh, has stated that "we follow the Hindu Law in all matters excepting three or four particular ceremonies." He is not able to give a detail of the respects in which they follow the Hindu Law, but he has stated that

one of the exceptions is that a widow gets maintenance no matter whether her husband's brother be separate or joint. The burden of proving the alleged exception, namely, special family custom, therefore, lies very heavily upon the plaintiffs.

In the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethuraya* (1), their Lordships of the Privy Council made the following authoritative observation :—

"Their Lordships are fully sensible of the importance and justice giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages modifying the ordinary law of succession, that they should be ancient and invariable : and it is further essential that they should be established so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

In the case of *Zarif Khan* v. *Amir Khan* (2) a Division Bench of the Chief Court, relying upon the pronouncement of their Lordships of the Privy Council in the case just mentioned, held that a party relying upon a special family custom must prove that such custom was ancient, invariable and definite. At page 293 of the report the learned Judges made the following pertinent remark :—

"Another point to be borne in mind is that the family is not shown to be an important and ancient one ; nothing is known before Nur Ulah Khan's time, and definite information is available only after the return of Muhammad Khan to British territory, which took place less than 50 years ago It is unusual to find a special custom regulating the law of inheritance in such a family under such circumstances."

This remark has a special bearing on the facts of this case. A reference to page 25 of the Gazetteer of the Ambala District, published in 1892, will show the confusion that prevailed in the district, especially among the Sikhs. Under those circumstances it was hardly possible for any custom to have grown up in the family of *Sodhis*. Moreover, having regard to the observation made in *Zarif Khan* v. *Amir Khan* (2), Surjan Singh's family cannot be said to be an ancient one. We mention this only by the way. We shall deal with the matter more fully when dealing with the evidence produced on behalf of the plaintiffs to establish this custom.

In the case of *Charanjit Singh*, v. *Amir Ali Khan*, (3) the learned Judges of a Division Bench made the following observation :—

"It should be quite unnecessary to say that an alleged family custom can never be held established merely on the strength of one or two instances. A custom to be legally binding must be ancient, certain and invariable, and family custom at variance with the general custom of the personal law of the parties requires even more cogent evidence than an alleged general custom before it can be held to be established."

In the case of *Chandika Bakhsh* v. *Muna Kunwar* (4), a family custom alleged to exist amongst the *Ahban Thakars* of Oudh, in derogation of the ordinary *Mitakshara* law in force there, was held by the Judicial Committee not to have been proved by four instances of the custom of comparatively modern date.

In the case of *Durga Charan Mahto* v. *Raghunath Mahto* (5), a Division Bench of the Calcutta High Court, following the rule laid down in *Hurpershad* v. *Sheo Dyal* (6), held :—

"that custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law ; it must be

(1) [1872] 14 M.I.A. 570—3 Sar.108—12 B.L.R. 396—17 W.R. 552.
(2) 85 P.R. 1901.
(3) [1921] 2 Lah. 243—64 I.C. 892.
(4) [1902] 24 All. 273—29 I.A. 70—4 Bom L.R. 276—6 C.W.N. 425—8 Sar. 213 (P. C.)
(5) [1913] 18 C.L.J. 559—18 C.W.N. 55—20 I.C. 810.
(6) [1876] 3 I.A. 259—26 W.R. 55. (P. C.

ancient, certain and reasonable, and being in derogation of the general rule of law must be construed strictly."

Bearing in mind the rule and the principles laid down in these cases we shall now proceed to examine and discuss the evidence which has been produced on behalf of the plaintiffs in order to see whether they have succeeded in proving that by a special custom obtaining among members of the family to which the parties belong the widow of a deceased proprietor is entitled merely to maintenance and not to a life estate according to the Hindu Law.

Mr. Ram Chand Munchanda, in support of his contention that by the special custom of the family of Surjan Singh a widow is entitled to maintenance only, has relied upon the following evidence :—

(*a*) Statements made by witnesses in the case of Narindar Singh, *v. Mussammat* Anand Kaur, the widow of Didar Singh.

(*b*) Statements of witnesses in this case ;

(*c*) Certain alleged instances in the family of Surjan Singh of widow's receiving maintenance only ; and.

(*d*) Instances in other *Sodhi* families of Anandpur.

We shall deal with each class of evidence *seriatim* :—

(*a*) *Mt.* Anand Kaur, the widow of Didar Singh, was in possession of Chak Guru. She adopted her daughter's son, Mehr Singh. In 1878 a suit was brought by Narindar Singh and Gajindar Singh, sons of Diwan Singh, and Har Narain Singh, and Ram Narain Singh, sons of Barjinder Singh the third son of Diwan Singh, for a declaration that *Mt.* Anand Kaur had no power to make the adoption to constitute Mehr Singh her successor to the property after her death. In this suit a large number of witnesses were examined to prove the custom relating to the right of a widow to succeed on her deceased husband's death. Copies of the statements of those witnesses have been produced as evidence in this case. They are found translated and printed in the paper book at pages 55 88. Objection was taken to the admissibility of those statements in evidence. Mr. Ram Chand Monchanda contended that the witnesses, copies of whose statements have been produced in this case, were dead and these statements were, therefore, admissible under clause (4) of S. 32 of the Indian Evidence Act According to that clause a statement of relevant facts made by a person, who is dead, is relevant when the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen. Now, it is clear that a controversy had already arisen when the witnesses made these statements in the case above mentioned. In the alternative Mr. Ram Chand relied on S. 33 of the same Act, but even this section does not make the statements relied upon admissible in evidence, because the *proviso* to that section lays down that a statement by a deceased witness is admissible only when the proceeding in which the statement was made was between the same parties or their representatives-in-interest. It is clear that the parties to this suit are not the same, nor are they their representatives-in-interest. Another condition laid down in the *proviso* is "that the questions in issue were substantially the same in the first as in the second proceeding." In the previous suit the right of *Mt.* Anand Kaur to a life interest was admitted. Her right to make an adoption was challenged, while she claimed an absolute interest in the property in her possession. Thus the question in issue in the suit of 1878 was entirely different from that arising in the present case. In the last resort the learned *vakil* relied on the provisions of S. 49 of the Evidence Act and argued that the statements of the witnesses were relevant as opinions of persons having special means of knowledge on the custom pleaded ; but the opinions relied upon, being contained in the statements of witnesses who are dead, cannot be received in evidence unless they are

admissible under the provisions of S. 32 or S. 33 of the Act. In our opinion it is extremely doubtful whether the statements are at all admissible in evidence. Moreover, the statements in question are quite worthless for the reason that they were obviously made by male members of *Sodhi* families against the interest of the weaker sex by persons who were interested in making those statements. We think that we are justified in ignoring those statements.

(*b*) Here again the statements are made by male members in their own interest and to the prejudice of the female members Some of the witnesses have spoken of instances in which the widows had received only maintenance, but all these instances took place at a time when either the witnesses were not born or they were very young. [After discussion of evidence the judgment proceeds.]

The oral evidence in such a case ordinarily is not of much importance and particularly that given in this case is utterly valueless.

(*c*) and (*d*) The decision of the case must, therefore, entirely depend on the evidence supplied by the instances cited in this case. The following nine instances have been relied upon on behalf of the plaintiffs-appellants :—

(1) Mt. Raj Devi, widow of Tilok Singh ;

(2) Mt. Rup Kaur, widow of Didar Singh ;

(3) Mt. Anand Kaur, widow of Didar Singh ;

(4) Mt. Gopal Kaur, widow of *Sodhi* Har Narain Singh ;

(5) Mt. Gobind Kaur, wife of Gajindar Singh ;

(6) Mt. Raj Devi, second widow of Gajindar Singh ;

(7) Mt. Partap Kaur, widow of Birjindar Singh, the mother of the plaintiff. Ram Narain Singh ;

These are the instances in the family of Surjan Singh. There are two instances from Khem Singh's family :—

(8) Mt. Aki and Mt. Puro, widows of Hira Singh ; and

(9) Mt. Narain Kaur and Mt. Tara Devi, widows of Isher Sing.

[After discussing the instances separately the judgment proceeded.]

At the foot of the *Shajra*, Ex. P. 123, a detail of the various customs governing the *Sodhis* of Anandpur is appended. Item No. 5 given therein is thus worded :—

"(5) According to the established custom a widow of a sonless proprietor is entitled to maintenance provided she bears good character."

A great deal of reliance was placed upon the *Shajra* in support of the alleged custom on behalf of the plaintiffs. It is very clear from this statement that no reference is made in it to the special family custom alleged in the plaint, nor does it appear whether the same rule is to be applied in the case of a widow of a separated sonless proprietor also. Moreover, as already pointed out in our judgment, the pedigree table was prepared at the instance of the plaintiff *Tika* Ram Narain Singh and, therefore, it cannot be a reliable piece of evidence. This is in fact evidence of an attempt to create a custom which never existed. The *onus probandi* being on the plaintiffs and they having failed to establish the alleged custom it is unnecessary to examine the instances of custom given in the evidence of the defendants. But in order to complete the whole history of the custom prevailing among the *Sodhis* of Anandpur we think it desirable to state the instances establishing the right of widows in the *Sodhi* families to a life estate in accordance with the rule of Hindu Law. These are eight instances mentioned in the judgment of the Court below and we shall deal with them *seriatim*. [Here again the judgment discusses each of the following instances & proceeds as follows.]

(1) Mt. Beant Kaur, the widow of Brji Ballab Singh

(2) Mt. Sada Kaur, the widow of Nihal Singh

(3) Mt Bhagwan Kuar, the widow of Raghbir Singh.

(4 & 6) Mt. Uttam Devi, widow of Dewa Singh and Mt. Khem Kaur, widow of Partap Singh.

(5) Mt. Jai Kuar, widow of Jiwan Singh.

(7) Mt. Mehtab Kuar, widow of Jassa Singh.

(8) Mt. Narain Devi, widow of Suraj Singh.

There are certain instances among the *Solhis* of other districts which go to show that the widows have a right to succeed to their husbands on their life interest. At pages 180-191 is printed a judgment of a case of *Solhis* of the Ferozepore District in which it was held that the plaintiff upon whom the *onus* rested had failed to prove a special custom whereby among *Jagirdar Khatri Solhis* of Ferozepore District a widow of a deceased proprietor was entitled merely to maintenance and not to a life estate in the landed property of her deceased husband. This judgment was upheld in appeal by the Punjab Chief Court and is reported as *Hukam Singh* v. *Bhagwan Devi* (8). In the instances cited on behalf of the defendants there were some *jagirdars* also. Therefore, the fact that the plaintiffs' kinsmen were *jagirdars* lends no support to his contention that among *jagirdars* a different custom prevails.

The result of our investigation is that the plaintiffs have failed to establish the special family custom set up by them and their suit has been rightly dismissed by the Court below. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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(8) 133 P. R. 1908—9 P.L.R. 1909—174 P.W.R. 1908—4 I.C. 642.

✱✱ 1924 LAHORE 123

Special Bench

SHADI LAL C. J. SCOTT SMITH AND ABDUL RAOOF, JJ.

Abdul Rashid ; In the matter of.

Mis. Civil A. No. 729 of 1922 ,Decided on 29th March 1923.

Legal Practitioner—Letters Patent (Lahore) Cl. 8—Conviction under Cr. L. A. Act is a reasonable cause—No regular procedure prescribed—Conviction need not subject the Vakil to general infamy.

A conviction unier S. 17 Sub, S. (1) of the Criminal Law Amendment Act (XIV of 1908) constitutes a reasonable cause within the meaning of Cl. 8 Letters Patent Lahore for the removel or suspension from practice of an advocate or vakil. Strictly speaking proceedings under Cl. 8 are neither civil suits nor criminal prosecutions. The High Court exercise a special jurisdiction over legal practitioners in pursuance of the authority conferred upon it by the Letters Patent or an Act of the Legislature and has inherent power to apply such rules of procedure as may ensure a fair trial of the matter requiring adjudication. What is essential is that the parties concerned should have a proper notice and a reasonable opportunity to be heard. The propriety in law or in fact of the conviction cannot be questioned in the proceedings taken by the Court in the exercise of its disciplinary jurisdiction 22 A. 49 P. C. Ref. Advocate or Vakil may be struck off the rolls for an offence which has no relation whatsoever to his character as a legal practitioner but the mere circumstance that he has been convicted of an offence does not make it imperative on the Court to remove or suspend him from practice, It is not necessary that the Act of a legal practitioner which is relied upon for striking his name off the roll should have subjected him to anything like a general infamy or imputation of bad character. 44 B. 418 F. B., 49 C. 732 and 49 C. 815 P.C. Rel.

[P 124 C 2, P 125 C 1, 2

Jai Lal—for the Crown.

A. Rashid—In person.

Shadi Lal, C. J.—Mr. Abdul Rashid, an Advocate, and Mr. Duni Chand, a Vakil, of this Court have been called upon to show cause why they should not be removed or suspended from practice under the powers conferred upon the Court by clause 8 of the Letters Patent. It appears that on the 12th December 1921 an association called " National Volunteers Association " was declared to be an unlawful association under S. 15, subsection (4), clause (b) of the Criminal Law Amendment Act, XIV of of 1908, and that on the 23rd January 1922 both the respondents were convicted of being members of that Association and sentenced under S. 17. sub S. (1) of the aforesaid Act, to rigorous imprisonment for six months each.

The judgment of the Magistrate shows that the members of the Association had devoted their attention chiefly to picketting liquor shops of Ambala, and that on the morning of the 23rd January a party of the National Volunteers carrying some flags and headed by the respondents went to the District Courts at Ambala where an auction of the liquor licenses was to be held. The respondents were invited by the Deputy Commissioner to sit on the platform where

the bidding was to take place, and they accepted this invitation and asked their followers to withdraw to a place at a short distance. The liquor licenses were then offered for sale, but no person came forward to make a bid. After this infructuous proceeding the Deputy Commissioner suggested to the respondents that the volunteers should surrender their flags, but he was told that they were not prepared to do so. Thereupon the District Magistrate arrested the respondents, and, after recording the evidence for the prosecution, pronounced judgment that very day convicting them of an offence under S. 17 (1) of the Act.

Now, clause 8 of the Letters Patent empowers this Court "to remove or to suspend from practice on reasonable cause" an Advocate or a Vakil, whose name is borne on the rolls of the Court, and the question arises whether a conviction under S. 17, sub-S. (1), of the Criminal Law Amendment Act constitutes a reasonable cause within the meaning of the above clause. Before adjudicating upon this matter it is necessary to notice a contention which has been pressed by Mr. Duni Chand. He challenges the propriety of the conviction and urges that neither he nor his colleague was afforded by the Magistrate an opportunity to submit a written statement in answer to the case set up by the prosecution. The record of the Magistrate, however, shows that he as well as his friend admitted his membership of the National Volunteers' Association, and it is beyond dispute that that Association had been declared to be an unlawful Association. The Magistrate no doubt acted hastily but his action cannot in the circumstances be said to have caused any prejudice to the accused.

There appears to be some misapprehension as to the nature and the scope of the present proceedings, and it is necessary to point out that these proceedings cannot be regarded as criminal in their character. It is true that they are sometimes described as *quasi* criminal, but only for the reason that they may result in penalties. They are not of a criminal nature in the sense that the rules of procedure applicable to a criminal trial, such as the filing of a written statement by the accused, are applicable to them. Strictly speaking, these proceedings are neither civil suits nor criminal prosecutions. The High Court exercises a special jurisdiction over legal practitioners in pursuance of the authority conferred upon it by the Letters Patent or an Act of the Legislature, and has inherent power to apply such rules of procedure as may ensure a fair trial of the matter requiring adjudication. What is essential is that the parties concerned should have a proper notice and a reasonable opportunity to be heard. These requirements have undoubtedly been fulfilled in the present case.

Coming now to the question whether the propriety of the conviction can be impugned in these proceedings, I find that the position of a legal practitioner convicted of a criminal offence was clearly and tersely described in an English case decided as far back as 1778. In the case of *Exparte Brounsall* (1), Lord Mansfield says :—

"This application is not in the nature of a second trial or new punishment. But the question is whether after the conduct of this man (*i. e.*, in stealing the guinea) it is proper that he should continue a member of the profession which should stand free from all suspicion * * * * and it is on this principle that he is an unfit person to practise as an Attorney. It is not by way of punishment, but the Courts in such cases exercise their discretion whether a man, whom they have formerly admitted, is a proper person to be continued on the roll or not. Having been convicted of felony we think the defendant is not a fit person to be an Attorney."

I am aware of the judgment of the Allahabad High Court in the case of *Durga Charan* (2) in which the pleader convicted of an offence was allowed to go behind the conviction in order to show that he had committed no offence at law. But this view has now been expressly overruled by the

(1) [1778] 2 Cowper 829.
(2) [1885] 7 All. 290—(1885) A.W.N 48. (F. B.)

Privy Council in *Rajendra Nath's* case (3).

In their judgment their Lordships of the Privy Council state in distinct terms that the propriety in law or in fact of the conviction cannot be questioned in the proceedings taken by the Court in the exercise of its disciplinary jurisdiction.

It is true that the respondents did not offer any defence to the charge brought against them, nor did they cross-examine the witnesses for the prosecution; and it may be urged that the rule in *Rajendra Nath's* case (3) was not intended to apply to a conviction of this character which proceeds upon what is practically an *ex-pârte* version. There can, however, be no doubt that the prosecution cannot be held responsible for this result. It appears that this contention was raised, but not accepted by the Allahabad High Court, in the case of a legal practitioner who had been convicted without making any defence to a charge under S. 153. A of the Indian Penal Code, vide *In the matter of Tasalduq Ahmad Khan Sherwani* (4).

While it is not permissible to go behind the conviction, there can be no doubt that the Court is not only entitled but bound to inquire into the nature of the crime in order to decide whether the offence was of such a character as to render a person guilty of it unfit to remain a member of the profession. The decided cases have placed it beyond doubt that an Advocate or a Vakil may be struck off the rolls for an offence which has no relation whatsoever to his character as a legal practitioner, but the mere circumstance that he has been convicted of an offence does not make it imperative on the Court to remove or suspend him from practice. As I pointed out to the learned Government Advocate at the hearing, suppose a legal practitioner is convicted of driving a motor car at an excessive speed or of some other offence of a trifling character, no Court would ever think of taking any disciplinary action against him on the other hand, there may be an offence which implies a defect of character unfitting the person guilty of it to be a member of the legal profession.

I will not attempt to suggest any precise rule which would distinguish cases of venial offences from those belonging to the other category; nor is it desirable to crystalize the Court's discretion into rigid rule. As observed by their Lordships of the Privy Council in *Sarbadhicary's case* ( ). "The intention of the crown was to give a wide discretion to the High Court in regard to the exercise of this disciplinary authority."

It is true that the offence committed by the respondents does not imply any moral baseness or deprivity of character; but the decided cases, to which I shall refer presently, do not show that it is necessary that the act of a legal practitioner, which is relied upon for striking his name off the roll, should have subjected him to anything like a general infamy or imputation of bad character. It must be remembered that we are dealing here not with an ordinary citizen, but with a legal practitioner, who, just as he enjoys special privileges, is subject to peculiar obligations not shared by ordinary citizens. It has repeatedly been laid down that he is an officer of the Court, and his position as such has been clearly defined by Lord Blackburn in the case of *In re Hill* (6).

"I think when we are called upon in exercise of an equitable jurisdiction to order an attorney to perform a contract to pay money, or to fulfil an undertaking, there we have jurisdiction only if the undertaking or the contract is made in his character of attorney, or so connected with his character of attorney as to bring it

(3) [1900] 22 All 49—26 I.A. 242—3 O.W.N. 736. (P. C.)

(4) 1922 All. 140—44 All. 352—20 A.L.J. 201—23 Cr. L.J. 128—65 I.C. 560. (F. B.)

(5) [1907] 29 All. 95—34 I. A. 41—4 A. L. J. 34—9 Bom. L. R. 9—17 M. L. J. 74—11 C. W. N. 273—5 C. L. J. 130—2 M. L, T. 1—5 Cr. L.J. 152. (P. C.)

(6) [1868] 3 Q.B. 543—9 B. & S. 481—37 L. J., Q. B. 295—18 L. T. 564—16 W.R. 1061.

within the power of the Court to require that their officer should behave well as an officer. But where there is a matter which would subject the person in question to a criminal proceeding, in my opinion a different principle must be applied. We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them upon the same principles as if we were considering whether or not a person is fit to become an attorney. If he has previously misconducted himself we should consider whether the circumstances were such as to prevent his being admitted, or whether he had condoned his offence by his subsequent good conduct, the principle on which the Court acts being to see that the suitors are not exposed to improper officers of the Court."

Now, if an Advocate or a Vakil deliberately joins, or continues to be a member of an association which has been declared to be unlawful under the provision of a statute, his conduct attracts the operation of the rule enunciated by Lord Blackburn. He may not like a particular measure, and he is entitled to protect against it even vehemently and agitate for its repeal by all lawful means. But so long as it is the law of the land, it is his duty to obey it and not to act in defiance of its provisions. It is unnecessary to pursue this discussion any further, because I find that the cases decided by the High Courts in India leave no doubt on the subject. Taking them in the chronological order, we have, first, the case of what is called the 'Satyagraha pledge' *In re Jivanlal Desai* (7). A full Bench of the Bombay High Court held in that case that the act of certain legal practitioners in signing a pledge "to refuse civilly to obey the Anarchical and Revolutionary Crimes Act and such other laws as a committee to be hereafter appointed may think fit" brought them within the disciplinary jurisdiction of the High Court. Then there is the judgment of the Calcutta High Court in *Emperor* v *Rajani Kanta Bose* (8) where three Judges of that Court dealt with the case of certain pleaders who had joined a *hartal* and in furtherance of that movement absented themselves from the Courts and consequently neglected to discharge their duties towards their clients. The Judges unanimously came to the conclusion that the conduct of the pleaders rendered them liable to disciplinary action by the High Court. Lastly, the Patna High Court has recently decided a case very similar to that before us. It appears that a Vakil, Babu Madhava Singh, was convicted of an offence under S. 17 (2) of the Criminal Law Amendment Act; and that when his conduct came up for consideration under clause 8 of the Letters Patent, the Judges had no hesitation in holding that the conviction constituted a reasonable cause for suspending the Vakil from practice. We have also the case of a pleader in the Central Provinces who had organised an agitation against the payment of a tax and was bound over by a Magistrate to keep the peace for one year. The Court of the Judicial Commissioner dismissed the pleader, holding that his conduct brought him within the purview of S. 13 (f) of the Legal Practitioners Act, and their Lordships of the Privy Council declined to grant leave to appeal against that judgment, *vide*, *Shanker Ganesh Dabir* v. *Secretary of State for India* (9),

These authorities, which in principle are indistinguishable from the present case, show that the question which we are called upon to determine, is by no means *res integra*; and I, accordingly, hold that the conviction of the respondents has rendered them liable to be dealt with under clause 8

(7) [1920] 44 Bom. 418—22 Bom. L.R. 13—21 Cr. L.J. 151—54 I.C. 679. (F. B.)

(8) 1922 Cal. 515—49 Cal. 732—26 C.W.N. 589—35 C.L.J. 356—24 Cr. L.J. 33—71 I. C. 81. (S. B.)

(9) 1922 P. C. 351—49 Cal. 845—49 I. A. 319—31 M. L. T. 192—44 M. L. J. 32—27 C. W. N. 343—37 C.L.J. 136—25 Bom. L.R. 131—18 N.L.R. 176—69 I.C. 367. (P.C.)

of the Letters Patent. Considering, however, that these are the first cases of the kind that have come before this Court ; and that Mr. Duni Chand has assured us that neither he nor his comrade had the slightest intention to cause a breach of the peace, and that the object aimed at by them was to promote the cause of total abstinence or temperance, an object which pursued in a lawful manner is not only a perfectly legitimate but a laudable one, I would take no action against them other than giving them a warning.

Scott-Smith, J.—I concur on all points

Abdul Raoof, J.—I also agree.

Warning given.

1924 LAHORE 127

LE ROSSIGNOL AND ZAFAR ALI, JJ.

Amir Khan and others—Defendants—Appellants.

v

Minh Mal and others—Plaintiffs—Respondents.

M. S A. No. 2033 of 1918, Decided on 15th November 1 2?, fro n the order of the D. J., Jullundur, D/- 30th April 1918, reversing that of the Hon. Sub. J. Jullun lur, D/-20th August 1917.

Punjab Tenancy Act, S. 57—Joint tenants, even though no common ancestor, succeed by survivorship where partition is for cultivation., 109. P. R. 1891, F. B. Full.

The principle to be followed as regards the landlord, is that the joint tenants of an occupancy holding, even though it was not held by their common ancestor, are to be regarded as a single tenant, and that as long as any of them, or the descendants of any of them, survive, the landlord cannot claim the share of any tenant whose line has died out. Where the joint tenants divided the holding for purposes of cultivation or in order to raise money.,

Held, this does not indicate that the holding had, as a matter of fact, been finally partitioned. [P 128 C 1]

Fakir Chand—for Appellants.

Har Gopal for *B. T. Chand*—for Respondents.

Judgment.—This second appeal arises out of a suit in which the plaintiffs, claiming to be the successors of the two original co-sharers in an occupancy holding, sued to redeem certain fields of that holding which one of the two said co-sharers, now dead, had mortgaged to the landlords themselves. The facts bearing on the points argued before us are briefly as below ;--

One Chanda Singh was originally the sole tenant of the occupancy holding in question but he associated with himself in the tenancy his collateral Labh Singh, the father of the plaintiffs, and consequently both were entered in the Revenue Records as joint tenants in equal shares. However, though the holding remained joint, they separated in cultivation so that some fields were cultivated by one and some by the other and they both individually as well as jointly affected several mortgages by which some of the fields were mortgaged from time to time Chanda Singh mortgaged much more than his own share. The mortgage in question is one of the mortgages effected by Chanda Singh. Labh Singh died first and was succeeded by his sons, the plaintiffs. On the death of Chanda Singh, the plaintiffs were entered in the Revenue Records as tenants of the entire holding. Thus they claimed to have succeeded by right of survivorship to Chanda Singh's share in the holding and to have become entitled in this way to redeem to mortgage effected by him. The defendants pleaded, *inter alia*, that Chanda Singh and Labh Singh were not joint tenants even if they were tenants-in-common that, as a matter of fact, the holding had been partitioned as evidenced by separate possession and mortgages, and that this being so the rule of succession by survivorship was not applicable in this case. It was further contended that before suing for redemption the plaintiffs should have obtained a decree from a Revenue Court declaring that they were occupancy tenants as successors to the share of Chanda Singh.

The trial Court dismissed the suit on arriving at the conclusion that the holding had been partitioned. On appeal the learned District Judge decided that separation in cultivation and alienations made by the co-sharers were not sufficient to establish final partition of the holding, and that the holding having remained joint, the plaintiffs were at present

tenants of the whole of it and so could not sue to redeem the fields that had been mortgaged by Chanda Singh.

The landlords appeal, and their Counsel has strenuously urged before us the pleas referred to above, but we are of opinion that his arguments carry no force. To take the last point first the plaintiffs were recognised by the Revenue Authorities as lawful successors of Chanda Singh. As stated above, according to the mutation sanction on the death of Chanda Singh they are recorded as the occupancy tenants of the entire holding. Therefore, no Revenue Court's decree is needed to declare them occupancy tenants of Chanda Singh's share in the holding.

As regards the main contention that there was no joint tenancy the argument is based on the assumption that joint tenancy which the Punjab Custom recognises is the same as the estate known as joint tenancy to English Conveyancers. In *Mohru* v. *Mutsaddi* (1), it was explained that the principle to be followed as regards the landlord, is that the joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as a single tenant, and that as long as any of them or the descendants of any of them, survive, the landlord cannot claim the share of any tenant whose line has died out." This being the guiding principle, it cannot be gainsaid with any show of reason that the plaintiffs being the survivors of the two joint tenants Labh Singh and Chanda Singh now represent the entire estate and have occupancy rights in the entire holding.

The contention that the holding had been partitioned can be of no avail because, obviously, what the joint tenants did was to divide the holding for purposes of cultivation or in order to raise money, but this does not indicate that the holding had, as a matter of fact, been finally partitioned. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

(1) 109 P. R. 1894 (F. B.)

1924 LAHORE 128

ZAFAR ALI, J.

Bhedu and others—Accused—Petitioners.

v.

The Crown—Respondent.

Criminal Rev. No. 1175 of 1922, Decided on 8th Dec. 1922 reported by the S. J. Karnal Dn. D/-14-8-1922.

Criminal P. C., S. 133—Evidence—Previous conviction of petitioner under S. 341 Penal Code is not sufficient.

Where to pass an order under S. 133 Cr. P. C. for the removal of a building on the ground that it obstructed a village street, the fact that the petitioner had been previously convicted under S. 341 Penal Code, in respect of the same building by a Magistrate of the third class and the conviction had been upheld by the Dt. Magistrate had been relied on.

Held: The Magistrate should have proceeded *de novo* as in summons cases. 32 P. R. 1917 Cr. Ref. [P. 128 C. 2]

Facts.

The Facts of this case are as follows:—

The Sub-Divisional Magistrate, Kaithal, purporting to act under S. 133 of the Code of Criminal Procedure, has ordered the petitioners to remove a building on the ground that it obstructs a village street.

Order of Reference.

The only evidence produced before the Magistrate was a copy of the map of the village prepared at the Settlement of 1854 and this was produced by the petitioners themselves. The Magistrate has relied on the fact that the petitioners have been previously convicted under S. 341, Indian Penal Code, in respect of the same building by a Magistrate of the third class and that the conviction had been upheld by the Dist. Magistrate.

These former proceedings, however, cannot be relied upon. After the Magistrate had summoned the petitioners on the complaint of the respondents, he had to proceed *de novo* as in a summons case. *Crown* v. *Sita Ram* (1) and the rulings quoted therein are authority for this view.

As there is no evidence on the Magistrate's record to support his order, I, therefore, recommend that it be set aside.

Judgment.—The order under S. 133 Cr. Pro. Code is not based upon any evidence. Therefore I set it aside.

Order set aside

(1) (1917) 32 P. R. Cr. 1917.

1924 LAHORE 129

SHADI LAL, C. J. AND FFORDE, J.

Faujdar Khan—Plaintiff-Appellant

v.

Abdul Samad Khan — Plaintiff — Respondent.

F. A. Appeal No. 2740, of 1918, Decided on 13th July 1923, from the judgment of the Senr. Sub. J. Jullundur D/-16th July 1918.

T. P. Act, S. 60—Period of 51 years together with interest on mortgage-debt without deduction for rents and profits is a clog—Transaction must be viewed as a whole.

On the 26th August 1896, the plaintiff's brother, on behalf of himself and as the guardian of the Plaintiff who was a minor at that time, mortgaged the land in dispute for 14,000. The mortgage was with possession, and it was stipulated between the parties that mortgagees would recover interest on the principal sum at the rate of 7½% per annum and that the mortgagors would not be entitled to get credit for the rents and profits to be realised by the mortgagees. The mortgagees were at the same time empowered to spend as much money as they liked on the improvement of the property, and, while they were entitled to recovor interest on the cost of improvements at 6% per annum, they were not liable to account for the enhanced income resulting from the improvements. Lastly the mortgagors were precluded from redeeming the property within the period of 45 years commencing from 1909. In a suit for redemption by plaintiff after his brother's death, *Held*, that the bargain was an unconscionable and oppressive one, and that the plaintiff was consequently entitled in equity to relief against the onerous terms entered into by his brother. [P. 130 C. 2.]

In order to determine whether a covenant is a clog on redemption or not, the transaction must be viewed as whole. [P. 130 C. 1.]

S. Niaz Muhammad and *S. U. Baksh*—for Appellant.

Lala Badri Das—for Respondent.

Judgment—This appeal arises out of an action for redemption and the main question debated before us is whether the plaintiff should be allowed to redeem the property before the expiry of the period within which the mortgagors were prevented by the contract from paying off the mortgage debt and recovering the property from the mortgagees. The facts which are relevant to the question are briefly these. On the 26th of August, 1896, the plaintiff's brother, Abdul Rahman, on behalf of himself and as the guardian of the plaintiff who was minor at that time, mortgaged the land in dispute for Rs. 14,000 to Faujdar Khan and his three brothers. The mortgage was with possession, and it was stipulated between the parties that the mortgagees would recover interest on the principal sum at the rate of 7½ % per annum and that the mortgagors would not be entitled to get credit for the rents and profits to be realized by the mortgagees. The mortgagees were at the same time empowered to spend as much money as they liked on the improvement of the property, and, while they were entitled to recover interest on the cost of improvements at 6% per annum, they were not liable to account for the enhanced income resulting from the improvements. Lastly the mortgagors were precluded from redeeming the property within the period of 45 years commencing from 1902. In other words the redemption could not take place before 1947, and even then if the mortgagors could pay, not only the principal mortgage money with interest thereon, but also the total amount spent on improvements and the interest on that amount.

Abdul Rahman has since died, and the plaintiff, who is now *sui juris* has brought the present action for redemption. The trial Judge had, upon an examination of all the relevant terms of the transaction held that the bargain was an unconscionable and oppressive one and that the plaintiff is consequently entitled in equity to relief against the onerous terms entered into by his brother. We have bestowed our careful consideration to the arguments advanced by the learned Counsel on both sides and are of the opinion that the conclusion reached by the learned Judge is correct.

There can be no doubt that the mortgagors were prohibited from redeeming the property for a period of 51 years and that, though this period is excessive, the term cannot *per se* render the bargain an unconscionable one. The decided cases show that periods restricting redeemption are much longer in this

country than in England, and that long terms have sometimes been upheld. The decision of the case before us depends, however, not solely upon the long term within which redemption was prohibited, but upon the question whether that term taken along with other stipulations in the contract had the effect of rendering redemption prohibitive or practically impossible. In order to determine whether a covenant is a clog on redemption or not, the transaction must be viewed as a whole.

Now, it is beyond dispute that the contract between the parties conferred upon the mortgagees an unlimited power to make improvements. They could spend as much money as they liked, and they were entitled also to charge interest on the sum expended by them without making any deduction for the value of the produce. And when we add to these unusual stipulations the fact that the interest was to run for the entire period of the mortgage we cannot but come to the conclusion that it was wholly within the power of the mortgagees to make it impossible for the mortgagors to redeem their property.

The evidence on the record shows that Abdul Rahman, when he entered into the transaction, was only 25 years old, and that he was heavily involved in debts and consequently stood in need of money. It is unnecessary to examine the correctness of the Sub-Judge's finding that the plaintiff has not succeeded in showing that the transaction was brought about by undue influence, because we are satisfied that the mortgagees drove a hard bargain and that Abdul Rahman agreed to their terms because he wanted money in order to pay off his creditors. The observations of Lord Henley *in Vernon* v. *Bethell*, which were quoted with approval by Lord Macnaghten *in Samuel* v. *Jarrah Timber and Wood Paving Corporation* (1) are apposite here. "This Court, as a Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance made absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them."

It is contended on behalf of the appellants that the mortgagees have not so far spent a very large sum in making improvements, but this contention is, in our opinion, beside the point. The authority to spend such amount as they may think fit has undoubtedly been conferred upon them, and the fact that they have not so far utilised that authority to the fullest extent is due to the dispute among themselves about the partition of their joint property. It appears that the bargain in question has now been allotted to two of the mortgagees, and if the suit for redemption is dismissed they would be free to utilise to the fullest extent the extremely wide power given to them by the contract.

The covenants in the mortgage deed referred to above including that of postponing redemption for a period of 51 years would certainly result in making redemption very difficult, if not practically impossible, at the end of the term; and the Sub-Judge in the exercise of his equitable jurisdiction was, therefore, justified in relieving the plaintiff against the oppressive terms of the contract and in granting redemption on reasonable terms before the mortgagees could render the equity of redemption practically nugatory.

With regard to the cost of improvements the appellants have wholly failed in proving that they expended any sum in excess of that allowed by the Sub-Judge. The appeal, therefore, fails and is dismissed with costs.

(1) [1904] A.C. 323—73 L.J., Ch. 526—90 L.T. 731—52 W.R. 673—11 Manson 276—20 T.L.R. 536.

The plaintiff has filed cross-objections challenging the award of interest on the cost of improvements, but considering that the amount allowed by the Sub-Judge is not excessive we are not prepared to interfere with the conclusion arrived at by him. We accordingly reject the cross-objections with costs. *Appeal and cross-objections dismissed.*

✱ 1924 LAHORE 131

LE ROSSIGNOL AND MARTINEAU, JJ.

Ganga Puri—Plaintiff—Appellant.

v.

Mohan Lal and others—Defendants—Respondents.

Civ. A. No. 527 of 1919, Decided on 27th February 1923, from the decree of Sub. J, Lahore, D/-13th December 1918, dismissing the plaintiff's claim.

Civil P. C., S. 92—Suit to protect private right as Mahunt is not covered by the section.

Where a plaintiff sues, not for the purpose of protecting the interest of the public but in order to enforce his own right as a Mahant or trustee, the suit does not fall within the purview of S. 92. 33 Cal. 789, 808, Foll. [P. 131 C. 2]

M. S. Bhagat and *Amin Chand*—for Appellant.

Tirath Ram—for Respondents.

Martineau, J.—The property in dispute in the present case was also the subject matter of a previous suit which was brought by three barbers of Lahore on behalf of the barber community for the ejectment of Shiv Charan, who was the manager of the property. Shiv Charan died during the pendency of that suit, and his minor sons and widow were brought on the record as his representatives. The first Court decided that case in the plaintiffs' favour, but on appeal the Divisional Judge, Mr. Agnew, on the 18th February 1914, dismissed the suit, holding that the property was *wakf*, that Shiv Charan was a constructive trustee, and that under S. 92 of the Civil Procedure Code, the suit was not maintainable without the permission of the Collector. The persons who had brought that suit and one other then applied to the Collector for permission to bring a suit, but they subsequently withdrew th application.

In the present case the defendants are the same persons who were impleaded as Shiv Charan's representatives in the previous case, but the plaintiff is one Bhawani Gir, who alleges that after the death of Shiv Charan he was appointed by the brotherhood of the barbers of Lahore as *Mahant* of the institutions to which the property is attached, that he is entitled to possession of the property, and that the defendants are trespassers.

The Subordinate Judge has held that the plaintiff, being a nominee of the barber community, can have no greater rights than the community itself on whose behalf the former suit was brought, and that as the former suit was continued against the present defendants after Shiv Charan's death, and it had been admitted in the application to the Collector that the defendants were *Pujaris*, and representatives of Shiv Charan, the plaintiff cannot now treat them as trespassers. He has accordingly dismissed the suit as being, like the former one, not maintainable without the Collector's permission. The plaintiff has appealed and the appeal must succeed.

The plaintiff is suing, not for the purposes of protecting the interests of the public, but in order to enforce his own right as a *Mahant* or trustee, and a suit of this nature does not fall within the purview of S. 92 of the Civil Procedure Code, as was held by Woodroffe J. in *Bulree Dass* v. *Chuni Lal* (1), where the learned Judge said:—

"In my opinion the present suit, so far as it is brought by the plaintiffs in their individual capacity as trustees to enforce their individual claim to be such trustees of the temple in suit, is not within the scope of the section. The public may be interested in seeing that their alleged appointees have the administration of this trust, but this right of the public and of the plaintiffs, *qua*

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(1) [1906] 33 Cal. 789—10 C. W. N. 581.

members of the public, is not the same as the right of the plaintiffs considered not as members of the public but as trustees suing to enforce their own personal right of management."

Further, it is admitted that S. 92 of the Civil Procedure Code does not apply to a suit brought against trespassers, as the plaintiff alleges the defendants to be, and we cannot agree with the lower Court that the plaintiff is in any way precluded from suing them as trespassers. In the first place, he was not a plaintiff in the former suit nor did he join in making the application to the Collector, and in the second place the present defendants were impleaded in the former suit merely as the legal representatives of Shiv Charan and not in their personal capacities.

Mr. Agnew's judgment is no bar to the present suit, and we hold that the suit is not one to which S. 92 of the Civil Precedure Code applies. We accordingly accept the appeal, set aside the decree of the lower Court, and remand the case to that Court under Order 41, rule 23, Civil Procedure Code, for decision on the merits. The Court fee paid on the memorandum of appeal will be refunded and other costs will be costs in the case.

Appeal accepted, case remanded.

1924 LAHORE 132

MARTINEAU AND MOTI SAGAR, JJ.

Benarsi Das—Appellant

v.

Gopi Chand and others — Respondents.

C. A. No. 1138 of 1919, Decided on 2nd May 1923, from the decree of S. Sub. J., Ambala, D/-27the February, 1919.

Civil P. C., S. 73 (1) (b)—Prior incumbrancer is not affected by private alienation under C. P. C., O. 21, R. 83.

Under S. 73 where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. But not so in the case of a private alienation where there is obsolutely no necessity to refer to the prior incumbrancer.

[P. 135 C, 1]

Manohar Lal — for Appellant.

Shamair Chand, Sagar Chand, and *Lala Faqir Chand* — for Respondents.

Moti Sagar, J.—This appeal arises out of a suit by a mortgagee to recover Rs. 5,300, principal and interest, on the basis of a mortgage-deed, dated the 24th of January 1902. Defendants 1 and 2 are the successors-in-interest of the original mortgagors who are now dead, while defendants 3 to 6 are the representatives of the subsequent mortgagees of some of the properties held under mortgage by the plaintiff. The properties mortgaged consisted of two houses, one shop and a garden in the town of Jagadhri, and the plaintiff was also given a second lien over 31,000 sleepers, the first lien holder being one *Lala* Raghu Mal of Delhi. The plaintiff's case is that the subsequent mortgage in favour of defendants 3 to 6 is invalid and that his rights as a prior mortgagee are not in any way affected by this subsequent mortgage in favour of the latter. The plaint recites that a total sum of Rs. 20,074-4-9 was due to the plaintiff, that defendants had paid in all a sum of Rs 14,755-10-0 and that a balance of Rs 5,318-10-9 still remained due. Out of it the plaintiff remitted Rs. 18-10-9 and prayed that a decree for Rs. 5,300, principal and interest, forming a charge on the property mortgaged under the aforesaid deed may be passed with costs and interest up to the date of payment in his favour against the defendants. The suit was resisted by the defendants on various grounds, but their main contentions were.—

(1) That the suit was barred under Order II rule 2 Civil Procedure Code, inasmuch as the plaintiff had previously instituted a suit in respect of the same cause of action and had omitted to include the present claim in that suit;

(2) That the plaintiff was estopped from enforcing the mortgage, inasmuch as he, in his capacity of the guardian of his nephew Hari Kishan, minor, had given up his lien on the mortgaged property and had given consent to the sale of the property free from mortgage;

(3) That the accounts filed by the plaintiff were not correct and that the sum of 5,300 claimed on the footing of the mortgage was not due.

The trial Court first dismissed the suit on the ground that it was barred under Order II, rule 2 of the Civil Procedure Code, but this order was subsequently set aside by the Chief Court on the 1st of May 1918 and the case remanded to the Court of first instance for a decision on the merits. The learned Senior Subordinate Judge has again found in fovour of the defendants and has held that the plaintiff had given up his lien on the mortgage property and that he was not entitled to any priority as against defendants 3 to 6. As to the accounts, the finding of the learned Senior Subordinate Judge is that they are correct and that the sum of Rs. 5,300 claimed by the plaintiff is really due. A decree for Rs. 5,300 has accordingly been passed in favour of the plaintiff against the defendants with a charge on the property mortgaged, but it has further been ordered that the property shall be subject to a prior charge of Rs. 4,500 found to have been advanced by defendants 3 to 6 to defendants 1 and 2 in good faith.

Against this decision the plaintiff has preferred this appeal, which has been argued before us by Mr. Manohar Lal on behalf of the plaintiff-appellant and by Mr. Shamair Chand for the defendants-respondents. Cross-objections have also been filed by defendants 1 and 2, and it has been contended on their behalf that the claim as to their personal liability is barred by limitation and that their other properties are not liable for the plaintiff's claim.

It appears that the plaintiff's nephew Hari Kishen obtained a money decree against the predecessors-in-interest of defendants 1 and 2 on the 7th of April 1903, and in execution of that decree he attached certain properties which were held under mortgage by the plaintiff. Hari Kishen was a minor and was represented in that litigation by his next friend Ganeshi Lal who was the father of the present plaintiff Banarsi Das. Ganeshi Lal died in May 1906, and shortly after the name of Benarsi Das appears to have been substituted in his place as the next friend of the minor.

On the 25th of July 1906 the executing Court passed an order that the mortgagee should specify his lien on the various properties attached and ordered to be sold in execution of the decree. On the 8th of December 1906, one Bishamber Das, an agent of the decree-holder, who was also employed by the plaintiff as his agent for the purposes of Court work, gave a petition to the effect that the house property under mortgage be sold free of mortgage on the condition that the sale proceeds should first be applied towards the discharge of the mortgage debt and that the balance, if any, be made over to the decree-holder in satisfaction of his decree. On the 15th of January 1907 the judgment-debtors applied to the Court for permission to raise money by private alienation, and on the 23rd of January 1907 Bishambar Das, on behalf of the decree-holder granted them one and a half month's time for this purpose. The judgment-debtors were unable to raise the money, and it was ordered that the sale should take place on the 21st of April, 1907. On the 13th of April, 1907, the judgment debtors again applied for permission to raise money by private sale and on the 20th of April 1907, Bishamber Das again agreed to give one and a half month's further time for the said purpose. The case was fixed for the 5th of June, 1907, but as the judgment-debtors were unable to raise money the sale was advertised for the 17th of July 1907. On the 24th of July 1907, Bishambar Das stated that the property advertised for sale might be sold free of mortgage. The sale took place on the 11th of November, 1907, and the 14th of December, 1907, was fixed for confirmation of the said sale and for

disposal of certain objections filed by the judgment-debtors. On the 16th of November, 1907, the judgment-debtors again applied for permission to effect a private alienation, as it was stated that the price obtained in the auction sale was inadequate and much below the market value. On the 6th of December 1907, Bishamber Das, the decree-holder's agent, again agreed to give one month's time to the judgment debtors on the condition that the sale proceeds be deposited in Court. The judgment debtors thereupon mortgaged the properties in suit to Tulsi Ram, defendant No. 5, and a sum of Rs. 4,500 obtained by means of this private alienation, was paid into Court on the 8th of January 1908. On that day the plaintiff, Banarsi Das, reiterated his request that his mortgage-debt might first be discharged and the balance, if any, credited towards the satisfaction of the decree. The case was fixed for the 20th of January 1908, and on that day the Court ordered that the whole of the sum deposited in Court be paid to the decree-holder in part satisfaction of his decree. The decree-holder, however, failed to withdraw this money from the treasury, and it remained deposited in Court till December, 1908. On the 20th of November, 1908, the plaintiff again made an application to the Court, stating that he had not given up his lien over the mortgaged property, and that the sum deposited in Court should be handed over to him in payment of his mortgage debt, and that the decree-holder had no right to this money until his (plaintiff's) claim was satisfied in full. On the 4th of December 1908, the plaintiff repeated his application of the 20th of November 1908, and stated that the mortgage in favour of defendant No. 5, Tulsi Ram, was fictitious and that his rights as a prior mortgagee were not in any way affected by this subsequent mortgage, which was effected without his consent and knowledge. On the 9th of December 1908, the sum of Rs. 4,500 deposited in Court was paid to the decree-holder's agent without any adjudication being arrived at on the question of the plaintiff's rights to recover this money as a prior mortgagee.

On the 28th of August 1912 the present suit was instituted and the sole question for determination now is whether the plaintiff had given up his lien over the mortgaged properties. The learned Senior Subordinate Judge has found that the statement of the plaintiff's agent on the 24th of July 1907 that the property be sold free of mortgage, and his conduct on the 20th of January 1908 in not raising any objections against the payment to the decree-holder, were tantamount to a giving up of his mortgage lien. He holds that Tulsi Ram, defendant No. 5, believed in good faith that the property was free of mortgage and that, acting on the representations of the plaintiff's agent that the property be sold free of mortgage, he advanced Rs. 4,500 to the judgment-debtors. In our opinion the view taken by the learned Senior Subordinate Judge is quite erroneous and cannot be accepted. We do not find anything in the conduct of Bishambar Das, the decree-holder's agent, or of the plaintiff himself giving rise to an inference that the plaintiff ever intended to give up his lien over the mortgaged properties. On the contrary, from the statements and the applications made from time to time it is clear that a discharge of the mortgage debt was always insisted upon and that the rights of the decree-holder were always subordinated to those of the plaintiff. The consent given by the plaintiffs to the sale of the property free of mortgage was also subject to the condition that the mortgage debt would first be discharged, and we do not see how in the face of the numerous applications on the record to the contrary the learned Senior Subordinate Judge could have come to the conclusion that the plaintiff had relinquished his mortgage and had allowed the property to be privately transferred merely for the purpose of obtaining a part satisfaction of his nephew's money decree. It is argued that the legal effect of the plaintiff having given his consent to the property being sold free

of mortgage was that his lien, if any, was transferred to the sale proceeds, and that if he allowed the sale proceeds to be handed over to the decree-holder the purchaser cannot in any way be responsible, and that the plaintiff cannot follow the property in the purchaser's hands which the latter gets entirely free of all incumbrances. There would have been force in this contention if the property had been sold in execution of the decree as originally arranged. In such a case, if the prior incumbrancer gives his consent, his lien would certainly be transferred to the sale proceeds Under S. 73 of the Civil Procedure Code where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. But not so in the case of a private alienation where there is absolutely no necessity to refer to the prior incumbrancer For a private alienation all that is necessary under Order XXI, rule 83, Civil Procedure Code, is that the Court should be satisfied that the application is made in good faith and that the decretal amount may be raised by the mortgage or sale of a part or whole of the attached property. In the present case it was represented to the Court that the decretal amount could be raised by private alienation. The decree-holder consented to time being given to the judgment-debtors for raising money by private alienation. The plaintiff was not asked to give up his mortgage lien, nor did he or his agent make any statement in Court to the effect that he would give up his mortgage lien if the judgment-debtors would satisfy the decree by private alienation. In the absence of any express consent on the part of the plaintiff we do not think that it can be held that the plaintiff had given up his mortgage security and that his rights as a mortgagee had come to an end. Tulsi Ram, defendant No. 5, when he took the mortgage from the judgment-debtors ought to have seen that the property had been freed from the prior charge, and if he did not do so it is clear that he must be considered to have taken his mortgage subject to such prior incumbrances as may have existed on that date.

Next, Ss. 78 and 56 of the Transfer of Property Act are relied on, but it is clear that they are entirely irrelevant and have not the slightest bearing on the question which is now at issue between the parties.

We hold that the plaintiff had not given up his mortgage security and that he is entitled to priority over defendants 3 to 6 who must be taken to have accepted their mortgage subject to the prior incumbrances existing in favour of the plaintiff. We accept the appeal with costs throughout and, in modification of the order of the Court below, direct that the words, "subject to a lien of Rs. 4,500 in favour of defendants Nos. 3 to 6 (defendants 5 to 8)" shall be deleted from the decree.

As to the cross-objections, a preliminary objection is raised that they are not properly stamped. We have heard counsel on both sides and are of opinion that they should have been filed on a Rs. 10 stamp. Mr. Fakir Chand for the respondents has made up the deficiency, and there is no necessity to postpone the case for this purpose. The first contention raised by Mr. Fakir Chand is that the Lower Court was not justified in holding the mortgagors personally liable when no personal liability had been claimed in the plaint. This contention in our opinion is well founded and must prevail. A reference to the plaint makes it clear that a decree against the mortgaged property only was claimed, and there was no mention therein of the defendants being personally liable under the mortgage We do not think that in these circumstances the Court was justified in holding that the defendants were personally liable, especially when there was no issue and no opportunity had been given to the defendants to contest the point.

Next, it is argued that the claim as to the defendant's personal liability is barred by limitation and *Ram Din* v. *Kalka Prasad* (1) is relied on. It is contended that article 132 applies only to suits to raise money, charged on immoveable property, out of that property; and that the twelve years bar does not apply to the personal remedy, as to which the shorter period prescribed in article 65 applies. The authority cited certainly supports the respondent's contention, but we do not think that it is necessary to express any definite opinion on this point as we are of opinion that the cross-objections must succeed upon the first point, namely, that the personal remedy was not asked for in the plaint and that the Court was not justified in making out a new case for the plaintiff.

We allow the cross-objections and hold that the decretal amount shall be realised from the mortgaged property alone and that the other properties of defendants 1 and 2 will not be liable for the decree.

Appeal accepted.

(1) [1885] 7 All. 502—12 I.A. 12—4 Sar. 619 (P.C.)

1924 LAHORE 136

HARRISON AND ZAFAR ALI, JJ.

Chanda Singh—Appellant.

v.

Jai Kishen Das and another — Respondents.

Civil Appeal No. 1818 of 1919, Decided on 26th May 1923, from the decree of S. Sub. J., Ferozepur, D/-2-6-1919.

Limitation Act, Art. 29 — Applies only to seizure.

Article 29 is applicable only to the seizure and does not govern any suits arising out of what happens later at the time of sale.

(P 136 C 2)

N. C. Mehra, —for Appellant.

Lala Kashi Ram and *Durga Das*, —for Respondents.

Harrison, J.—Plaintiff in this case sued to recover Rs. 6,000 on account of compensation for loss sustained by him on account of the irregular sale of certain property in execution of a decree, alleging that in consequence of the irregularities a sum far below the market value of the property had been realized. He also claimed the refund of a sum which he said had not been credited. The suit was dismissed as barred by limitation, and the only question to be decided is whether this order of dismissal is correct.

In 31 Mad. 431 (F. B.) it was held that the limitation for a suit of this nature is governed by Article 29, inasmuch as the sale follows from the seizure and the cause of action must be taken to be the irregular seizure. It is contended on appeal, though this is not by any means clear from the plaint, that the plaintiff merely seeks compensation for the irregular sale though he does distinctly state in his plaint that the seizure or attachment was also irregular. It is obviously possible that there should be a case where the attachment was in every respect correct, but the formalities prescribed before sale had not been observed, and it would, in our opinion not be correct to hold under these circumstances that the cause of action was one for damages for wrongful seizure and that the cause of action arose on the date of attachment. It is also clear, that the sale might take place more than a year after the attachment, and apparently on the view taken in that ruling the plaintiff would be debarred from seeking any remedy for the loss caused to him by any irregularities in the sale as distinguished from the seizure, and the cause of action would be still born. We are of opinion that the sale, though following naturally on the attachment and being the object which the decree-holder had in view at the time of making his original application, can be distinguished from that attachment. It is only after the attachment has been completed that the proclamation issues under rule 66 and the sale subsequently takes place. Article 29 must in our opinion be interpreted to apply only to the seizure and not to govern any suits arising out of what happens later at the time of sale.

It is contended by the appellant that Article 62 or Article 48 or 49 applies. In his own replication at page 17 of the paper book he uses the following words :—

"The plaintiff's right to relief arises in respect of facts or series of facts constituting the same transaction and giving rise to a common question of law regarding the liability to the plaintiff under the general Law of Torts."

Suits based on tort are governed by Article 36, unless specifically provided for by some other Article in just the same way as suits based on an unregistered contract are governed by Article 115 unless some other Article definitely applies.

There can be no question that the act complained of in bringing the property to sale is a tort, whether it be described as non-feasance or malfeasance. Holding that neither article 48 nor article 49 nor any of the other articles governing torts applies in express terms to the suit, we find that it is governed by Article 36 and having been brought admittedly more than two years after the sale it is barred by time.

In addition to the compensation claimed on account of the moveable property sold, the plaintiff claims the return of a sum of Rs. 400 which he says has not been credited by the defendant to his account. This sum was paid in on the 24th of June 1916 and the suit was instituted on the 20th of January 1919. It is urged that Article 62 applies more especially to this sum of money, but in our opinion the words as used do not cover this portion of the claim. Money was not received by the defendant for the plaintiff's use and was not payable by the defendant to the plaintiff. This portion of the claim also, in our opinion, is based on an alleged tort and the same Article 36 applies.

The suit therefore fails throughout and the appeal is dismissed with costs.

Appeal dismissed.

✱ 1924 LAHORE 137

ABDUL RAOOF AND FFORDE, JJ.

Munshi Lal—Plaintiff—Appellant.

v.

Mt. Shiv Devi and others—Defendants—Respondents.

S. A. No. 2131 of 1919 Decided on 30th April 1923, from the decree of the D.J. Ludhiana, D/- 20th July 1919.

Hindu Law—Alienation by widow—Gift to charity of more than one fourth is not valid.

A gift made by a Hindu widow to a charitable institution of a portion more than one fourth of her deceased husband's estate is not valid against the reversioners. A gift by a Hindu widow of a moderate portion of her deceased husband's estate can only be valid if it is expressly made for the spiritual welfare of the deceased. A gift, however pious or meritorious, cannot be enforced against the reversioners unless it is proved to be made with that object and unless that purpose is deemed by the Hindu religion to be fulfilled by the character of the gift in the question.

[P. 139 C. 1 P 140 C. 2]

Jai Gopal Sethi—for Appellant.

Gokul Chand Narang for Bakhshi Tek Chand—for Respondents.

Fforde J.—The main question for our consideration is whether a gift made by a Hindu widow to a charitable institution of a portion of her deceased husband's estate is valid as against the reversioners.

The gift admittedly amounts to a little more than one fourth of the whole estate of the deceased and it is admittedly made for a charitable purpose.

The Court of first instance in a very clear and well-reasoned judgment held the gift to be invalid for two reasons. Firstly, because it was not made for the spiritual benefit of the deceased husband but for her own good, and, secondly, because it comprised too large a portion of the entire estate.

The first appellate Court reversed this decision, holding that as the widow had done a virtuous act according to her personal notions, "there was nothing in the eye of the law to stand in her way provided it is ascertained that she has not behaved recklessly and has gifted a reasonable portion of her husband's estate."

Mr. Jai Gopal Sethi for the appellant contends that a gift by a Hindu widow of a portion of her husband's estate is only valid in law if it is made.

(1) For necessity.

(2) For the purpose of defraying the expenses of the obsequial rites, etc. of the deceased.

(3) It is given for recognised charitable purposes for the spiritual benefit of the deceased, and then only if it comprises a small portion of his estate.

In the first two cases the entire estate may be alienated if only by so doing the necessary funds can be obtained.

Dr. Gokal Chand Narang for the respondents on the other hand advances the bold proposition that any gift by a widow for a pious purpose, recognised as such by Hindu Law, is valid even though admittedly made for the widow's own spiritual benefit alone. He argues that such a gift having regard to the Hindu view of the relationship of husband and wife must necessarily be for the husband's spiritual benefit. He agrees, however, that only a reasonable portion of the deceased's estate can be alienated for this purpose.

The power of a Hindu widow to alienate for necessity, whether the necessity be her own or to defray the obsequial expenses arising out of her husband's death need not be considered here. It is true that the respondent pleaded necessity in her answer to the plaint but that plea is not relied upon.

The only questions we need consider are:—

(1) Can the proportion of the estate alienated viz, one-fourth of the whole, be held to be justifiable?

(2) Was it alienated for the spiritual benefit of th deceased?

(3) Is the alienation valid though made for the spiritual welfare of the alienor alone?

The first question, though it has arisen in the course of argument, has not been pressed upon us. In fact counsel on both sides seem to have assumed that if the gift is valid in law in other respects, it cannot be deemed to be execessive in proportion to the estate. This view appears to me to be very doubtful. The Hindu authorities on the point are all agreed in holding that a gift of a moderate portion of the property only is valid. The difficulty lies in the practical application of this principle. How is a Court to decide what is a moderate portion? In the case of *Ramchunder Surenah* v. *Gunga Govind Bunhoopiah* (1) referred to in the Tagore Law Lectures of 1979, at page 307, the Pandits gave it as their opinion that the widow has the power of alienating from one to three sixteenth of her husband's property for the benefit of his soul," but I can find no case in which as large a portion as 3/16 ths has been held valid in this respect. It is true that in *Churaman Sahu* v. *Gopi Sahu* (2) cited with approval in *Khub Lal Singh* v. *Ajodhya Misser* (3) the Court held that between ¼th and 1/3rd of an estate was a reasonable amount to expend on the occasion of a daughter's Gowna ceremony but the principle upon which that case was decided can hardly be held to be exactly analogous to those under consideration here.

In *Sardar Singh* v. *Kunj Behari Lal* (4) which came before the Privy Council in June of last year, Mr. Aneer Ali who delivered the judgment of the Board says as follows:—

"In their Lordships opinion the Hindu Law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. It is clear in this case that the act which the Rani did was fully in accordance with Hindu religious sentiment and religious belief, and was not, therefore, in excess of her powers, having regard to the fact that the dedication related to one-seventyfifth of the

(1) [1826] 4 Sel. Rep. 147

(2) [1909] 39 Cal. 1—13 C.W.N. 991—10 C.W.J. 545—1 I.C. 945.

(3) [1916] 43 Cal. 571—22 C.L.J. 345—31 I.C. 433.

(4) 1922 P.C. 261—44 All. 503—49 I.A. 383—16 L.W. 371—31 M.L.T. 253—69 I.C. 36. (P. C.)

property, and was made specially for the creation of a permanent benefit"

The Hindu authorities are all agreed that a gift of a "moderate portion," or a "small portion," may be valid when made for the husband's spiritual benefit, but the difficulty is to fix the limit at which the portion gifted ceases to be moderate or small. It must, of course depend largely upon the facts of each particular case, but I very much doubt if any Court could reasonably hold that a gift amounting to 1/4th of an inheritance could be fairly regarded as "a small fraction of the property."

As we do not intend to decide the present case on the question of the validity of the amount of the alienation, I need not discuss this aspect of the case further, I have only dwelt on it to the extent I have done so that it may not be said that this Court has acquiesced in the view that an alienation of 1/4th of an inheritance is valid so far as *quantum* is concerned.

The second question is largely one of fact. The Court of first instance has decided it in favour of the appellant, holding that the gift was not made for the spiritual benefit of the husband, who had at the time of the alienation been dead for nearly eleven years, but for the alienor's own good.

In my opinion this finding is wholly in accordance with the facts of this case.

The deed of gift itself nowhere suggests that its object is in any way referable to the spiritual benefit of the husband. It in fact rebuts such a suggestion. The donor declares that the property in question is owned and possessed by herself absolutely and she recites that the donees "have been declared absolute owners of the gifted property like myself."

In her answer to the plaint she makes the case that the alienations in question were for consideration and lawful necessity, and further pleads that the land in question and the houses are not ancestral but were in fact purchased by the father-in-law Gobind Ram. It must be conceded, however, that there were other alienations referred to in the plaint in addition to the one in question, and moreover a litigant in this country should not be too strictly bound by pleadings, but the fact remains that in her final defence the case now made, namely, that the alienation was for her husband's spiritual benefit, is nowhere even suggested.

In the defence to the amended plaint, it is true that she does suggest this plea, but in her statement in Court made on the 25th June, 1918, she definitely declares that her two sons, one of whom died at the age of 14 and the other at the age of 11 years, told her that the property should be given in charity and directed that it be given "in the name of the "*Granth Sahib*"

In a further statement made on the 24th of August she appears to have re-considered her position and expressed her reasons as follows:—

"I am a Sikh woman. I believe in *Granth Sahib*. My husband gave me instructions to give the land and the site in charity. He was not a Sikh. This house, *i.e.*, stable, is haunted. My sons used to say that I should get the land and the site entered in papers in the name of the *Pujari* of the "*Granth Sahib*."

This is the first time she makes any suggestion that the gift is in any way referable to her husband, and I have no doubt that the improvement in her statement is due to the progressive legal enlightenment which she received in the course of the suit.

The lower appellate Courts' view that her present contention that the gift was intended to spiritually benefit her husband "can very well be inferred from the virtuous way in which she has made use of this portion of her husband's estate," is in my opinion inconsistent with the facts and unsound in law.

I am quite satisfied that until the present suit was instituted, it had never even occurred to the widow to consider whether or not the gift might promote her dead husband's spiritual welfare.

It remains to be considered whether such a gift, which is admittedly for a pious and charitable purpose approved of by the Hindu religion is valid merely for that reason. Dr. Narang

in his able argument has relied strongly upon certain observations in the judgment in *Khub Lal Singh* v. *Ajodhya Misser* (3) which undoubtedly favour his contention that if a gift is of a recognized pious nature it must be deemed to accrue to the spiritual benefit of the departed husband. This view, however, has been expressly dissented from in a very recent case on the subject, *Sham Dei* v. *Birbhadra Prasad* (5). That case not only bears a close resemblance to the present one on the facts, but the very proposition advanced by Dr. Narang was discussed in the course of the judgment where the learned Judges expressed themselves as follows :—

" We are not, however, in accord with the view pressed by the learned counsel for Sham Dei that an act supposed to conduce to the spiritual benefit of the widow is necessarily an act supposed to conduce to the spiritual benefit of the husband. This proposition appears to have been looked at not with disfavour by the learned Judges who decided *Khub Lal Singh* v. *Ajudhya Misser* (3). We should not go so far as to say that they accepted it. Whatever be its application to persons governed by the Dayabhaga law, it would not appear to be a doctrine applicable to persons governed by the Mitakshara law. It is obvious that an act done by a widow supposed to conduce to the spiritual benefit of her husband would confer spiritual benefit on herself, but the converse does not appear to follow. An act done by the widow supposed to conduce to the spiritual benefit of herself would not confer spiritual benefit on her husband. In any circumstances we should have been precluded from accepting this view, in face of the decision in *Puran Devi* v. *Jai Narain* (6)

" The decision in *Khub Lal Singh* v. *Ajudhya Misser* (3) was recently discussed by a Bench of this Court in *Kunj Behari Lal* v. *Lalta Singh* (7). That Bench derived similar assistance to the assistance which we have derived from the exposition of the law therein.

" The conclusion at which we arrive is this that unless it can be established that the alienation in question was for the performance of religious acts which were supposed (in this case intended) to be for the spiritual benefit of Bal Kishen, the alienation cannot operate to the prejudice of the reversioners, even if the portion of the property alienated be not excessive.

This judgment which is in agreement with the views expressed in the Privy Council decision already referred to, finally disposes of the last argument of the respondent. I have no doubt that it must now be held to be the law that a gift by a Hindu widow of a moderate portion of her deceased husband's estate can only be valid if it is expressly made for the spiritual welfare of the deceased. A gift, however, pious or meritorious cannot be enforced against the reversioners unless it is proved to be made with that object and unless that purpose is deemed by the Hindu religion to be fulfilled by the character of the gift in question.

For these reasons I think the appeal succeeds. The result is that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored, the appellant to have his costs throughout.

A. Raoof, J.—I entirely agree. The judgment of my learned colleague is so full and exhaustive that I have very little to add to it. The rule enunciated in the judgment was clearly and authoritatively stated so far back as the year 1882 in the decision of a Division Bench of the Allahabad High Court in the case of *Puran Dai* v. *Jai Narain* (6). Mr. Justice Iyrrell, who delivered the judgment following the decision in the case of *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (8) made the following observation at page 483 :—

" The point is now covered by authority that acts of alienation

(5) [1921] 43 All. 463—19 A. L. J. 312—62 I. C. 432.

(6) [1882] 4 All. 482—(1882) A.W.N. 115.

(7) [1918] 41 All. 130—16 A.L.J. 996—48 I.C. 847.

(8) [1859—61] 8 M.I.A. 529—2 W.R. 61 (P.C.)

calculated to be of religious benefit and efficacy to the widow, or to any persons other than the deceased owner, will not justify an alienation of any part of the property in the hands of the widow. It has been justly pleaded in the second and third grounds of appeal that there is nothing on the record sufficient to show, nor other good reason for believing, that the gift of the house in suit, made some sixteen months after the death of Ram Kishen, without any reference to him or his funeral celebrations, and specifically declared to be 'Bishunprit,' or to the honour of Vishnu, was a gift made to benefit Ram Kishen in his after state; and was not, on the contrary, as indeed from the terms of the deed of gift in this case it plainly appears to be, an offering by the widow to a favoured idol for her own special credit and spiritual advantage." Every word of this observation is peculiarly applicable to the facts of this case. Here too in the deed of gift no mention is made of the name of the husband, nor is it stated that the gift is made for his spiritual benefit. Similarly the gift in this case was also made after a very long time, namely, 14 years after the death of the husband. Another significant fact is that while the husband was an Arya Samajist, the gift had been made to *Kakas*. The rule laid down in the Allahabad case has been firmly established by the later decisions of the High Courts in this Country as well as by the decisions of their Lordships of the Privy Council to which my learned colleague has referred in his judgment. I accordingly concur in the order made by my learned colleague.

Appeal allowed.

✱ 1924 LAHORE 141

SCOTT-SMITH AND FFORDE, JJ.

Rodha Ram—Defendant-Appellant

v.

Amar Chand and another—(Plaintiff) (Defendant)—Respondents.

Civil Appeal No 180 of 1920, Decided on 17th February 1923, from the decree of D. J., Jullundur D/- 28-10 1919, affirming that of, Munsiff, 1st class, Jullundur, D/-2-4-1919.

Hindu Law—Joint family — Alienation— Alienee must prove atleast bona fide *enquiry and want of knowledge of ficticious nenessity.*

The lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does so enquire, and acts honestly, the real existence of alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and under such circumstances, he is not bound to see to the application of the money. [P. 142 C. 1]

Diwan Mehr Chand—for Appellant.

H. D. Bhalla and *Faqir Chand*—for Respondents.

Fforde, J.—The suit out of which this appeal arises was brought for a declaration that a certain sale deed, dated the 20th October 1916, should be held not to affect the reversionary rights of the plaintiff

The deed in question was for the sale of certain ancestral lands by Maya Mal, the father of the plaintiff, to one Rodha Ram.

Both the Courts below have held that the plaintiff is entitled to the declaration prayed for. The grounds relied upon by the plaintiff in his suit were that the lands being ancestral, and the family being a joint Hindu one governed by Hindu Law, the sale can only be valid as against the plaintiff if made for consideration and for valid necessity. The main point in issue was whether or not there was valid necessity. The necessity alleged by the defence was the requirement of the purchase money for payment of the expenses of the plaintiff's marriage.

It was found, however, by the Court below that it was not proved that the money was in fact raised for the purposes of the marriage. It appeared that the alienor was possessed of considerable property, and was in no need to raise funds.

On behalf of the alienee, defendant No. 2, it was argued that even upon these findings the transaction could not be impeached unless it could be shown that he had knowledge of these facts. It was contended that the alienee was not bound to inquire into the actual necessities for the sale, and still less was he under any duty

to inquire into the actual application of the purchase money.

In support of this proposition, counsel for the defendant cited the case of *Hanooman Persaud Pandey* v. *Babooee Munraj Koonweree* (1) and relied upon the following passage in the judgment delivered by Knight Bruce, L. J. :—

"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money."

The principles there expressed, however, when applied to the facts before us instead of supporting the appellant's case are entirely in favour of the respondent. The burden of proving that he acted *bona fide* and without knowledge that the necessity was fictitious lay upon the alienee. This has been very definitely established in *Charanjit Singh* v. *Telu Mal* (2) where it was held that a person who takes a mortgage of ancestral property from a father in consideration of a present advance, as opposed to an antecedent debt, is bound to establish, in a suit brought by a son to challenge the validity of the alienation so far as it affectes his interests, that the advance was made by him—

"After a reasonable and fair inquiry which satisfied him, as a prudent man, that the money was required for the legal necessities of the family."

In the present case it has been proved that the money was not required for the necessities of the family, and, moreover, the alienee has entirely failed to show that he made any inquiry whatsoever as to the necessity for the alienation. Not only has he not discharged this *onus* of proof, but it is quite obvious upon the indisputable facts before us that the smallest inquiry would have shown him that the alleged necessity was a pure fiction. The two defendants lived in adjoining villages within 200 *karams* of one another, and the vendee must have known perfectly well that the vendor was a man in excellent financial circumstances.

We are satisfied that the alienation was not for legal necessity, and that the decisions of the Courts below are correct, and we accordingly dismiss the appeal with costs.

But as the plaintiff and his father are members of a joint Hindu family, we amend the decree and make it one for a declaration that the alienation in question does not affect his rights.

Appeal dismissed.

(1) [1856] 6 M. I. A. 393—18 W.R. 81 (P. C.)

(2) 152 P. R. 1888.

✱ 1924 LAHORE 142

SCOTT-SMITH AND FFORDE, JJ.

Karori Mal—Plaintiff—Appellant.

v.

The E. T. and Lighting Coy. Ltd., Delhi—Defendant—Respondent.

S. A. No. 374 of 1920, Decided on 17th February 1923, from the decree of D. J., Delhi, D/- 10-11-1919, affirming that of Sub, J. Delhi, D/-12-3-1919.

Electricity Act (IX of 1910) Sch, Clause VI Pro (2) (c)—Supply can be discontinued where cut-out seals are out of order.

A part of the electric apparatus namely the seals of the cut-out were not in good order and condition. As a result of this defect there had been a leakage of energy.

Held, such a state of things must certainly be deemed to be "likely to affect injuriously the use of energy by the licensee or by other persons," and accordingly, the electric company were entitled, upon discovering this condition of things, to discontinue the electric supply. [P. 143 C 2]

Where a main fuse was burnt out-in other words, where the cut-out became defective.

Held, the company was entitled to discontinue the supply of energy to the consumer.

Shamair Chand, for Moti Sagar—for Appellant.

Dalip Singh and Sarda Ram—for Respondent.

Fforde J.—The appellant sued the respondent Company for damages alleged to have arisen by reason of the latter having disconnected the supply of electricity to the former's mills. The respondents in defence contended that they were justified in the course they had adopted in view of the fact that the seals on the cut-outs on the appellant's premises were not in good order and condition, with the result that the supply of electric energy was injuriously affected.

The justification relied upon is alleged to be contained in the statutory provisions which govern the company's contractual rights and liabilities. The particular provision relied upon is to be found in clause VI (1) *proviso* (2) (*c*) of the schedule to the Indian Electricity Act of 1910, which provides that the licensee (*i. e.* the Electric Company) shall be entitled to discontinue the supply of electricity to the consumer—

" if the electric wires, fittings, works and apparatus in such property are not in good order and condition, and are consequently likely to affect injuriously the use of energy by the licensee, or by other persons."

The Court of first instance held that this clause did not apply to the facts of the present case; but further held that the appellant had not proved that he had suffered any loss from the act of disconnection, and dismissed the suit on that ground. The learned District Judge agreed with this finding on the question of damages, and held, for that reason, that it was unnecessary to give a decision on the other issue, but suggested that, assuming the defective condition of the cut-out was due to its having been tampered with by the appellant, sub-clause (1), *proviso* (2) (*d*) of clause VI might be applicable.

We find ourselves unable to agree with the views of the lower Courts as to the proper construction of the enactment.

It has been found as a fact that a part of the electric apparatus on the appellant's premises, namely the seals of the cut-out were not in good order and condition. As a result of this defect there had been a leakage of energy, whether by theft of the current or otherwise it is unnecessary to decide. Such a state of things must certainly be deemed to be " likely to affect injuriously the use of energy by the licensee or by other persons," and accordingly, the respondents were entitled, upon discovering this condition of things, to discontinue the electric supply.

The attention of the Courts below does not appear to have been called to a decision on this very point in *Lahore Electric Supply Company* v. *Durga Das* (1). The powers of an electric supply company under the Indian Electricity Act, IX of 1910 were, there, very fully considered by Scott-Smith J., and amongst other questions the effect of clause VI (1), *proviso* (2) (*c*) was a subject of decision. It was held in that case that where a main fuse was burnt out-in other words, where the cut-out became defective-the company was entitled to discontinue the supply of energy to the consumer. Precisely the same facts appear here, the only difference being that in the reported case the cause of the defect in the cut-out was apparent, whereas in the present case the cause is only to be conjectured.

As we hold—following the reasoning in the relevant passages of the judgment above referred to that the respondent company was fully justified in the steps they took, it is unnecessary to consider whether or not the lower Courts were justified in their finding as to the failure of the appellants to prove damage.

For the reasons we have given the appeal is dismissed with costs.

Appeal dismissed.

(1) [1918] 85 P. R. 1918—79 P. W. R 1918—77 P.L.R. 1918—45 I.C. 171

1924 LAHORE 143

LE ROSSIGNOL AND MARTINEAU, JJ

Jaimal and others—Appellants.

v.

Ganeshi Mal and others — Respondents.

S. A. No. 381 of 1920, Decided on 21st February, 1923, from the decree of D. J., Ludhiana, D/-9th December 1919, affirming that of Sub. J., Ludhiana, D/-30th May, 1919.

Civil P. C., 012, R. 2—Suit for possesion as trespasser does not bar suit for redemption.

A suit by plaintiffs (sons) against the mortgagees for possession on the ground that they were trespassers and that the mortgage by their father was not binding upon them by reason of absence of consideration and legal necessity, does not bar suit for redemption.

[P. 144 C 1-2]

Lala Jagannath—for Appellants.

Nand Lal—for Respondents.

LeRossignol, J.—The plaintiffs in this case prayed to redeem the land in suit which had been mortgaged by their father for Rs. 1,525 in the years 1897 and 1898. The Courts below have dismissed the suit on the ground that it is barred by Order II rule 2 of the Civil Procedure Code, inasmuch as in 1904 the appellants brought a suit against the mortgagees for possession on the ground that they were trespassers and that the mortgage by their father was not binding upon them by reason of absence of consideration and legal necessity.

In our opinion this appeal must succeed. Order II rule 2 of the Code provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs but shall not afterwards sue for any relief omitted, and the first question for consideration is whether the cause of action in both suits is the same. It was laid down in *Dhanpat Mal* v. *Jhaggar Singh* (1) that where mortgagors have obtained a decree for redemption and have failed to execute it, another suit to redeem will lie for the reason that the cause of action is not the same. The allegation against the present appellants is that in 1904 they did not ask to redeem, and may, therefore, not do so now. They are thus placed in a worse position than if they had secured a decree for redemption in 1904 and failed to execute it. But we are quite clear that the cause of action now is not the same cause of action as in 1904. In 1904 the cause of action was a mortgage to which the plaintiffs objected *ab initio*. They were attempting to avoid it and had they prayed for redemption they would have *ipso facto* admitted their liability to redeem the mortgage; in other words such a prayer would have cut at the roots of their claim. On the cause of action recited in the 1904 case no redemption was possible. The cause of action in the present suit is the mortgage now admitted as binding on the plaintiffs plus a refusal of the mortgagees to accept redemption on the terms offered by the plaintiffs. *Barkhurdar* v. *Chhotta Mal* (2) is cited by the learned District Judge as being on all fours with the present case, a propostition which we cannot admit. This case is very easily distinguishable so that it is not necessary for us to express any opinion whether we are prepared to follow the decision above cited.

In short our finding is that the present cause of action and that of 1904 are quite different, and we accept the appeal and remand the case to the first Court for decision on the merits. Costs to be costs in the cause.

Case remandea.

(1) [1908] 93 P. R. 1908—164 P.L.R. 1908—133 P.W.R. 1908 (F. B.)

(2) [1081] 119 P.R. 1918—48 I.C. 798.

1924 LAHORE 144

LE ROSSIGNOL AND BROADWAY, JJ

Nathu Ram and another—Defendants—Appellants.

v.

Dogar Mal and others—Plaintiffs—Respondents.

Mis. A. No. 618 of 1920, Decided on 1st March 1923, from the order of D. J., Hoshiarpur, D/-9th January 1920, reversing that of Sub. J., Hoshiarpur, D. 9-7-1919.

Stamp Act, S. 36—Hundi though inadmissible suit on original cause of action can lie.

Where the contract embodied in the *hundis* was a mere sequel and consequence of the earlier transaction, there is no reason why the principles set forth in Parsotam Narain vs. Taley Singh 26 All. 178 should preclude the plaintiff from falling back on his original cause of action.

Fakir Chand and Amar Nath Chona—for Appellants.

Nemo—for Respondents.

LeRossignol, J.—Plaintiff sued in this case for Rs. 1,500 principal and Rs. 85-4-0 interest on two *hundis*, reciting that there had been dealings between the parties ending in the striking of a balance of account for Rs. 2,500 which the defendants paid, as to Rs. 1,000 in cash and as to the balance of Rs. 1,500 by the *hundis* on which this suit was based. Inasmuch as the *hundis* were improperly stamped they were held to be inadmissible and the question arose whether the debt could be proved *aliunde*. The first Court held that inasmuch as the original transactions were liquidated and a complete discharge was effected by the payment of Rs, 1,000 cash and the delivery of the two *hundis* for an aggregate of Rs. 1,500 the plaintiff could not have rocourse to his original cause of action.

The learned District Judge on appeal held that a cause of action existed to the plaintiff independently of the promissory notes and that consequently the plaintiff was entitled to prove that original cause of action and the failure of consideration represented by the defective promissory notes, and, in our opinion, his view is correct. Had the defendant borrowed Rs. 1500 and the contract been embodied in the *hundis* the plaintiffs would have had no remedy other than of a suit on the *hundis*. Since, however, the contract embodied in the *hundis* was a mere sequal and consequence of the earlier transactions, we see no reason why the principles set forth in *Parsotam Narain* v. *Taley Singh* (1) preclude the plaintiff from falling back on his origiual cause of action. In this case the plaintiff had a complete cause of action for money for goods sold. That transaction was liquidated in part by the delivery of the *hundis* and as the *huudis* are found to be inadmissible in evidence and that. through the default of the debtor, the plaintiff is at liberty to sue for the original consideration.

We accordingly dismiss the appeal with costs and maintain the order of the lower Court remanding the case for redecision.

Appeal dismissed, Case remanded.

(1) [1903] 26 All. 178—(1903) A. W. N. 217.

✱ 1924 LAHORE 145

MARTINEAU AND ZAFAR ALI, JJ.

Ladha Singh and others—Appellants.

v.

Mt. Hukam Devi and another —Respondents.

S. A. No. 1929 of 1220, Decided on 8th March 1923, from the decree of D. J., Lahore, D/· 24th February 1920, affirming that of Munsiff, Lahore, D/- 12th August 1918.

Evidence Act, S. 90 — Date of production is immaterial—Date of Challenging genuineness is to be looked to.

The period is to be reckoned, not from the date on which the document is put into Court, but from the date on which, after the document has been tendered in evidence, its genuineness becomes the subject of proof. [P.146,C.1]

Gobind Ham—for Appellants.

Ganga Ram—for Respondents.

Martineau, J.—The first five defendants, who live at Atari Saroba, sued Indo and her husband Diwan Chand for possession of a house in that village. The case ended in a compromise by which half of the house was given to Indo. Indo's sister has now sued for a declaration that half of the house belongs to her, alleging that the house was owned by her father Kahna, and that since his death it has been the property of her sister and herself. The defendants denied that the plaintiff was in possession and pleaded that Kahna was not the owner of the house but lived in it with their permission. The Courts below have given judgment for the plaintiff, finding that she is in possession and that Kahna's ownership is proved by two documents, Exhibits P. 3 and P. 4 which show that defendants or their ancestors sold the house to him.

No evidence was given as to the execution of those documents, but the Courts below have held that their genuineness may be presumed under S. 90 of the Evidence Act as they are more than 30 years old and were produced from proper custody. No objection is taken to the admissibility of P. 4, which was executed in 1874, but it is contended in second appeal that P. 3, which is dated the 3rd August 1888,

is not admissible without proof, as it was produced on the 19th December 1917 less than 30 years after its execution.

The learned District Judge has held that the period of 30 years mentioned in S 90 of the Evidence Act is to be reckoned back from the time when the document is in controversy, and this view is supported by *Minu Sirkar* v. *Rhedoy Nath Roy* (1), where it was held that the period is to be reckoned, not from the date on which the document is put into Court, but from the date on which, after the document has been tendered in evidence, its genuineness becomes the subject of proof. Up to the 12th August 1918, when the first Court gave its judgment, the genuineness of P. 3 does not appear to have been called in question, and it was only when the case came up to the Appellate Court that the defendants took the objection that P. 3 had not been proved. The learned District Judge is of opinion that the period of 30 years should be reckoned from the date of his predecessor's order remanding the case, and we think that at all events it cannot be reckoned from a date earlier than the 12th August 1918, when the trial Court gave its decision. From whichever of these dates the period be counted the document is more than thirty years old, and we hold, therefore, that proof of its execution is not required.

It is argued that the house to which P. 3 relates is not shown to be the one in dispute, but this point was not taken in the grounds of appeal either in this Court or in the lower appellate Court.

The finding, therefore, that the house belonged to Kahna, being supported by evidence, cannot be contested, and the finding as to the plaintiff's possession is also not open to contest. The contention that the plaintiff has a third sister and cannot sue for more than her own share has no force, as in the first place it does not appear to be known whether that sister is alive or dead, and in the second place the suit is not for possession but only for a declaration of the title of the plaintiff, with whose rights the defendants are seeking to interfere.

The appeal is dismissed with costs.

Appeal dismissed.

(1) [1879] 5 C.L.R. 135.

✱ ✱ 1924 LAHORE 146

HARRISON AND ZAFAR ALI, JJ.

Sain Das—Defendant—Appellant.

v.

Ram Chand— Plaintiff — Respondent.

Civ. A. No. 1460 of 1920, Decided on 25th April 1923, from the decree of D. J., Amritsar, D/- 10th April 1920, reversing that of Sub. J., Amritsar, D/- 22nd July 1919.

Contract Act, S. 43 — Where shares of vendees are, but money is not, specified it is a joint transaction and is enforceable against major vendee but not his minor co-vendee.

Where the portions of the purchase money to be paid by each of the two co-vendees were not specified,

held the transaction was a joint one and as such enforceable against the major vendee under S. 43, although void as regards the minor vendee. 39 Mad. 409 (P. C.) and 66 P. R. 1896 Foll. [P. 147, C. 1]

Sheo Narain—for Appellant.

Jagan Nath—for Respondent.

Harrison, J.—The plaintiff in this case sold a house to Sain Das and Sant Ram for Rs. 3,100 of which Rs. 100 were received as earnest-money, Rs. 1,000 were to be paid to the previous mortgagee and the balance of Rs. 2,000 was to be paid at the time of registration. The vendee refused to have the deed registered and the vendor had this done. Excluding the Rs. 1,000 which were to be paid to the mortgagee he brings the suit for the recovery of Rs. 2,180-3-6 including interest and a small item of Rs. 25 for expenses against both vendees. It has been held by the learned District Judge that Sant Ram is a minor and is not liable, that the suit is governed by S. 43 of the Contract Act, and he has given a decree to the plaintiff for Rs. 2,025 against Sain Das who appeals urging that the whole contract is bad in law on account or his co-vendee having been a minor and that anyhow a sum of

Rs. 1,584-8-0 was realised at the subsequent sale of the property which was brought about by the mortgagee by means of a separate suit, that this sum is lying in deposit to the credit of the plaintiff and should be deducted. He also claimed a further deduction on the ground that the mortgagee's charge was found to be Rs. 1,218 and not Rs. 1,000 as recited in the deed.

The points to be decided are whether a decree has rightly been given against Sain Das alone or whether the whole transaction is vitiated by the fact of Sant Ram's minority and, in the second place, whether the appellant can claim these deductions. As to the first point *Jamna Bai* v. *Vasanta Rao* (1) is a clear authority that a contract of this nature entered into by a major and a minor may be enforced against the major alone under S. 43 of the Contract Act provided that there is a joint promise to pay. The joint nature of the transaction is clear from the fact that although the shares were specified the portions of the purchase money to be paid by each vendee were not so specified and under these circumstances, on the reasoning adopted in *Kesar Singh* v. *Punjab Singh* (2), there is no such specification as renders the contract unenforceable against either promisor.

* * *

Decree modified.

(1) [1916] 39 Mad. 409—43 I.A. 99—14 A.L.J. 534—18 Bom. L.R. 432—31 M.L.J. 18—3 L.W. 540—24 C.L.J. 74—20 M.L.T. 31—(1916) 1 M.W.N. 452—34 I.C. 213 (P.C.)
(2) [1896] 66 P.R. 1896.

1924 LAHORE 147

LEROSSIGNOL AND BROADWAY, JJ.

Pala Ram—Defendant—Petitioner.

v.

The Notified Area Committee, Kot Addu, District Muzaffargarh—Plaintiffs—Respondents.

Civil Ref. No. 9 of 1922, Decided on 2nd March 1923.

Punjab Municipal Act (III of 1911) S. 242 (1) (a)—Profession does not include the office of Naib Tahsildar.

The expressions "persons exercising any profession" "or carrying on any trade" do not cover or include a Naib Tahsildar. 74 P. L. R. 918 Ref. [P. 148 C. 1]

Order of the High Court.—Acting under S. 242 of the Punjab Municipal Act, the Punjab Government imposed a professional tax in the Kot Addu notified area by Notification No. 320, dated 12th May 1915, which is to the following effect :—

"Under the provisions of S. 242 (1) (a) of the Punjab Municipal Act (III of 1911) the Lieutenant Governor is pleased to impose the following profession tax within the Notified area of Kot Addu in the Muzaffargarh District with effect from 1st July 1915."

"DESCRIPTION OF TAX."

"Class of persons to be taxed"—"All persons exercising any profession or carrying on any trade or calling within the Notified Area of Kot Addu. * * * * * * *"

The tax was to be assessed by the Committee of the Notified area and the assessment was subject to confirmation by the Deputy Commissioner of the Muzaffargarh District. The Committee considered that Lala Pala Ram, Settlement *Tahsildar* of Kot Addu, was liable to pay the tax and assessed him accordingly. He protested and the Deputy Commissioner of Muzaffargarh referred the question to the High Court under S. 84 (2) of the Municipal Act for a decision as to whether the expression "persons exercising any profession or carrying on any trade" covered or included a *Naib Tahsildar*. The matter came up before Harrison, J., who has referred the question to a Division Bench.

In an unreported case printed as 74, P.L.R. 1918 Scott Smith J. held that a Munsif could not be said to follow a profession, and this appears to be the only occasion when this point has come up before this Court. It seems to be clear that a *Tahsildar* or *Naib Tahsildar* does not carry on any "trade", nor can he be said to practice any "calling" in the Notified Area. A profession is defined in Webster's dictionary as "the occupation, if not mechanical, agricultural, or the like,

to which one devotes himself; the business which one professes to understand and to follow for subsistence; calling; vocation and employment;"

A *Tahsildar* or a *Naib Tahsildar* can scarcely be considered to carry on a profession in the above sense. It would be more appropriate to describe him as holding an office which term according to Stroud's Judicial Dictionary is "a right to exercise a Public or Private Employment, and to take the fees and emoluments there unto belonging "and" has been sometimes confined to a public employment regulated by law"; while in Wharton's Law Lexicon the term "office" is said to be "an employment, either judicial or Municipal, Civil, military, or ecclesiastical." A public servant such as a *Tehsildar* or *Naib Tahsildar* is appointed to, and holds, an office and does not, in our opinion, carry on a profession or calling, such as would bring him within the purview of the notification in question.

Our answer to the reference is, therefore, in the negative.

Answered in the negative.

1924 LAHORE 148

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Liquidator, Union Bank of India—Plaintiff—Appellant.

v.

Gobind Singh—Defendant—Respondent.

Letters Patent Appeal No. 240 of 1922, Decided on 30th March 1923, from the judgment of Broadway J., D/-11-11-1922.

Companies Act, S. 186—Compromise with contributory is not binding, until sanctioned.

Compromise with contributory, though it might be binding upon the Liquidator personally, would not be binding upon the Bank until sanctioned by an extraordinary resolution of the Company, as provided in section 234 of the Companies Act. [P. 149 C. 1]

Companies Act, S. 186—The principal partner can be made to pay.

Where the principal partner signed the promissory notes.

Held although the firm is not settled on the list of contributories the principal partner being so settled it is open to the liquidator to select him from among the partners and call upon him as a contributory to liquidate the whole debt. [P. 149 C. 1]

Prem Lal—for Appellant.

G. C. Narang—for Respondent.

Le Rossignol, J.—These cross-appeals arise out of liquidation proceedings in connection with the Union Bank of India, Ltd. The respondent Gobind Singh was a shareholder in the Bank and was also indebted to the Bank on promissory notes. The Bank went into voluntary liquidation in October 1914 and one Pandya was appointed Liquidator. Up to the date when liquidation proceedings commenced the defendant had paid Rs. 1,750 on fifty shares and the Liquidator called upon him under S. 186 of the Companies Act to pay the sum of Rs. 3,250 on account of unpaid calls and Rs. 3,507-14-0 on account of promissory notes representing loans by the Bank to the defendant. With the addition of interest the total claim against the defendant amounted to Rs. 9,989-10-6 The learned Judge in Chambers appears to hold that the Liquidator Pandya did enter into a compromise with the defendant; that if he did that compromise would be binding on the Company; that inasmuch as the promissory notes, though executed by the defendant, were executed by him as a partner in a Firm, the debt was not recoverable by summary proceedings under S. 186 of the Companies Act inasmuch as the Firm itself was not a contributory. The learned Judge, therefore, accepted the defendant's appeal and held him liable to pay only the calls on his shares amounting to Rs. 3,250 together with interest at 6 *per cent.* and left the Bank at liberty to sue the defendant's Firm known as Rall Ram-Daya Ram in respect of the debt due on the promissory notes. Before us there is one appeal on behalf of the defendant in which he contends that on the finding of the learned Judge that a compromise had been entered into by the Liquidator, Pandya, and Gobind Singh and as the terms of the compromise had been fulfilled by Gobind Singh. the defendant should have been discharged from all further

liability in the case. The counter-appeal is on behalf of the present Liquidator who contends that the amount due on the promissory notes is recoverable by the summary procedure provided by S. 186 of the Companies Act,

To deal first with the alleged compromise; from its terms it does not appear to be a completed transaction but merely a proposal. On its face it was conditional on the acceptance of one Ganesh Das who appears to have been Manager of one of the branches of the Bank. This man Ganesh Das has not been called as a witness and we are unable to hold that he gave his consent to the proposed composition. In any case such a compromise, though it might, if proved, be binding upon the Liquidator personally, would not be binding upon the Bank until sanctioned by an extraordinary resolution of the Company, as provided in S. 234 of the Companies Act. The defendant relies upon *Cyclemakers Co-operative Supply Co.* v. *Sims* (1), but that case is readily distinguishable. In that case the Liquidator had made a compromise in a suit and it was held that until that compromise had been set aside no cause of action remained to the Company, and consequently the second suit did not lie in view of the judgment on the compromise. That case was of a peculiar nature and the general remarks of the learned Judges were made entirely with reference to the facts of that case.

For these reasons we dismiss the appeal of the defendant Gobind Singh with costs.

The next point is the applicability of the summary procedure under S. 186 of the Companies Act to the debt due on the promissory notes. Now the loan from the Bank was taken by the firm Rallia Ram-Daya Ram of which Gobind Singh is the principal partner. It was Gobind Singh who signed the promissory notes, it was he who got the money. The partners of the firm are jointly and severally responsible on the bills and although the firm is not settled on the list of contributories one of the partners Gobind Singh is so settled and it is open to the Bank to select him from among the partners and call upon him as a contributory to liquidate the whole debt. We see no reason why the principles of S. 43 of the Contract Act should not apply to the present case. We accordingly accept the appeal of the Liquidator and hold that the money due on the promissory notes is recoverable from Gobind Singh by summary procedure under section 186 of the Companies Act.

There remains still one question, namely, whether the claim on the promissory notes is within limitation and on behalf of the Liquidator it is contended that the claim was made within time inasmuch as the defendant paid interest on the debt and also has repaid principal in part and that the requirements of Ss. 19 and 20 of the Limitation Act have been fulfilled. The learned District Judge has calculated interest on the promissory notes at 10 per cent. but inasmuch as the Official Liquidator did not claim more than 9 *per cent.*, we do not think that the rate should be calculated at more than 9 *per cent.*

With the foregoing directions the case is returned to the learned District Judge for disposal after determination whether the claim on the promissory notes was made within time. Costs to be costs in the case.

Case remanded.

(1) [1903] 1 K. B. 477.—72 L. J. K. B. 160—88 L. T. 360—19 T. L. R. 153.

1924 LAHORE 149

SCOTT-SMITH AND BRASHER, JJ.

Wali and others—Appellants.

v

Khuda Bakhsh—Respondent.

Civil Appeal No, 1749 of 1919, Decided on 1922, from the decree of D. J., Shahpur, D/- 19th June 1919, reversing that of the Junior Sub J., Sargadha, D/ 12-4-1919.

(a) *Limitation Act, Art. 115—Suit to recover an agreed amount on default of paying produce is within the article.*

Suit to recover the amount payable in default of payment of produce is one for compensation for breach of the agreement to pay a share of produce and falls within the purview of Art. 115. [P 151 C 1]

(b) *Punjab colonisation of Government Lands Act, S. 19—Promise to pay half produce or money is not illegal.*

When all that the tenant executant of agreement did was to agree, for consideration received, to pay half of the produce of certain lands, and if he failed to pay the produce to pay a sum of money annually.

Held, the agreement did not transfer any of the tenancy rights nor can they be said to create a charge thereon. [P 151 C 1]

(c) *Registration Act, S. 17—Agreement to give a share of crops needs no registration*

Agreement to pay a share of the crops or a certain sum of money needs no registration. [P 151 C 1]

Fakir Chand—for Appellants.

Nanak Chand and *M. A. Ghani*—for Respondent.

Judgment.—This is a second appeal by Wali and his brothers, the sons of Jalal, from the order of the District Judge of Shahpur, decreeing plaintiff-respondent's claim for Rs. 1,400. Jalal was a Government tenant under Act III of 1893 and it appears that Khuda Bakhsh, respondent, advanced him various sums of money in order to enable him to comply with the terms of his tenancy. The tenancy was what is called a horse-breeding one, and Jalal had to keep a mare for the purposes of breeding. On the 9th of March 1906 Jalal executed two documents in favour of Khuda Bakhsh (P-3 and P-4). Exhibit P-3 was a bond in which he admitted that he owed Khuda Bakhsh Rs. 798-11-0 and promised to pay the same to him on demand without interest. Exhibit P-4 was an agreement by Jalal in favour of Khuda Bakhsh in which he stated that he owed him Rs. 798-11-0 for which he had given him a bond. He went on to say that he would pay Khuda Bakhsh half the produce of the square which was in his name in *Chak* No. 98. If he made default in giving the produce, Khuda Bakhsh would be entitled to realise the sum of Rs. 798-11-0 together with Rs. 200 on account of *munafa* annually. So long as Jalal paid the *batai*, Khuda Bakhsh was not to be entitled to realize the principal sum due. Jalal is said to have complied with the terms of the agreement and to have paid Rs. 200 annually to Khuda Bakhsh. After his death, the tenancy was entered in the name of Wali as appears from the agreement P-5. On 6th March 1912 Wali executed the two deeds, P-5 and P-6, in favour of Khuda Bakhsh. P-6 was a bond in which the executant acknowledged the debt of Rs. 798-11 due from his father but it contained no promise regarding payment. P-5 is an agreement which refers to the previous agreement of 1906 executed by Jalal and goes on to say at the end.—"Now, upon the death of my father, Jalal, the square has been entered in my name. Therefore, I am executing a new agreement according to previous conditions and I promise that I shall accept and agree to the former conditions which my father agreed to." In this deed it is stated in the preamble that one of the conditions which his father agreed to was that if he failed to pay half share of the produce yearly, he would pay Rs. 400. The first Court found that the deeds were duly executed but that the plaintiff's suit was barred by time. The lower Appellate Court held that the suit was not barred by time and that it was really one for interest and was governed by Art. 63 of the Limitation Act. It also held that the agreement sued upon was not in contravention of S. 19 of Punjab Act V of 1912, and that it did not require registration. On these findings the suit was decreed.

The first point taken in appeal is, that the agreement is contrary to the provisions of S. 19 of Punjab Act V of 1912, and is therefore, void. In our opinion the decision of the lower Courts on this point is correct. It cannot, we consider, be said that under the agreement either of 1906 or of 1912, the tenant transferred or charged any of the rights or interests vested in him under the Government Tenants Act, 1893. All that the executant of either of these agreements did was to agree, for consideration received, to pay to Khuda Bukhsh half of the produce of certain lands and if he failed to pay the produce to pay sum of money annually. Neither

agreement transfers any of the tenancy rights to Khuda Bakhsh nor can it be said to create a charge thereon.

The next point urged was, that the registration of the agreement is compulsory as it created or declared rights in immoveable property of the value of more than Rs. 100. Here, again, we agree with the lower Courts that registration was not compulsory. The agreement does not create any rights in the future produce in favour of Khuda Bakhsh. All that it does is to promise to pay a share of the crops or a certain sum of money.

The point of limitation was only raised by appellants' Counsel to this extent that he urged that the suit was governed by Art. 115 and not by Art. 63 of the Second Schedule to the Limitation Act. It cannot be said that the suit is one for interest. The agreement did not provide for the payment of interest at all. The suit is clearly one for compensation for the breach of the agreement to pay a share of produce and falls within the purview of Art. 115 and the limitation is three years. Plaintiff can, therefore, recover three years arrears of the sum promised to be paid. [The rest of the judgment is not material for our report].

Appeal accepted.

1924 LAHORE 151

MARTINEAU AND MOTI SAGAR JJ.

Sadiq Hussain—Defendant—Appellant.

v.

Anup Singh and another—Plaintiffs-Respondents.

F. A. No. 2529 of 1919, Decided on 23rd April 1923 from the decree of the S. J. Lyallpur, D/-12th August 1919.

(a) Punjab Land Revenue Act, Ss. 44 and 31 (2) (a)—No presumption can be drawn as to caste from an entry in annual records.

The mere fact that there is an entry as to the caste of a particular person in the Revenue Records does not in any way relieve him from the necessity of proving that he really belongs to that caste if the fact is contested by the opposite party. S. 44 of the Land Revenue Act merely provides that entries in the annual records shall be presumed to be true until the contrary is proved. The annual record comprises the statements mentioned in sub-section 2 Cl. (a) of S. 31, and a statement as to the caste of a land-owner is not a statement covered by S. 31 (2) (a) and therefore no presumption of correctness attaches to such entry. [P 152 C 2, P. 153 C 1]

(b) Sp. performance—Sale of immoveable property—Real intention and not mere words determine whether time is of essence.

Equity which governs the rights of the parties in cases of specific performance of contracts to sell real estates looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. 40 B. 389 30 Ch. 61 (1887) and A. C. 386 1915 Rel. on. [P 153 C 2]

(c) Sp. Performance—Thing agreed must be done though penalty attached.

The general rule of equity is that if a thing is agreed upon to be done though there is a penalty annexed to secure its performance, yet the very thing itself must be done. 15 P. R. 1908 Ref. [P 154 C 1]

Sheo Narayan, Aziz Ahmed and *F. Ahmed*—for Appellant.

Abdul Qadir and *M. Salim*—for Respondents.

Judgment.—This is an appeal from a decree for specific performance by the senior subordinate Judge of Lyallpur at the instance of a purchaser of immoveable property. The facts are briefly these.

On the 4th of November 1918 the appellant, who is a resident of Amroha in the Moradabad District agreed in writing to sell 2½ squares of land in chak No. 90, Gugera Branch, in the Lyallpur Tahsil of the same district, to the respondent Anup Singh for Rs. 18,250/-, and the latter paid Rs. 1000/- of this sum as a deposit or earnest. The agreement for sale provided that the appellant shall execute a sale deed in favour of respondent No. 1 or in favour of any other perso whom the latter wanted to associate with himself in the purchase, and have ragistration of the same effected by the 15th of December 1918. There were certain other clauses in the agreement for sale which are of special importance with reference to the points arising in this case. It was agreed that if the vendor committed a breach in the performance of this contract he would be liable to

refund the earnest money and to pay damages to the respondent vendee. It was also agreed that if the vendee made a default in making the purchase he would be liable to have his earnest money forfeited. It appears that the vendee Anup Singh, who is a member of an agricultural tribe, wanted to associate with himself in the purchase one Inayat Ullah who was not such a member. He accordingly informed the vendor that he should execute two sale-deeds, one in respect of half a square in favour of Inayat Ullah, and the other in his own (Anup Singh's) favour in respect of the two remaining squares. Now, the 15th of December 1918 the day on which the documents were to be registered, was a holiday. It was accordingly arranged that the documents should be executed and registered on the next day. The plaintiff's case is that on the 16th of December 1918 the defendant vendor, who had gone to his chak came back late in the evening when it was impossible to get the documents registered, though drafts of the sale deeds were prepared and stamp purchased. On the 17th of December 1918, the defendant vendor informed the plaintiff by a notice that the latter had made a default in carrying out the terms of the contract inasmuch as he had not the full price ready for the purchase of the property and that the contract was, therefore, rescinded. Without waiting for any reply to this notice the defendant vendor left Lyallpur for Amroha on the same day.

On the 18th of February 1919 the plaintiff instituted this suit for specific performance of the contract, impleading Inayat Ullah as a *proforma* defendant to the suit. Inayat Ullah demurred to his remaining a defendant, and on his expressing a desire to that effect his name was transferred from the list of the defendants to that of the plaintiffs. Defendant No. 1 resisted the suit on various grounds, but his main contentions were :—

(1) That he was a member of an agricultural tribe, and that as the plaintiff had associated with himself in the purchase a non-agricultural the contract could not be lawfully performed, having regard to the provisions of S. 3 of the Alienation of Land Act ;

(2) That the plaintiffs were themselves guilty of breach, inasmuch as they had not the full price ready for the purchase of the property,

(3) That time was of the essence of the contract, and that as the plaintiffs had failed to have the sale deed executed and registered within the time prescribed in the agreement the contract was cancelled ; and

(4) That the contract could not be specifically enforced, inasmuch as an alternative remedy in the shape of damages had been provided for in the agreement which was the only relief the plaintiffs were entitled to

The trial Court found in favour of the plaintiffs and decreed specific performance of tha contract. The defendant has now preferred a first appeal against this decree to this Court through Pandit Sheo Narain and Mr. Aziz Ahmed and we have heard Mr. Abdul Qadir for the respondents.

It is argued by Pandit Sheo Narain that the appellant is recorded in the revenue papers as a Kazilbash Pathan, that Pathans in the district of Lyallpur have been notified to be members of an agricultural tribe, that a presumption of correctness attaches to revenue entries, and that as the defendant is recorded in the revenue papers as belonging to an agricultural tribe, the onus of proving that he does not is shifted on to the plaintiffs. With this contention we are unable to agree. The mere fact that there is an entry as to the caste of a particular person in the revenue records does not in any way relieve him from the necessity of proving that he really belongs to that caste if the fact is contested by the opposite party. S. 44 of the Land Revenue Act, upon which reliance has been placed, merely provides that entries in the annual records shall be presumed to be true until the contrary is proved. An annual record has been described in S. 33 of the same Act as an amended edition of the record of rights annually prepared under the authority of the financial Commissioner and comprises the statements mentioned in

Sub-S. (2) clause (a) of S 31. The question for determination is whether a statement as to the caste of a land-owner is a statement falling within the purview of S. 31, sub-S. (2), clause (a). That section provides that the record of rights for an estate shall include the following documents, namely :—

(a) Statements showing, so far as may be practicable ;

(i) the persons who are land-owners, tenants, or assignees of land revenue in the estate, or who are entitled to receive any of the rents, profits, or produce of the estate, or to occupy land therein :

(ii) the nature and extent of the interests of those persons, and the conditions and liabilities attaching thereto ; and

(iii) the rent, land revenue, rates, cesses, or other payments due from and to each of those persons and to the Government. We do dot think that a statement as to the caste of a land-owner is a statement covered by this section, and we are consequently of opinion that no presumption of correctness attaches to such an entry and that S. 44 of the Land Revenue Act does not in any way assist the appellant. The only evidence on the record on this point is that of Mr. G. F, DeMontmorency, the Deputy Commissioner of Lyallpur. He has stated that in his opinion Kazilbashes are Afghans, but not necessarily Pathans, and that the vendor was not a member of an agricultural tribe. The defendant did not produce any evidence in support of his contention that he was a Pathan, and as the onus of proving that he belonged to an agricultural tribe was clearly upon him, we are of opinion that the finding arrived at by the learned senior subordinate Judge is quite correct and cannot be questioned in this appeal.

The second contention raised by Pandit Sheo Narain is that the plaintiffs were guilty of breach and that they failed to get the documents registered on the 16th of December 1918 as they were not in possession of the full price they had contracted to pay for the property in suit. It appears, however, from the evidence that Sardar Anup Singh, plaintiff No. 1, sold three squares of his for Rs. 16,750/- to Sundar Singh and Bishen Singh on the 6th of September 1918 in order to provide himself with the money required for the purchase of this property. There is also evidence to show that Inayat Ullah, plaintiff No. 2, mortgaged his house to one Lala Wazir Chand Pleader for Rs. 2500/- which he received in cash on the 13th of December 1918. The finding of the learned senior subordinate Judge is that on the 16th December 1918 the two plaintiffs had Rs. 17,700/- in their possession between themselves and that they were quite ready and prepared to perform their part of the contract. We are in full agreement with this finding and hold that the defendant has entirely failed to show that the breach was in any way due to the default of the plaintiffs. The facts that the plaintiffs went to the length of selling and mortgaging their other properties, that they purchased stamps on the 16th of December 1918, and that they got drafts prepared on that very day are also strong pieces of evidence in favour of the view that the plaintiffs had the full price ready and that they were not guilty of any breach.

Next, it is argued that time was of the essence of the contract, and that the contract was cancelled, inasmuch as the plaintiffs failed to get the documents executed and registered within the time prescribed in the agreement. We have no hesitation in holding that this contention is not well-founded. It is now well-settled by the Judicial Committee in the case reported as 40 Bom. 289 that equity which governs the rights of the parties in cases of specific performance of contracts to sell real estates looks, not at the letter but at the substance of the agreement, in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. This doctrine is in full accord with what has been formulated by Lord Cairns in

Tilley v. *Thomas* (1) and by the House of Lords in *Stickney* v. *Keeble* No. 1 (2) The evidence in the present case shows that the documents could not be executed and registered on the 6th owing to the default of the defendant and that on the 17th, when the plaintiffs were quite ready to have the contract completed, the defendant left the station without assigning any valid reason for the non-performance of his part of the contract. We do not, therefore, think that there is any substance in this contention, and we overrule it. The main point in the case is whether the contract could or could not be specifically enforced. Pandit Sheo Narain's contention is that an alternative remedy in the shape of damages was provided for in the agreement itself, and that it was at the election of the defendant either to perform the contract or to pay damages to the plaintiffs. He further argues that as a specific sum is not named in the agreement as the amount payable to the plaintiffs in case of a breach of the contract the case does not fall within the purview of S. 20 of the specific Relief Act, and that therefore specific performance of the contract cannot be claimed. There is no doubt that S. 20 has nothing to do with alternative contracts, which stand on an entirely different footing from contracts in which a sum is named as the amount to be paid in case of a breach. Alternative contracts are as fully performed by the payment of the money as by the doing of the act and therefore there is no ground for proceeding against a party having the election to compel the performance of the other alternative. But the question whether a contract is alternative or not is a question of construction, and consequently each case depends upon its own circumstances, though the guide is always the primary intention of the parties. The general rule of equity is that if a thing is agreed upon to be done, though there is a penalty annexed to secure its performance. yet the very thing itself must be done. On the other hand, it is certainly open to parties entering into contracts to agree that in case of a breach of the contracts a fixed sum of money shall be paid by way of compensation. In the present case it is clear from the evidence that the intention of the parties was that the contract should be specifically enforced. In the case of *Hukam Chand* v. *Nikka Singh* (3) an agreement to sell executed by the vendor contained understandings to execute a deed of sale in favour of the vendees, to get it registered, receiving the balance of the purchase money at the time of registration, to put the vendees into possession, and, on failure to do so, to pay them a certain sum of money as damages and to refund the earnest money. It was held that as there was no condition that the vendees should abandon their right to specific performance, and there was no understanding by them to accept a certain sum of money in lieu of their rights as purchasers, the contract could be specifically enforced. In our opinion, the principle laid down in this authority fully applies to the present case, and there is no force in the contention that the vendor could pay the penalty and decline to convey the subject matter of the contract.

The appeal fails and is dismissed with costs.

Appeal dismissed

(1) [1867] 3 Ch, 61—17 L. T. 422—16 W. R. 166.
(2) [1915] A.C. 386—84 L.J.,Ch. 259—112 L. T. 664.
(3) [1908] 15 P. R. 1908—27 P. W. R 1908—97 P.L.R. 1908.

1924 LAHORE 154

SHADI LAL, C. J. AND ABDUL QADIR, J.

Henry Alfred—Appellant.

v.

Karim Bakhsh and others—Respondents.

S. A. No. 1467 of 1918, Decided on 3rd August 1922, from the decree of D.J. Lahore, D/- 4th February 1918.

T. P. Act, S. 72—Principle contained therein applies in the Punjab.

Payments made by puisne mortgagee in possession in satisfaction of a decree on a prior mortgage fall within the purview of that section and are recoverable from mortgagor at the time of redemption. The rule embodied in the section proceeds upon an equitable principle and the general principles contained in the Transfer of Property Act are applicable to cases arising in the Punjab. [P. 155, C. 2]

B. D. Qureshi and *M. C. Michael* and *Ganga Ram*—for Appellant.

Mohsin Shah for Md. Amin — for Respondents.

Judgment. — The circumstances which have given rise to this second appeal are briefly as follows :—On the 19th January 1892 and the 27th March 1899 one Pir Bakhsh executed two mortgage deeds in favour of Ram Chand, the total principal amount secured by the mortgages being Rs. 199. In August 1899 Pir Bakhsh mortgaged the same property to George Alfred the predecessor-in-interest of the plaintiff for Rs. 400 and in pursuance of the terms of the mortgage the mortgagee obtained possession of the property. In April 1902 Ram Chand o tained a decree on the strength of his mortgage for the recovery of Rs. 223 and also for costs which amounted to Rs. 12-4-0 to be recovered by the sale of the mortgaged property. In order to preserve the property from sale in execution of that decree the puisne mortgagee paid the entire amount due to Ram Chand and the only question for determination is whether he is entitled to add the said amount to the principal money advanced by him and to ask the mortgagor to pay him before redemption not only the money due on his own mortgage but also this amount with interest at the rate of nine per cent. per annum.

Now S. 72 of the Transfer of Property Act lays down that a mortgagee in possession may spend such money as is necessary for the preservation of the property from sale, and it has been held in several cases that payments made in satisfaction of a decree on a prior mortgage fall within the purview of that section. The learned Vakil for the respondents does not dispute the proposition that the present case falls within the ambit of the aforesaid section, but contents himself with the contention that the provisions of the Transfer of Property Act are not applicable to the Punjab. The rule embodied in the section proceeds upon an equitable principle, and it has been repeatedly held that the general principles contained in the Transfer of Property Act are applicable to cases arising in the Punjab.

Accordingly, we hold that the plaintiff is entitled not only to Rs. 400, due on the footing of his own mortgage, but also to Rs. 235-4-0 paid by him to Ram Chand with interest thereon at nine per cent. per annum from the date of the payment by him to Ram Chand up to the date when the mortgagor's representative satisfies his claim. We, therefore, accept the appeal to this extent and also direct the defendant Karim Bakhsh to pay half the costs incurred by the plaintiff throughout the litigation.

Appeal accepted.

✱ 1924 LAHORE 155

LEROSSIGNOL AND HARRISON, JJ.

Hadayat Khan and others — Appellants.

v.

Shahamand and others — Respondents.

S. A. No. 1883 of 1919, Decided on 24th January 1923, from the decree of D. J. Jhang at Sargodha, D/- 22nd May 1919.

Partition—Deed providing a date of separation—Partition is presumed as taken place on that date though parties take possession of shares earlier.

Where the instrument of partition provided that the land should remain joint up to Kharif 1905 and become severalty only in that harvest,

Held that even if the sharers took possession of the plots allotted to them before kharif 1905, their possession up to that date was merely the possession of co-sharers in separate possession of portion of the joint estate. [P. 156, C. 1, 2]

G. C. Narang—for Appellants.

Fakir Chand—for Respondents.

Judgment.—The only question in this and the connected appeals is whether the suits are within time. The

brief facts are that *shamilat* was partitioned in 1904-05, and the defendants were allotted shares in spite of the contention of the present plaintiff that the defendants held no share in *shamilat*.

These suits were brought on the 16th January 1917, and the Courts below have held that the defendants have been in adverse possession since the 31st August 1904 when the proceedings in partition were completed before the Revenue Officer, and that the suits were brought more than 12 years after that date. It is necessary to consider what the expression "completion of partition proceedings" means. It means simply that all disputes raised before the Revenue Officer had been decided by him but up to that date the joint estates remained joint. The parties had not been even inducted into the several shares which it was proposed to allot to them under the scheme of any partition, and apparently no formal order of that kind was ever passed. After appeals to the Settlement Officer and applications for revision to the Financial Commissioner had been rejected the Revenue Officer gave orders for the drawing up of the deed of partition and the deed of partition was accordingly drawn up on the 1st December 1905; and in obedience to the provision of S. 121 of the Land Revenue Act it was provided in that deed that the partition should take effect from *Kharif* 1905. It is, of course, quite possible that a partition should be made, and possession of the several lots be given and taken, and that no formal instrument of partition be prepared, in which case no doubt the giving and taking of possession by the several sharers of their several lots would be held to be the date on which the joint holding ceased to be joint and became severalty. The present, however, is not such a case. There were no doubt proceedings taken with a view to effect partition long before *Kharif* 1905, but those proceedings culminated and found their ultimate result and expression in the instrument of partition, and that instrument provided that the land should remain joint up to *Kharif* 1905, and become severalty only in that harvest. From this it follows that even if the sharers took possession of the plots allotted to them before *Kharif* 1905 their possession up to that date was merely the possession of co-sharers in separate possession of portions of the joint estate.

We have been referred to *Khuidad* v. *Alamgir* (1) but that judgment is based on quite different facts and the remarks therein made are irrelavent to the matter before us. *Lakhera* v. *Mahji* (2) has also been referred to, but it is not clear whether in that case the plaintiff had any share in the *shamilat* at all. If they had no share in the *shamilat* this partition could not invest them with a right which did not exist before partition. In this case the parties in order to convert their joint holding into several holdings had recourse to the Revenue Authorities, and the partition was effected in accordance with the order of the Revenue Officer. That order must be read as a whole and an integral portion of that order was that the land should remain joint property up to *Kharif* 1905, and should, from that date, be split up into the several portions allotted to the parties.

For these reasons, we accept this and the connected appeals, and remand the cases under O. XLI, r. 23 to the Trial Court for disposal on the merits.

Costs to follow final event.

Appeal accepted.

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(1) [1900] 116 P.R. 1900.
(2) [1919] 50 I.C. 550.

1924 LAHORE 156

ABDUL RAOOF, J.

Paira Ram—Appellant.

v.

Keshonath, and others—Defendants.

Mis. S. A. No. 977 of 1920, Decided on 1st February 1923, from an order D. J. Lyallpur, D/-31st March 1920.

C. P. Code, O. 2 R. 3—Suit for preemption of several plots sold by different vendors is good, where vendee is the same.

Vendee purchased four plots of land from different owners at different dates and for

different prices. The plaintiff preemptor brought a single suit in respect of all the sales impleading the vendee and also the various vendors of the four sales.

Held that the suit for pre-emption was really against the vendee. The different vendors under the different four sale-deeds were not necessary parties, but only *Pro forma* defendants and the suit therefore was not bad for misjoinder. [P 157 C 2]

M. Saleem and Devi Dayal—for Appellant.

Nand Lal—for Respondents.

Judgment.—This is an appeal from an order of remand in a preemption suit made under the following circumstances :—

The vendee purchased four plots of land from different owners at different dates and for different prices. The plaintiff preemptor brought a single suit in respect of all the sales impleading the vendee and also the various vendors of the four sales. An objection was raised in the Trial Court on the ground of misjoinder of causes of action and parties. It was overruled and the suit of the plaintiff was decreed in respect of all the four plots. The vendee appealed to the lower Appellate Court and again put forward the objection as to the misjoinder. The lower Appellate Court without deciding whether the suit was bad on account of misjoinder of parties or causes of action has thought it proper to act under O. 2 r. 6. Civil Procedure Code and has directed the institution and trial of four separate cases regarding the sale and has made an order of remand under O. 41 r. 23 Civil Procedure Code.

Against this order of remand the present appeal has been preferred. O. 2 r. 3 (1) provides that "Save as otherwise provided a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit." Rules 4 & 5 of the same Order provide that in certain cases this cannot be done. The suit for pre-emption was really against the vendee. The different vendors under the different four sale deeds were not necessary parties. They were simply impleaded as *proforma* defendants. The suit was therefore, properly instituted. The Trial Court did not think fit to act under rule 6. tried the case and passed a decree. In my opinion it was not proper for the Appellate Court to have interfered with the discretion of the Trial Court in this matter. Evidence has been taken, the suit has been tried and a decree has been passed. It is highly inconvenient if not improper that the entire proceedings taken in the Court below should be set aside and four separate suits should be instituted and the trial should begin over again. This will result in loss of time and money to the parties.

I accordingly accept this appeal and set aside the order of remand with costs.

Appeal accepted.

1924 LAHORE 157

HARRISON J.

Mt. Durga Devi and another—Petitioners.

v.

Gur Narain—Respondent.

Civ. Rev. Pet. No. 642 of 1921, decided on 28th June 1922, from an order of S. J. Amritsar dated the 4th July, 1921.

(a) *Majority Act (IX of 1875) S. 3-Guardian once appointed—Age of majority is 21.*

Where once a guardian had been appointed under Act VIII of 1890, however that guardianship may terminate, the minor cannot attain majority until the age of 21. 21 B. 281 ; 29 A. 672 ; (F. B.) 36 C. 768 ; 11 L. W. 596 ; 5 P.L. J. 460 foll. [P 158 C 1, 3]

(b) *C. P. Code, O. 6, R. 17-Majority of the plaintiff discovered on defendants objection-Amendment should be allowed—C. P. Code, O. 32 R. 2 (b) (ii).*

Where the fact of plaintiff's minority is ascertained upon objection by the defendant and an enquiry by the Court, and it is held that the plaintiff had no knowledge of his minority and no intention of deceiving the Court, an opportunity should be given on application being made to amend the plaint. [P 158 C 3]

L.C. Mehra—for Petitioners.

Mehr Chand—for Respondents.

Judgment. — The plaintiff, Mt. Durga Devi, purporting to have attained majority brought this suit against Gur Narain. An objection was taken that she was still a minor, to which she replied that she was over 18 and under 21 years of age and that in his order, dated 27th Obtober 1920, the Senior Subordinate Judge had declared her to be a major, she having had a guardian, who had died and the Senior Subordinate Judge having held that, as she had married, the guardianship had lapsed and that she was a major. The facts were all candidly and truly stated, and the Subordinate Judge held that under S. 3 of the Majority Act, she was still a minor, that the fact that she was a minor was apparent on the face of the plaint and that, therefore, although an application for amendment had been put in, the application being to the effect that permission should be given to amend if the Court were of opinion that the plaintiff was still a minor, such permission should not be granted, passed an order that the plaint should be taken off the file and returned to the presenter. This forms the subject matter of the present application and it is urged that the order of the Sanior Subordinate Judge justified and legalised the action taken by the plaintiff in suing as a major, and that anyhow the amendment of the plaint should have been allowed. It has been held by all the High Courts in India except this, and the authorities are to be found in *Gordhasdas Jadowji* v. *Harivalubhdas Bhaidas* (1), *Sadho Lal* v. *Murlidhar* (2), *Jaraomull* [*Jagon Ram Marwari*] v. *Mahadeo Prosad Sahu* (3), *Jambagothcchi* v. *Rajamannaswami Mudaliar* (4) a ruling of the Madars High Court, and *Harihar Prasad Singh* v. *Edul Singh* (5) a ruling of the Patna High Court, that where once a guardian has been appointed under Act VIII of 1890, however that guardianship may terminate, the minor cannot attain majority until the age of 21. A Division Bench of the Allahabad High Court once took the opposite view but that view was dissented from in *Sadho Lal* v. *Murlidhar* (2), a Full Bench ruling. The law on the subject, therefore, is perfectly clear and the order of the Senior Subordinate Judge can in no way affeet the position. On the second point, however, it appears to me that the Subordinate Judge is wrong. The fact of minority is not apparent on the face of the plaint but was discovered after an enquiry. The defendant challenged the right of the plaintiff to sue as a major and on the enquiry which ensued it was discovered that the plaintiff was mistaken in thinking that she was a major as was also the Senior Subordinate Judge and that she was in fact a minor. Under these circumstances the case falls under the sub-division given as (*ii*) (*b*) under O. 32, r. 2 by Mr. Mulla in his Commentary at page 723, that is, where the fact is ascertained upon objection by the defendant and enquiry by the Court and it is held that the plaintiff had no knowledge of his minority and no intention of deceiving the Court. Where these facts exist an opportunity should be given on application being made to amend the plaint. The application was made, though it was not the unconditional application as it should have been but was in the common but incorrect form of a conditional application asking the Court first to decide whether it was necessary to amend the plaint and, if so, to give permission for the amendment. In spite of this irregularity there being no question as to the *bona fides* of the plaintiff, I think permission should have been given and I, therefore, accept the revision and direct the lower Court to allow amendment of the plaint within such time as it may fix on payment of Rs. 32 costs to the defendant. The costs of this revision will be borne by the parties.

Revision accepted.

(1) [1897] 21 Bom. 281.
(2) [1907] 29 All. 672—(1907) A.W.N. 213—4 A.L.J. 597 (F.B.)
(3) [1909] 36 Cal. 768—13 C.W.N. 643—1 I.C. 724.
(4) [1920] 11 L.W. 596—57 I.C. 678.
(5) [1920] 5 P.L.J. 460—57 I.C. 333

1924 LAHORE 159

BROADWAY AND BRASHER, JJ.

Kanshi Ram—Appellant.

v

Bhojaram and others—Respondents.

Mis. S, A. No. 1244 of 1921, Decided on 28th July 1922, from the order of D. J. Jhang at Sargodha, D/- 22nd February 1921,

Evidence Act, S. 115—Pre-emption—Accepting money from the vendee in satisfaction of mortgage does not stop mortgagee from pre-empting.

The plaintiff was mortgagee with possession of some of the land sold and mortgagee without possession of certain other parts of it Subsequent to the sale he had received the monies due to him as mortgagee from the vendee without any protest or without expressing any intention of enforcing his right of pre-emption.

Held that the conduct of the plaintiff in accepting the money from the vendee was quite consistent with his claim to pre-empt and cannot be regarded either as an act of acquiescence or waiver of such claim on his part.

Fakir Chand—for Appellant.

Sheo Narain—for Respondents.

Judgment.—Gosain Bhoja Ram sought to pre-empt a sale effected on on the 26th November 1918 by which Pandit Kanshi Ram bought certain land from Sahib Diyal and others for Rs. 6,499-1-4. The vendee defendant pleaded inter alia that the plaintiff had waived his right to pre-empt by agreeing to the sale in his favour as well as by certain conduct on his part subsequent to the sale which, it was pleaded, amounted to acquiescence on his part. The Trial Court dismissed the suit holding these allegations established. The plaintiff thereupon appealed to the learned District Judge who took a different view and accepting the appeal remanded the case for a decision on the remaining issues. Against this order of remand the defendants have come up to this Court in second appeal through Mr. Fakir Chand.

Firstly, it was alleged by the appellants that the plaintiff had in the presence of certain persons, who were produced as witnesses, definitely agreed to the sale by Sahib Diyal, etc., to the vendee-appellant. The learned District Judge has considered the evidence of these witnesses and has definitely refused to believe them. It has, therefore, been found as a fact that the plaintiff did not consent to the sale prior to the 26th November 1918, and as this is a finding on a question of fact, we are precluded from going into it.

Next it was urged that the plaintiff was mortgagee with possession of some of the land sold and mortgagee without possession of certain other parts of it; that subsequent to the sale he had received the monies due to him as mortgagee from the vendee without any protest or without expressing any intention of enforcing his right of pre-emption. This conduct on his part, it was urged, amounted to acquiescence. Further, it was said that these monies had been paid to him by the vendee on a demand made by him. As to the latter point the learned District Judge has held that it has not been proved that the plaintiff demanded his money from the vendee. This again is a question of fact which we cannot examine in second appeal. There thus remains only his conduct in accepting the money from the vendee and to this circumstance must be added the fact that the plaintiff did not institute his suit till the last possible moment.

The authorities cited by the learned District Judge support the view taken by him. In *Baijnath* v. *Ramdhari Chowdhry* (1) their Lordships of the Privy Council make the following :— "Until a decree for pre-emption was made, Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the plaintiffs as mortgagees, was no recognition of anything more than this, and was quite consistent with the claim to pre-empt." The conduct of the plaintiff in the present case in accepting the money from the vendee is similarly quite consistent with his claim to pre-empt and cannot be

(1) [1908] 35 Cal. 402—35 I. C. 60—12 C. W. N. 419—10 Bom. L. R. 253—7 C. L. J. 318—18 M. L. J. 116—3 M.L.T. 349. (P. C.)

regarded either as an act of acquiescence or waiver of such claim on his part. We, therefore, dismiss this appeal with costs. The order of remand will stand.

Appeal dismissed.

1924 LAHORE 160

MARTINEAU, J.

Sita Ram—Petitioner.

v

Emperor—Respondent.

Cr. Rev. P. No. 1250 of 1921, Decided on 27th March 1922 from an order of Ss. J. Ludhiana, D/- 27th June 1921.

Salt Act (XII of 1882) S. 27—Importation includes bringing from one part of territory into another.

There is nothing in S. 27 to bear out the contention that importation into a part of the territories mentioned in S. 1 is to be taken as meaning only importation from outside those territories and not importation from one part of the territories into another part. [P 160 C 2]

Mukand Lal Puri—for Petitioner.

Khilinda Ram—for Respondent.

Judgment.—The petitioner, Sita Ram, has been fined Rs. 200 for infringing a rule made on the 24th April 1920 under S. 27 of the Indian Salt Act, XII of 1882, prohibiting, under certain conditions, the importation of salt into the Ludhiana District. The facts found are that a waggon containing salt was booked from Khewra to Gobindgarh, and that Sita Ram, a partner in the firm to which the consignees had sold the salt, got the Station Master of Khana, which is in the Ludhiana District, to detach the waggon at that station, after which the salt was delivered to Sita Ram's firm at Khanna.

S. 27 of Act XII of 1882 provides that the Governor-General in Council may, from time to time, by rule, prohibit absolutely, or subject to conditions, the importation of salt into, or the transit of salt over, the said territories or any part thereof. The said "territories" are specified in S. 1 and the main contention on behalf of the petitioner is that importation into a part of those territories means importation from outside them, and that the rule prohibiting the importation of salt into the Ludhiana District was not infringed by bringing salt into that district from another district in the same Province.

I think that this is not a correct interpretation of S. 27. It is urged that "importation" is defined in dictionaries and in Warton's Law Lexicon as meaning the bringing of anything into a place, from abroad. But the term "abroad" is relative, and in relation to the Ludhiana District any place outside that district could be regarded as a place "abroad" "Importing" literally means simply "bringing in" and I see no reason why the expression "importation into the Ludhiana District" should not be taken in its ordinary sense. There is nothing in S. 27 to bear out the contention that importation into a part of the territories mentioned in S. 1 is to be taken as meaning only importation from outside those territories and not importation from one part of the territories into another part.

Next, it is contended that the firm in which the petitioner was a partner was not the importing firm but had purchased the goods from the consignees, and that the goods had already been imported when Sita Ram got the Station Master of Khanna to detach the waggon and give delivery. It is however to be observed that until the wagon was detached there was no infringement of the rule against importation as the rule had been made subject to the condition that the salt was not imported by Railway in course of through transit. The salt was in course of transit to Gobindgarh so long as the waggon was not detached from the train at Khanna. When the wagon was detached the character of the importation changed and in getting the Station Master to detach the waggon the petitioner contravened the rule made under S. 27 of the Act.

The conviction is correct and I dismiss this application for revision.

Application dismissed.

1924 Lahore 161.

MOTI SAGOR, J.

Lekh Raj and another—Plaintiffs-Appellants.

v.

Inder Mal and another—Defendants-Respondents.

S. A. No. 1478 of 1922, decided on 15th January, 1923, from the decree of District Judge, Karnal, dated 11th March, 1922, reversing that of Munsif, 1st Class, dated 13th June, 1921.

Pre-emption—Town divided into sub-divisions—Custom of pre-emption in one sub-division does not lead to presumption of the same in the neighbouring sub-division.

Where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-divisions in which the property is situate and that the onus is not discharged by proof of the custom in the neighbouring sub-divisions.

(b) *Evidence Act, S. 42—Judgment after contest has more probative value than one on compromise.*

A judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest, a custom is held to be proved or negatived. [P. 162, C. 1.]

Shamair Chand—for the Appellant.

Jagan Nath—for the Respondents.

Judgment:—This is a second appeal against a decision of the District Judge of Karnal, dated the 11th March, 1922, dismissing the plaintiffs' suit for possession by pre-emption of a house situate in *Mohalla* Bagarian of the town of Kaithal, in the Karnal District. The contentions raised by the defendant were that the house was not situate in *Mohalla* Bagarian, that the custom of pre-emption did not prevail in the *Mohalla* in question and that the price of Rs. 900 mentioned in the sale-deed was neither paid nor fixed in good faith. The trial Court found against the defendant on all these points and decreed the plaintiffs' claim. On appeal the District Judge, however, was of opinion that the plaintiffs had failed to establish that the custom of pre-emption prevailed in *Mohalla* Bagarian, and he accordingly dismissed the suit. The plaintiffs have now come up in second appeal to this Court through Mr. Shamair Chand after obtaining a certificate from the District Judge, while Mr. Jagan Nath has appeared on behalf of the respondents.

The sole question for determination is whether the custom of pre-emption prevails in the *Mohalla* of Kaithal where the house sold is situate. In support of the contention that the custom of pre-emption prevails in the *Mohalla* in question, the learned Counsel for the appellants relies upon two things. Firstly, he cites certain published judgments of the Chief Court from which it appears that the custom of pre-emption exists in some of the neighbouring sub-divisions. In one of the judgments there is an expression of opinion to the effect that pre-emption prevails very generally throughout the town of Kaithal. It is argued that in these circumstances the *onus* of proving the non-existence of the custom of pre-emption in this *Mohalla* is upon the defendant and that he has failed to discharge that *onus*. I am unable to accept this contention. As held in *Melaram* v. *Mussammat Bandeo* (1), a case which has been cited with approval in another recent case reported as *Prabh Dial* v. *Bhikhoo Mal* (2), it may now be taken as settled that where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-divisions in which the property is situate and that the *onus* is not discharged by proof of the custom in the neighbouring sub-divisions. The two authorities, *Jai Devi* v. *Noubat Rai* (3), and *Muhammad Husain* v. *Ghulam Muhammad* (4), relating to *Mohalla* Tayyab and *Mohalla* Pansarian in the town of Kaithal, and the sale-deed of 1883 relating to *Mohalla* Boran to which reference has been made in the course of arguments, are consequently not of any great help to the plaintiffs. As to the prevalence of the custom of pre-emption in the town generally, reference may be made to *Bul Chand* v. *Lekhu* (5) in which it was found that the custom of pre-emption did not exist in *Mohalla* Marhat Khan, another sub-division of the same town. The observations made by the learned Judge in *Jai Devi* v. *Naubat Rai* (3), that pre-emption prevails very generally in the town are, therefore, not strictly in accordance with the facts.

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(1) 59 P. R. 1911=48 P.L.R. 1912=198 P.W.R. 1911=12 I. C. 859.
(2) (1921) 3 Lah. L.J. 387=61 I. C. 892.
(3) 71 P.R. 1905=129 P.L.R. 1905.
(4) 78 P.R. 1911=138 P.L.R. 1911=241 P.W.R. 1911=10 I.C. 240.
(5) 189 P.W.R. 1911=242 P.L.R. 1911=12 I.C. 485.

Next, reliance has been placed on a decision by *Lala* Amrit Lal, Munsif, dated the 16th December. 1913, in the case of *Durga Parshad* v. *Sita Ram* by which the claim of the plaintiff for possession of a house by pre-emption in this very *Mohalla* was decreed. It is argued that this is a very strong piece of evidence in favour of the plaintiffs and that it completely shifts the *onus* of proof on the defendant. A reference to the written statement filed by the defendants in that case, however, makes it quite clear that there was no contest between the parties as to the right of pre-emption, the vendee having admitted that the pre-emptor in that case was entitled to claim the house, and it is clear, as laid down in *Imperial Oil Soap and General Mills Company* v. *M. Misbah-ud-Din* (6), that a judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest a custom is held to be proved or negatived.

The next piece of evidence upon which reliance has been placed is a judgment of *Lala* Achhru Ram, dated the 9th October 1920, in the case of *Joti Ram* v. *Hisari*. This case also relates to *Mohalla* Bagarian, but it will be observed that the judgment in that case practically proceeds on the basis of the earlier judgment of 1913 in which the right of pre-emption was admitted.

The defendant, on the other hand, has produced some evidence to show that many sales have taken place in this Mohalla without the exercise of the right of pre-emption. In these circumstances I do not think that one or two solitary instances of the admission of the custom supported by a few instances in the nighbouring sub-divisions are sufficient to discharge the onus of proving the existence of the custom in Mohalla Bargarian which lay heavily upon the plaintiffs. In my opinion the District Judge was right in holding that the plaintiffs had failed to establish the prevalence of the custom in this Mohalla, and I dismiss the appeal with costs.

Appeal dismissed.

(6) (1921) 2 Lah. 83=61 I.C. 325.

1924 Lahore 162.

SCOTT-SMITH, J.

Nizam Din—Petitioner.

v.

The Crown—Respondent.

Criminal Revision No. 1761 of 1922, decided on 16th February, 1923, reported by the Sessions Judge, Multan, with his No. 216-J. of 1922.

Penal Code, S. 383—Demanding money for doing what one is not bound to do is no offence.

A Nikah Khawan is not bound to read a Nikah for a person unless he chooses to do so, and it is certainly no offence for him to demand any fee he likes for doing so. [P. 163, C. 1].

REFERENCE:—The accused on conviction by *Khan Sahib Maulvi* Ghaus Bakhsh, exercising the powers of a Magistrate, 1st class, in the Muzaffargarh District, was sentenced by order, dated 30th August, 1922, under section 384 of the Indian Penal Code.

The facts of this case are as follows:

Nizam Din, the accused petitioner, is a *Nikah Khawan.* Allah Rakhiya, the complainant, engaged the petitioner to read the *nikah* for the complainant's younger brother. When the people were collected, the petitioner refused to perform the ceremony and enter the marriage in his register unless he was first paid Rs. 5. A great deal of dispute ensued and eventually the complainant paid Rs. 5 and the marriage was performed. The petitioner said that he had received only Rs. 2, of which he himself had to get Re. 1, the remainder being spent on payment to the *girdawar* of the *Nikah Khawans*, the *chaukidar* and for postage expenses. The petitioner was prosecuted by the complainant for extortion. The Honorary Magistrate came to a finding that Rs. 5 had actually been paid by the complainant to the petitioner and convicting the petitioner under section 384, Indian Penal Code, sentenced him to pay a fine of Rs. 15, in default of payment to undergo two weeks' rigorous imprisonment. The evidence for the prosecution is, in my opinion, credible. Several respectable persons deposed that Rs. 5 had actually been paid after protest to the petitioner, and I consider that the Magistrate came to a correct finding on facts.

The proceedings are forwarded for revision on the following grounds :—

The definition of extortion in section 383, Indian Penal Code, runs :—

"Whoever intentionally puts any person in fear of any injury to that person or to any other, and thereby dishonestly induces the person put in fear, etc."

In cases under this section the threat must be of an injury, which means a harm illegally caused. Now, in the present case, doubtless harm was caused to the complainant and the persons attending the marriage; but it cannot be said that the harm was caused illegally. The District Board of Muzaffargarh has laid down certain rules, a copy of which is on the record, regarding the registration of marriages.

Rule 9 reads:—"At the time of performing a marriage the *Nikah Khawan*, in addition to his customary dues, will get 6 *annas* more for every marriage, which will be distributed as follows:—

"*Girdawar Qazi*, 4 *annas*, District Board fee, 1½ *annas*, postage stamps, ½ *anna*".

Now, it is nowhere laid down what the customary dues are, and theoretically a *Nikah Khawan* might demand any fee that he likes. There is no law forbidding him to do so. His demand for Rs. 5 was not illegal, because his due is not prescribed by law. The petitioner's action did not put any one in fear of such an injury as is contemplated in section 383, Indian Penal Code, and I therefore forward the record to the High Court and recommend that the conviction be set aside and the fine, which has been paid, be refunded.

Scott-Smith, J.:—A *Nikah Khawan* is not bound to read a *Nikah* for a person unless he chooses to do so, and it is certainly no offence for him to demand any fee he likes for doing so. I agree with the learned Sessions Judge and setting aside the conviction and sentence acquit Nizam Din. Fine if paid will be refunded.

Revision accepted.

1924 Lahore 163.

MOTI SAGAR, J.

Genda Ram and another—Defendants-Appellants.

v.

Ram Chand and another—Respondents.

S. A. No. 2508 of 1922, decided on 25th May, 1923, from the decree of the District Judge, Karnal, dated 11th July, 1922.

(a) *Pre-emption—Parts of house separately sold—No pre-emption of any one part is allowed merely because it forms part of the whole.*

The mere fact that all the three portions sold were at one time parts of the single house is not sufficient to enable the plaintiff to claim pre-emption in respect of any particular portion, if the latter is not independently subject to that right when the pre-emption was claimed, on the ground of contiguity alone. [P. 165, C. 1.]

(b) *Registration Act, S. 17 (2) (v)—Receipt for earnest money stating another document to be drawn up need not be registered.*

A document was executed under which a sum of Rs. 50 was paid to the defendant vendor by way of earnest money and the latter agreed to sell immoveable property to the plaintiff for a sum of Rs. 180. *Held*, that the document merely evidenced the receipt of the earnest money and did not in any way create or declare any rights in immoveable property of the value of more than Rs. 100 especially when it clearly recited that another document would subsequently be executed which would serve as a document of title in respect of the portion agreed to be sold under that receipt. Therefore the document clearly came within the purview of S. 17 (2) (v) and can be admitted without registration. [P. 165, C. 1.]

(c) *Specific performance — Would be refused where its grant would not give appreciable advantage to plaintiff.*

Although plaintiff was entitled to specific performance it was refused as its grant would not have given him appreciable advantage and would have compelled him to defend pre-emption suits by defendants, the portion in question being situated between two other portions belonging to defendants themselves. [P. 165, C. 2.]

Shamair Chand—for the Appellants.

Jagan Nath—for the Respondents.

Judgment:—Civil Appeals Nos. 2508, 2509 and 2510 of 1922 are connected and may conveniently be disposed of by one judgment. The plaintiff in all these three cases is one Ramchander, and the suits relate to three different portions of a house in ruins at Karnal, possession of which is claimed by him by right of pre-emption. With respect to the portion which is the subject-matter of dispute in suit No. 77, there is a further allegation that the defendant-vendor had agreed to sell it to the plaintiff for Rs. 180 prior to its sale to Gainda Ram and Ladli Parshad, defendant-vendees, and that the plaintiff was consequently entitled to claim specific performance of the contract in respect thereof, irrespective of his claim on the ground of pre-emption. It was further alleged that the plaintiff had paid a sum of

Rs. 50 to the defendant-vendor by way of earnest money and that in any case he was entitled to its refund and to damages which he assessed at Rs. 130. The property sold was owned by the defendants in the following shares:

(1) Asa Ram, one half; and (2) Har Sarup and Ram Sarup, one half in equal shares.

It will be convenient for the sake of reference to designate these shares by the names of A, B and C.

On the 6th of January 1920, Har Sarup and Ram Sarup, vendors, sold to the defendants Gainda Ram and Ladli Parshad the portion A for a sum of Rs. 200. The sale deed was registered on the 27th of January 1920. This is the sale which forms the subject-matter of attack in suit No. 78.

On the 28th of January 1920 Asa Ram sold the portion B to the same vendees for a sum of Rs. 300 and had the sale-deed registered on the next day, *i.e.*, the 29th of January, 1920. It is with reference to this portion that specific performance of this contract is claimed by the plaintiff in the first instance and a decree for possession by pre-emption in the alternative. This sale is attacked in suit No. 77.

On the 29th of January, 1920 another sale-deed was executed by Har Sarup and Ram Sarup in respect of the portion C, in favour of the same vendees for Rs. 300 and registered on the 30th of January. It is in suit No. 79 that this sale is attacked by the plaintiff. The plaintiff claimed pre-emption in respect of A and C on payment of Rs. 100 each and in respect of B on payment of Rs. 180. In this suit it was further prayed that in case it was found that the plaintiff was entitled neither to the specific performance of the contract nor to a decree for pre-emption, he should be given a decree for return of the earnest money and damages.

The trial Court dismissed the plaintiff's suit in respect of the portion A on the ground that the property by virtue of which pre-emption was being claimed was not contiguous to the property sold and that, therefore, the plaintiff had no right of pre-emption superior to that of the defendant-vandees. The suit in respect of the portion C was decreed on payment of Rs. 200. As to the suit relating to the portion B it was held that the plaintiff was not entitled to the specific performance of the contract but that he should be given a decree for pre-emption subject to the payment of Rs. 200. The plaintiff was also given a decree for Rs. 50 against the vendor which had been paid to the latter by the former by way of earnest money. No appeal was preferred by Asa Ram, vendor, against the decree directing him to pay Rs. 50 to the plaintiff. The vendees, however, appealed in the two suits No. 77 and 79 relating to portions B and C which had been decided against them by the trial Court. The plaintiff Ram Chandar filed cross-objections in these suits on the question of costs and on the issues relating to the specific performance of the contract which had been decided against him. He also appealed against the dismissal of suit No. 78 relating to the portion A. The appellate Court reversed the judgment of the first Court in suit No. 78 on the ground that the three plots sold were all parts of a single house which was contiguous to the plaintiff's house and that, therefore, it did not very much matter if the particular portion A was situated at some distance and not actually touching the house of the plaintiff. The decree of the trial Court in suit No. 79 relating to portion C was maintained by the appellate Court and the vendee's appeal dismissed. As to suit No. 77 relating to the portion B, the finding of the trial Court that the plaintiff was not entitled to claim specific performance of the contract as also the finding that the plaintiff be given a decree for pre-emption was upheld but the pre-emption money was raised from Rs. 200 to Rs. 300.

Against these decisions three appeals have beeen preferred to this Court by the defendant-vendees, and points for determination are—

(1) Whether the plaintiff is entitled to claim pre-emption in respect of portion A and C;

(2) Whether the plaintiff is entitled to claim specific performance of the contract in respect of portion B;

(3) If not, whether he is entitled to claim pre-emption in respect of this portion; and

(4) If the plaintiff is entitled neither to the specific performance of the contract nor to a decree for pre-emption, whether he is entitled to any damages, and if so to what extent.

On the first question I have no hesitation in holding that the plaintiff has no case and that the decree for possession by

pre-emption granted to him by the Court below should be set aside. It is indisputable that the house was owned by different co-sharers and sold by means of different sale deeds. The sale deeds were executed and registered on different dates and the prices fixed for the shares sold were also not exactly the same. The plaintiff's house by virtue of which he is claiming pre-emption adjoins at the back the portions B and C only. It is admitted that the portion A is situated at a distance of about 11 feet and that it does not adjoin the plaintiff's house. The mere fact that all three portions sold were at one time parts of a single house is not sufficient in law to enable the plaintiff to claim pre-emption in respect of any particular portion if the latter is not independently subject to that right. In the present case pre-emption was claimed on the ground of contiguity and contiguity alone. The plaintiff having failed to establish the ground upon which the suit was based, the suit ought to have been dismissed, and I hold accordingly.

On the second question the plaintiff relies upon a document, dated the 22nd of January, 1920, under which a sum of Rs. 50 was paid to the defendant vendor by way of earnest money and the latter agreed to sell the portion B to the plaintiff for a sum of Rs. 180. Both the Courts below have concurrently found that this document is inadmissible in evidence for want of registration. This finding in my opinion is obviously wrong. The document merely evidenced the receipt of the earnest money and did not in any way create or declare any rights in immoveable property of the value of more than Rs. 100. The receipt clearly recited that another document would subsequently be executed which would serve as document of title in respect of the portion agreed to be sold under that receipt. The document clearly falls within the purview of section 17 (2) (v) which provides that a document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest is not compulsorily registrable. In my opinion this document did not require registration and both the Courts below were wrong in excluding it from evidence. The execution of the document is admitted by the defendant-vendor, and I fail to understand why he should not be held bound by it. The question for consideration is whether under the special circumstances of this case specific performance of the contract should or should not be decreed in favour of the plaintiff. On this question the first point to be taken into consideration is whether the defendant vendees are purchasers in good faith without notice. None of the Courts below have given any finding upon this point but it is unnecessary to remand the case for this purpose as in my opinion this is not a case in which specific performance should be decreed even if the finding on the question of good faith and notice is in favour of the plaintiff. It is not denied that the defendant vendees have now become the owners of the whole house by purchase. The portion B is situated between the two portions A and C with respect to which the plaintiff's suit for pre-emption must be dismissed. If a decree is given in favour of the plaintiff in respect of the portion B, it would be a source of constant trouble and friction between the parties and would not result in any appreciable advantage to the plaintiff. Moreover it appears from the plan that this house and the houses A and C have a common entrance from the street which would give the defendant vendees a superior right of pre-emption to claim this property under section 16 (fourthly) of the Punjab Pre-emption Act. The decree for specific performance, therefore, even if allowed, would become nugatory and would not avail the plaintiff in any way whatever. It is not denied that the Courts have an absolute discretion to decree specific performance or not, and I am clearly of opinion that this is not one of those cases in which the plaintiff should be held entitled to such a decree. I accordingly dismiss the suit for the specific performance of the contract.

The result of this finding is that the suit for pre-emption in respect of this portion must also be dismissed. This portion adjoins the portion A, and having been purchased a couple of days after the defendant-vendees had become the owners of the portion A, it is clear that the plaintiff cannot have any right of pre-emption superior to that of the defendant vendees. There is, however, on

reason why a decree for damages should not be given in favour of the plaintiff. It is proved beyond doubt that a contract for the sale of the property had been entered into between the parties prior to the sale to the vendees. Specific performance has not been decreed in favour of the plaintiff for special reasons to which reference has already been made. The property was originally agreed to be sold for Rs. 180 and was sold only a few days after for Rs. 300. Under section 73 of the Indian Contract Act the plaintiff in my opinion was certainly entitled to claim damages which naturally arose in the usual course of things. These damages are clearly ascertainable, and I am of opinion that the plaintiff is entitled to claim the difference between the contract price and the price at which the property was subsequently sold, namely, Rs. 120. On the finding that the plaintiff is not entitled to claim pre-emption in respect of the portions A and B it is obvious that the suit with respect to C must also be dismissed. This portion was purchased last when the defendant vendees had already become owners of the adjoining portions. It is obvious that the defendant-vendees had as much right to purchase this portion as the plaintiff, and the defendent-vendor having exercised his right in favour of the defendant vendees, it is not open to the plaintiff to challenge the sale merely because his house also is contiguous to the house sold.

The result is that all the three appeals are accepted and the plaintiff's suit dismissed with costs throughout. The plaintiff, however, will be given a decree for Rs. 120 against Asa Ram defendant-vendor in addition to Rs. 50 which have already been decreed in his favour by the Courts below.

Appeals allowed.

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* 1924 Lahore 166.

MARTINEAU, J.

Chanda Singh and others—Defendants-Appellants.

v.

Bishen Singh—Plaintiff-Respondent.

S. A. No. 3079 of 1922, decided on 23rd May, 1923, from the decree of Additional District Judge, Lahore, dated 14th October, 1922, reversing that of Munsiff, Kasur, dated 18th July, 1921.

Civ. Pro. Code, S. 144—Limitation starts from reversal and not confirmation of the reversal.

An application under S. 144, Civ. Pro. Code, for mesne profits is not one for execution, and as soon as the decree is reversed a right to apply for mesne profits accrues. [P. 167, C. 1.]

Nand Lal—for the Appellants.

Amar Nath Chopra—for the Respondent.

Martineau, J. :—This appeal arises out of an application made by the respondent Bishen Singh under section 144 of the Civil Procedure Code for mesne profits of land of which he was deprived by the appellants under a decree which was subsequently reversed on appeal, and the question for determination is whether the application was made within the time prescribed by law. The appellants got possession under their decree in 1912. The decree was reversed in appeal by the Additional Divisional Judge on the 13th May, 1913, and his decree, so far as the appellants were concerned, was confirmed by the High Court on the 20th January, 1915. The respondent's application under section 144, Civil Procedure Code, for mesne profits was made on the 15th January, 1918. It is admittedly governed by article 181 of the 1st Schedule to the Limitation Act, and the period of limitation is 3 years from the time when the right to appeal accrued. The question is whether time runs from the date of the Additional Divisional Judge's decree or from the date on which that decree was confirmed by the High Court in second appeal. The Munsif dismissed the application as time-barred, but the Additional Judge on appeal has held that it is within time and has awarded the respondent Rs. 800 for mesne profits. A second appeal has been preferred from the Additional Judge's order.

It is contended on behalf of the appellants that the order of the Munsif was not a decree and that therefore no appeal lay from it to the Additional Judge. I do not agree with this contention, and it appears to me that *Ram Chand* v. *Sham Prashad* (1), which is cited in support of it, does not apply. It is however, unnecessary to discuss this point, as I am of opinion that the contention that the application made under section 144 of the Civil Procedure Code was barred by limitation must prevail. The learned Additional Judge holds that as the Additional Divisional Judge's decree of the 13th May, 1913, became merged in the

(1) 110 P.R. 1918=117 P.L.R. 1914=22 I.C. 851.

decree of the High Court the latter decree is to be taken as the starting point for limitation. This would no doubt be correct if the application now in question were an application for execution of the decree, for an application for execution would be governed by article 182 of the 1st Schedule to the Limitation Act and the only decree which could be executed would be the decree of the High Court. But an application under section 144 of the Civil Procedure Code for mesne profits is not one for execution, and as soon as the decree obtained by the appellants was reversed by the Additional Divisional Judge a right to apply for mesne profits accrued to the respondent. The decree passed by the High Court on second appeal did not give the respondent a fresh right, but it merely affirmed the right which the Additional Divisional Judge had already declared.

I hold therefore that the period of limitation is to be reckoned from the date of the Additional Divisional Judge's decree, and that the respondent's application having been made more than three years from that date is barred by limitation.

I accept the appeal, set aside the order of the Additional Judge, and restore the order of the first Court dismissing the application. The respondent will pay the appellants' costs throughout.

Appeal accepted.

1924 Lahore 167.

ZAFAR ALI, J.

Maula Bakhsh and others—(Convicts) Petitioners.

v.

The Crown—Respondent.

Criminal Revision No. 23 of 1923 decided on 26th February, 1923, for revision of the order of Sessions Judge Sialkot, dated 2nd December, 1922, affirming that of Magistrate, Sialkot, dated 31st October, 1922.

Penal Code, S. 331—Demand refers to property.

Extorting a promise from complainant to restore the woman that he was alleged to have abducted does not fall within the purview of the section.

Nand Lal—for the Petitioners.

Zafar Ullah Khan—for the Crown.

Zafar Ali, J.:—The four petitioners have been convicted under section 331, Indian Penal Code, of voluntarily causing grievous hurt to the complainant to extort a promise from him to restore the woman that he was alleged to have abducted. The prosecution theory was that the petitioners compelled him by beating him to execute an agreement to restore the woman. It was contended in the Courts below and is again urged in this Court that, even if the petitioners did all that was attributed to them, their act does not fall within the purview of section 331, Indian Penal Code. The learned Sessions Judge dealt with this objection in the following way :—

"It is argued that no offence under section 331 has been made out but it is clear from the evidence on the record that the appellant voluntarily caused grievous hurt to the complainant for the purpose of extorting from him a statement that the woman *Mussammat* Resham Bibi who was said to have been abducted was in his possession and also extorting from him a promise that he would return her. The fact moreover that a number of persons were asked to stand surety for the return of the woman would show that the object of the appellants was to create evidence in the case under section 494, Indian Penal Code, and the promise to return the woman was clearly a promise to satisfy a demand."

But in *Queen-Empress* v. *Ella Boyan* (1), it was held that, under this section, the demand must be with respect to property. The learned Counsel, who appeared for the Crown, conceded this, but argued that the extortion of the said promise amounted to an extortion of confession. But a promise is quite different from a confession especially when it was not extorted with the object of proving an offence. I am, therefore, of opinion that the petitioners' offence does not fall under section 331, Indian Penal Code, and accordingly I alter the conviction to that under section 325, Indian Penal Code. The evidence relied upon by the Courts below proves that all the four accused beat the complainant and caused severe injuries to him including a fracture of a rib. All four are, therefore, responsible for the grievous hurt; but, as there was only one grievous hurt, I reduce the sentence of each to rigorous imprisonment for two years. The sentences of fine shall stand as well as the sentence under section 342, Indian Penal Code.

Sentences reduced.

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(1) (1888) 11 Mad. 267.

1924 Lahore 168.

BROADWAY AND LUMSDEN, JJ.

Jagtu—(Convict) Appellant

v.

The Crown—Respondent.

Cr. A. No. 522 of 1923, decided on 28th June, 1923, from the order of the Sessions Judge, Ferozepore, dated 18th April, 1923.

Penal Code, S. 302—Evidence consistent—Accused should be acquitted.

Where the body of the deceased was not identified when it was discovered and the prosecution evidence was inconsistent with the medical evidence, the accused was given the benefit of doubt. 18 P.R. 1917 distinguished mainly on the ground that the parties in the present case were not shown to be on bad terms.

Kashi Ram—for the Appellant.

The Public Prosecutor—for the Crown.

Judgment:—On the evening of the 12th October one Nathu, an elderly *Jat* belonging to the village of Lopon in the Ferozepore District went out to cut fodder and has not again been seen alive. A report was made at the local police station by the village *lambardar* on the afternoon of the 14th October. Four days later a body was found floating in the canal near the railway bridge over the Muktsar Rajbaha more than fifty miles from Lopon. This body was sent for *post mortem* examination when it was discovered that death had been due to violence, the skull being fractured and the humerus bone and two ribs broken. The body was then identifiable but unfortunately the news of Nathus' disappearance was not known to the police of that locality. The prosecution theory is that this body was that of the missing man and that the latter had been murdered by the present appellant Jagtu a cousin and reversioner of his, because Nathu who was childless had been alienating his property in favour of a niece named Mt. Bhani to whom he was much attached. The assessors were unanimous in considering that the identity of the body had not been satisfactorily established and in rejecting certain evidence produced to connect appellant with the disappearance of Nathu. The learned Sessions Judge, however, held that it was Nathu's body which was found in the canal and that the prosecution evidence was generally reliable. Appellant was accordingly convicted under section 302, Indian Penal Code, and sentenced to death subject to the confirmation of this Court. Jagtu has appealed and the case has also come before us under the provisions of section 374, Criminal Procedure Code.

The first question for determination is as to the identity of the body. We have carefully considered the evidence on this point and have come to the conclusion that there is no adequate proof that the body found in the canal is that of Nathu. There seems to be little doubt that the latter has been murdered and we are not impressed by the argument that if the body had been thrown into the canal near Lopon, it could not have found its way into the Muktsar Rajbaha. It seems clear too that the description of the body to some extent corresponds with Nathu's appearance. But on the other hand, there are various facts which cannot be ignored. It is admitted that Nathu was a sikh and the wording of the *naqsha surat-i-hal*, especially in regard to the hair, does not suggest that the body was regarded as that of a sikh. In the second place, the state of the body at the time of *post mortem* is hardly consistent with an admitted four days immersion and a journey of over fifty miles plus two days exposure to air. In the third place, the prosecution story is to the effect that much blood had been shed whereas the injuries found on the body make it evident that the bleeding must have been of a strictly limited character. In connection with these injuries it is also important to note that while the prosecution story is that the murder was committed with a *Jakwa* on the blade of which blood stains were found by the Chemical Examiner, the medical evidence shows that there were no incised wounds on the body. The cumulative effect of these facts is such that, in our opinion, it cannot be safely held that the body found was that of Nathu. The identity not having been established we do not consider that conviction can be based on the remaining evidence. The learned Sessions Judge has relied on P. R. 18 of 1917, but there are several important distinctions between the cases. In that authority a strong motive, revenge was proved and the identity of the body was satisfactorily established. Moreover, it was shown that the convict had disposed of part of the plunder obtained from his victim. In the present case the motive is not very convincing seeing that the prosecution witnesses depose that the parties were not on bad terms, the

body has not been identified, and nothing belonging to the deceased was found with the appellant. The latter is alleged to have pointed out two places at which blood stained earth was found and this fact no doubt is highly suspicious. But in the circumstances of the case we cannot regard the proof as sufficient and the appellant is entitled to the benefit of the doubt. We accordingly accept the appeal and direct that appellant be acquitted.

Appeal allowed.

1924 Lahore 169.

HARRISON AND ZAFAR ALI, JJ.

The Punjab Cotton Press Company, Ltd.—Plaintiff-Appellant

v.

The Secretary of State for India—Defendant-Respondent.

F. A. No. 2440 of 1917, decided on the 31st May, 1923, from the decree of the Senior Sub-Judge, Lahore, dated 21st May, 1917.

(a) *Northern India Canal and Drainage Act (VIII of 1873), S. 15—Preventive action taken by Canal Officer falls under S. 15—Suit for damage caused by such action comes under Limitation Act, Art. 2.*

In the Raya branch canal, a large amount of water collected at more than one point and the Canal Officer cut the channel in various places to allow this surplus water to escape into the lower lands on the west of the distributary. In spite of this action the flood water was held up and diverted from its natural course and eventually reached the property of the plaintiff, and injured it: *Held* that the action taken in dealing with the flood is covered by S. 15, that Art. 2 of the Limitation Act applied and that the terminus *a quo* in calculating limitation is the date of the damage and not the date of the construction of the work which caused the damage. [P. 170, C. 1.]

(b) *Northern India Canal and Drainage Act (VIII of 1873), S. 15—Construction.*

The words "may execute all works which may be necessary for the purpose of repairing or preventing such accident" are independent of the preceding words "may enter upon any land adjacent to such canal." [P. 170, C. 1.]

(c) *Interpretation of statute—Place of section in the Act does not override its plain meaning.*

The place at which a particular section is to be found and the heading of the chapter in which it is contained, are not sufficient reasons for placing an interpretation on the plain words of the section which is not justified by the words themselves. [P. 170, C. 2.]

Tek Chand, B. R. Puri and *Umar Baksh*—for Appellants.

Jai Lal—for Respondents.

Judgment:—Three suits against the Secretary of State claiming damages on account of the action taken by the canal department which is said to have caused the high floods in the river Ravi in the year 1914 and 1917 to injure the property of the plaintiffs have been dismissed. The three appeals being Nos. 2440 of 1917 and 1305 and 1306 of 1921 have been argued together by the same Counsel, as the preliminary point involved is almost indentical in all the three. The facts, however, are not the same and we think it better to take the two appeals of 1921 together and the earlier appeal, 2440 of 1917, separately. The two latter suits have both been dismissed as barred by article 2 of the Limitation Act, and that with which we are now dealing 2440 of 1917 has been dismissed on the merits and also on the finding that it is barred by limitation under section 9 of Act VIII of 1873. The learned Government Advocate contents that this suit also is barred by article 2, and the first question to be decided is whether this contention is correct.

Before the year 1914 the Raya Branch Tail Distributary of the Upper Chenab Canal was constructed both for irrigation purposes and to prevent the water remaining in the natural bed from causing unnecessary damage. The bank of the distributary nearest the river was made specially strong with a view to the latter purpose. In 1914, the first year of this channel's working, a large amount of water collected at more than one point and the canal officer cut the channel in various places to allow this surplus water to escape on to the lower lands on the west of the distributary. In spite of this action, or, as plaintiff says, because it was not efficiently and thoroughly carried out, the flood water was held up and diverted from its natural course and eventually reached the property of the plaintiff, the Punjab Cotton Press, and injured it. The position, therefore, as put by Counsel is that the damage was caused both by the unscientific construction of the channel and the injudicious action taken in dealing with the flood. It is admitted by both sides that whatever be the article of the Limitation Act which governs the suit, the cause of action accrued on the 23rd and 30th of July 1914. If, therefore, article 2 applies the suit which was instituted on the 18th

of August, 1915, is hopelessly barred. It is fully established that the *terminus a quo* in calculating limitation is the date of the damage and not the date of the construction of the work which caused the damage. The Government Advocate points out that the action taken, whether wise or unwise, was so taken under section 6, section 15 or possibly section 58 of Act VIII of 1873. Section 15 runs as follows :

"In case of any accident happening or being apprehended to a canal, any Divisional Canal Officer or any person acting under his general or special orders in this behalf may enter upon any lands adjacent to such canal and may execute all works which may be necessary for the purpose of repairing or preventing such accident."

Bakhshi Tek Chand for the appellants contends that the words "may execute all works which may be necessary for the purpose of repairing or preventing such accident" are ancillary to and dependent on the preceding words "may enter upon any land adjacent to such canal." He states that it is not shown that the canal officer first entered upon any land adjacent to the canal and therefore any work executed by him is not covered by the section and further that the cutting of the banks cannot be held to have been a work necessary for the purpose of repairing or preventing such accident. We are of opinion that the words "may execute all works, etc." are independent of the preceding words and, anyhow, it is impossible to execute any work on a canal without entering upon the land adjacent and thereby reaching it.

So far as the actual cutting of the banks is concerned, *Bakhshi* Tek Chand points out that it did not prevent the accident and urges that he is prepared to show on the merits that it did not repair it, inasmuch as he contends that it aggravated instead of alleviating the damage caused. We do not think there is any force in this contention, for the word "repairing" covers any attempt to minimize the natural consequences of the accident and the cutting of the banks could only have been undertaken with a view to preventing further damage. Whether it achieved that purpose or not is quite immaterial, for all that is necessary in order to bring a suit within the purview of article 2 is that a public officer should have done what he did with the honest intention of acting as the statute authorized. We are therefore of opinion that the action taken in dealing with the flood is covered by section 15 and the suit is therefore barred.

As far as section 6 is concerned, it is contended that the place at which this section was to be found coupled with the use of the words "in this behalf" in line 2 shows that the section only applies to action taken at the time of construction. The place of the section between sections 5 and 7 lends some support to this contention as also does the repetition in section 15 of the authorization of canal officers to take action on running canals.

We are however of opinion that the place at which the section is to be found and the heading of the chapter of the application of water for public purposes are not sufficient reasons for placing an interpretation on the plain words of the section which is not justified by those words themselves ; and whether section 15 be wholly tautologous or not, the expression "in this behalf" applies to the application or use of the said water and the word "use" coupled with the preceding words covers all actions necessary both for construction and maintenance and whether taken at the time of construction or later.

So far as section 58 is concerned we are of opinion that it does not apply to the facts of the present case. It contemplates permanent work, for the carrying out of which the Local Government has previously authorized some of its officers, and any acts committed by them after that definite authorization are covered by the section. Here there is no question of any permanent work but of the immediate action required to deal with a sudden emergency in the shape of an unexpected flood. We find, therefore, that the suit is governed by article 2 and we therefore dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 170.

HARRISON and ZAFAR ALI, JJ.

Keshwa Nand—Appellant.

v.

Mohan Puri—Respondent.

S. A. No. 31 of 1918, decided on 23rd July, 1923, from the decree of District Judge, Karnal, dated 9th October 1917.

Religious endowment—Succession by Chela *to one shrine does not entitle him to succeed to another.*

The constitution of a particular shrine must govern the succession and the mere fact that a certain *chela* has succeeded to one of the shrines enjoyed by his *guru* does not *ipso facto* entitle him to succeed to another, also enjoyed by his *guru*. (76 P.R. 1867, *Foll.*)

G. S. Salariya for *Nandal Lal*—for Appellant.

Devi Dayal—for Respondent.

Judgment:—The plaintiff in this case is one Mohan Puri, *chela* of the late *Mahant* Turat Puri, and he brings this suit for possession of the land attached to the shrine known as Samadh Manjpuri situate in village Khurasea against one *Mahant* Aditya Puri who is in possession and other formal defendants. He has been given a decree and the appeal was dismissed by the District Judge. A certificate has been given regarding the right of the villagers to appoint the *Mahant* of this shrine, and on second appeal the only point to be decided is whether the appointment admittedly made by the proprietary body of Aditya Puri, defendant, is valid or not.

The history of the shrine is that the *Gaddi* is a Puri Gaddi; the Puris being a sub-division of the sect of Gosains. The original holder was one Manjpuri who was succeeded by his *chela* Zabin Puri. Ram Puri duly succeeded his Guru Zabim Puri and Mast Puri succeeded Ram Puri. On Mast Puri's death in 1897 no *chela* could be discovered. The proprietary body appear to have appointed Gopal Ban and he was shown in the revenue record as *Mahant* of the institution, although he did not belong to this particular sect. He resigned his appointment and the shrine then remained vacant for eight years. The *patwari* and the Naib Tahsildar finding that the land was being enjoyed by some of the proprietors and more especially by the *lambardar* recommended that it should be forfeited to the crown. The Deputy Commissioner passed an order that if there was any question of forfeiture at all, the land was to go to the proprietary body, but suggested that the *lambardars* should nominate a *Mahant*. In the year 1897 they elected the *Mahant* of the shrine at Pai village, ten miles distant, a man named Turt Puri; and he was duly shown as the *Mahant* of this shrine also. Two months later he died. The villagers thereupon appointed the present defendant Aditya Puri, who is a member of the Puri sect.

The plaintiff bases his case on the admitted fact that he is the *chela* of the late Turt Puri and that the Bhek ratified his succession to the Pai shrine. He contends that inasmuch as his spiritual father held both shrines, he is entitled to succeed to this shrine also. It is noticeable that the Bhek is never said to have taken any action whatever in ratifying or appointing a successor to either of these Puri shrines until this particular occasion, and what is even more important, they took no action when this shrine was lying vacant after the death of Mast Puri. It being therefore perfectly clear that at the beginning *chela* succeeded Guru as a matter of course, the question is whether the present plaintiff in virtue of his *chelaship* is entitled to succeed Turt Puri in this shrine. It is clear that up to the time when Turt Puri was elected by the *lambardars* or the proprietary body the Pai shrine had no sort of connection with this shrine. It is also clear that had the *lambardars* not taken the action which they did, the Deputy Commissioner would have directed that the land should revert to the proprietary body.

After taking everything into account we are of opinion that the definite break in the succession is all important more especially when combined with the two appointments of Gopal Ban and Turt Puri, who had no connection with the last incumbent Mast Puri beyond the fact that one of them belonged to the same sub-sect. These appointments were not objected to in any way by the Bhek or any other body of *Mahants* or others claiming to control Puri foundations. After Mast Puri's death without spiritual issue there was what amounted to a re-foundation and in accordance with the rules of that re-foundation as established by practice the villagers appoint their *Mahant*. We find, therefore, that the mere fact that Mohan Puri was a *chela* of Turt Puri and did succeed to the Pai shrine and and that Turt Puri held both the Pai shrine this does not entitle him to succeed. As laid down in 76 P.R. 1867, the constitution of the particular shrine in question must govern the succession and the mere fact that a certain *chela* has succeeded to one of the shrines enjoyed by his guru does not *ipso facto* entitle him to succeed to another. The history of this particular

shrine shows that the proprietary body are entitled to nominate the *Mahant*, this being established by their having done so on the last two occasions without any challenge or objection during a period of 20 years.

We therefore accept the appeal and dismiss the plaintiff's suit. The costs of the contesting defendant Aditya Puri will be paid by the plaintiff throughout.

Appeal allowed.

1924 Lahore 172.

BROADWAY AND ZAFAR ALI, JJ.

Md. Umar and another—Appellants.

v.

Fayazuddin and others—Respondents.

S.A. No. 234 of 1918, decided on 20th January, 1923, from the decree of District Judge, Delhi, dated 21st August, 1917.

Punjab Pre-emption Act (I of 1913), S. 16 (secondly)—'Structure', meaning—'Structure and Building,' difference between.

What the law contemplates is that the owner of the building or other structure on a site is like a co-owner in the property sold and therefore his right of pre-emption is inferior only to a co-sharer therein. The word building or structure is not defined in the Act but it may be stated that every building is a structure though every structure is not a building and the word structure can be applied to a wall or a shed or any other unsubstantial erection for which the word building cannot be used. Therefore not only the owner of a building on a site but also of an erection of less substantial kind has a right of pre-emption in respect of it.

Durga Das and *Sardha Ram*—for Appellants.

Jagan Nath and *Hargopal*—for Respondents.

Judgment:—The only question for us to decide in this second appeal, which arises out of a pre-emption suit, is, whether the Courts below have rightly interpreted clause "*secondly*" of section 16 of the Punjab Pre-emption Act (I of 1913) in holding that the sheds, etc., existing on the site pre-empted, which had been erected by the defendant-vendee before the sale when he held the land on a lease, were structures within the purview of the said clause "*secondly*."

The site in question is situated on the margin of a public road in Delhi and is about 210 square yards in area. The defendant originally obtained from the owner a lease of it for three years and 11 months from the 31st January, 1913 to the end of December 1916 to start a workshop there, and for that purpose he constructed therein three extensive sheds supported on wooden poles with roofs of iron sheets. As the level of the site was much higher than that of the road he constructed a stone wall alongside the road up to the height of its level. Further, he constructed a latrine and a *katcha* wall with a door in it to serve as an entrance. The learned District Judge inspected the place and says in his judgment:—"I have inspected these erections and I have not the least hesitation in concurring with the lower Court and holding that they were erected before the sale and that they amount to "other structures" within the meaning of section 16, "*secondly*," Pre-emption Act. The structures, although not of a very massive nature are by no means of a temporary kind. The place is being used as a *karkhana* and the wooden pillars are well driven into the earth, and the roofing is sufficient to protect workers from the inclemencies of the weather." These structures were valued by an Overseer at Rs. 594-10-0.

It was argued on behalf of the plaintiff-appellant that the clause "*secondly*," did not contemplate temporary structures of this kind; that the word "structure" signified a building or edifice of large dimensions; that the defendant was entitled to only the materials of the structures because he had to remove the same on the expiration of the term of his lease and could not be said to be the owner of a structure or building; that the building or structure according to clause "*secondly*" shall cover the whole of the site while the structures in the present case do not do so, and that the place in the order of priority given to this class of pre-emptors indicates that his rights should be of a very superior nature. We are of opinion that these contentions are quite untenable. What the law contemplates is, that the owner of the 'building or other structures" on a site is like a co-owner in the property sold, and, therefore his right of pre-emption is inferior only to a co-sharer therein. The word "building" or "structure" is not defined in the Act but it may be stated that every building is a structure though every structure is not a building and the word "structure" can be applied to a wall or

shed or any other unsubstantial erection for which the word "building" cannot be used. Therefore, not only the owner of a building on a site but also of an erection of less substantial kind, has a right of pre-emption in respect of it. It is true that on the expiration of the lease the defendant lessee was liable to remove the structures, but it does not follow from this that at the time of the sale he was not the owner thereof. Further, the structures practically cover the whole of the site leaving a space in the centre to be used as a courtyard. Therefore, it cannot be said that they do not cover the whole of the site.

We are, therefore, of opinion, that the clause "*secondly*" was rightly interpreted by the Courts below and we dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 173.

BROADWAY AND ABDUL QADIR, JJ.

Firm Sawan Mal-Gopi Chand—Appellants.

v.

Shiv Charan Das—Respondent.

S. A. No. 2226 of 1918, decided on the 15th July, 1922, from the decree of District Judge, Rawalpindi, dated 20th April, 1918.

Companies Act, S. 34—Passing of property.

Plaintiff sold some shares of a Bank to defendant, but did not take the purchase-money. A deed of transfer was duly executed and signed by the parties and was made over to the defendant to enable him to have his name registered in the books of the Bank in place of transferor. Later on the Bank failed and went into liquidation before the transferee had presented his deed of transfer to the Bank and thus the shares continued to stand in the name of transferor, as before. *Held* that the contract was complete on the day that the deed of transfer was signed by both parties and that by virtue of that the defendant stepped into the shoes of the transferor and became an owner of the shares in the company in his place, with all the advantages and disadvantages attached to that status. [P. 174, C, 2.]

M. S. Bhagat—for Appellants.

M. N. Mukerji—for Respondent.

Judgment:—A firm, known as Sawan Mal-Gopi Chand, sold 20 shares of the Lahore Bank, Limited, worth Rs. 2,000 to Shiv Charan Das on the 12th or 13th September, 1913. They had paid only Rs. 100 to the Bank on account of the said shares up to that time and a sum of Rs. 8 was due to them as dividend. They sold the shares for Rs. 80 only and it was agreed that the defendant would be entitled to receive the dividend. A deed of transfer was duly executed and signed by the parties and was made over to the defendant to enable him to have his name registered in the books of the Bank in place of Sawan Mal-Gopi Chand. In November, 1913, however, the Bank failed and went into liquidation before the transferee had presented his deed of transfer to the Bank and thus the shares continued to stand in the name of Sawan Mal-Gopi Chand as before. It may be mentioned that the sum of Rs. 80 had not been paid by the defendant at the time of the transfer. In October, 1916, about three years after the above transaction, Sawan Mal-Gopi Chand brought a suit against Shiv Charan Das for the recovery of Rs. 80 as the price of the shares sold, and for establishing that the defendant was liable for any demands that the liquidators of the Bank may make from the person owning the said shares. The suit was described as one for specific performance of a contract. The defendant denied having entered into the contract and pleaded that the suit was barred by time and that the contract could not be specifically performed. The trial Court held that the suit was within time, but that the transfer of the shares was not complete, because it required the sanction of the Bank and that, therefore, the contract could not be specifically enforced. The plaintiff appealed against this decision and the learned District Judge upheld the decision of the Court of first instance and dismissed the appeal. The plaintiffs have now preferred a second appeal to this Court and we have heard Mr. M. S. Bhagat on their behalf and Mr. M. N. Mukerji for the respondent. It was noticed that the memorandum of appeal was insufficiently stamped and the appellants have made good the deficiency.

It has been found as a matter of fact that a deed of transfer selling the 20 shares was drawn up between the parties and handed over to Shiv Charan Das. He has failed to produce that deed in Court and the production of secondary evidence as to that deed has, therefore, been permitted and it is proved that the transfer did take

place. The only point in dispute in the case is, whether in the eye of the law this transfer amounted to a complete transaction binding on the parties or not. Mr. Bhagat draws our attention to section 44 of the old Act VI of 1882, which corresponds to section 28 of the present Indian Companies Act VII of 1913, and provides that the shares of any member in a Company shall be moveable property, transferable in manner provided by the Articles of the Company. The Articles of Association of the Lahore Bank, Limited, are on the record, and provide for a transfer of shares in the Company in a form prescribed in article 30. He urges that the shares were transferred by his clients according to law and nothing further remained to be done by them. He relies on a note given under section 34 of Mr. Ranga Chariar's Indian Companies Act, which says that the transferor is only bound to execute a valid transfer and hand it to the transferee and that there is no warranty on his part that the Company will accept the transferee, nor is the transferor under any obligation to get the transfer registered. He argues, therefore, that, according to this test, the contract as between his clients and Shiv Charan Das was quite complete and, though it was open to the Company to refuse to register the name of the transferee in place of the transferor, such refusal could not render the sale incomplete. He goes on to say that if such refusal had taken place and the Bank had given any reasons for its refusal it would have been open to the defendant to apply to a Court and to have the reason examined, or if he had paid the money and the Bank had refused to register his name, perhaps he could sue for its refund, but he could not say that the contract was in any way incomplete. Counsel refers to *Bahadur Singh* v. *Syam Sunder Tag* (1) which is a case where certain shares in a Company were sold by *A* to *B*, who, instead of paying the price in cash, executed a bond for it in favour of *A*. The transferee then applied for registration and the transfer was refused by a person who described himself as the Chief Manager of the Company, but was one apparently who had no authority to refuse registration of the transferor's shares, under the Articles of Association. It was held in that case that as the said Chief Manager's refusal to register this transfer was improper, it could not be said that the Company had refused to register the shares, and *B* was, therefore, held to be liable on the bond he had executed for the price of the shares. It is urged that the present case is stronger than the Allahabad case referred to above, because here the Bank has never refused to register the transfer and would probably have registered it, if the transferee had promptly presented an application for the substitution of his name for the transferor. Mr. Mukerji in reply lays stress on the terms of articles 28 and 29 of the Articles of Association of the Lahore Bank, Limited, which provide that the Company may decline to register a transfer of shares without assigning any reasons therefor, and that the transferor shall be deemed to remain a holder of such shares until the name of the transferee is entered in the register in respect thereof. He contends that, under such circumstances, it could not be said that the ownership of the shares had completely passed to the defendant, simply because the deed of transfer was executed. It is, however, obvious that the articles above alluded to are meant to safeguard the interests of the Banking Company and to give it an occasion to reject any transferee of whom it disapproves, but they are not meant to affect either the right of a share-holder to transfer his shares, which is absolute, nor can they determine the rights and liabilities of a share-holder and his transferee *inter se*. The Bank has never refused to register these shares and, what is more, the defendant has not given the Company any opportunity of refusing to register this transfer or registering it.

Under these circumstances the defendant can hardly be allowed to take advantage of his own omission to present the deed of transfer promptly to the Bank and to say that because it was not presented to the Bank, therefore, the contract between him and the plaintiff's firm became a nullity. We hold that the contract was complete on the day that the deed of transfer was signed by both parties and that by virtue of that the defendant stepped into the shoes of the transferor and became an owner of the 20 shares in the Company in his place, with all the advantages and disadvantages attached to that status. If all had gone well he would have secured a dividend of Rs. 8 to begin with, and might have got further dividends if the Company had continued, but as the Company has come to grief, he

(1) (1914) 36 All. 365=12 A.L.J. 629=23 I.C. 900.

incurs the liabilities which his predecessor-in-interest would have incurred regarding these shares. We think the suit was not properly described as one for specific performance of a contract. The contract was complete and no specific performance can be ordered under the circumstances but we grant the plaintiffs a decree for Rs. 80 which the defendant was bound to pay as soon as the deed of transfer was handed over to him, and hold that by virtue of the transfer that he obtained from Sawan Mal-Gopi Chand, the defendant became the owner of the 20 shares standing in the name of the latter in the books of the Lahore Bank, Limited, with all the rights and obligations attached to those shares.

We, therefore, accept this appeal with costs.

Appeal accepted.

1924 Lahore 175.

SHADI LAL, C.J. AND FFORDE, J.

Mt. Maryan Bibi—Appellant

v.

Ghulam Muhomad and others—Respondents.

F. A. No. 762 of 1919, decided on 31st January, 1923, from the decree of Senior Sub-Judge, Sialkot, dated 31st March, 1919.

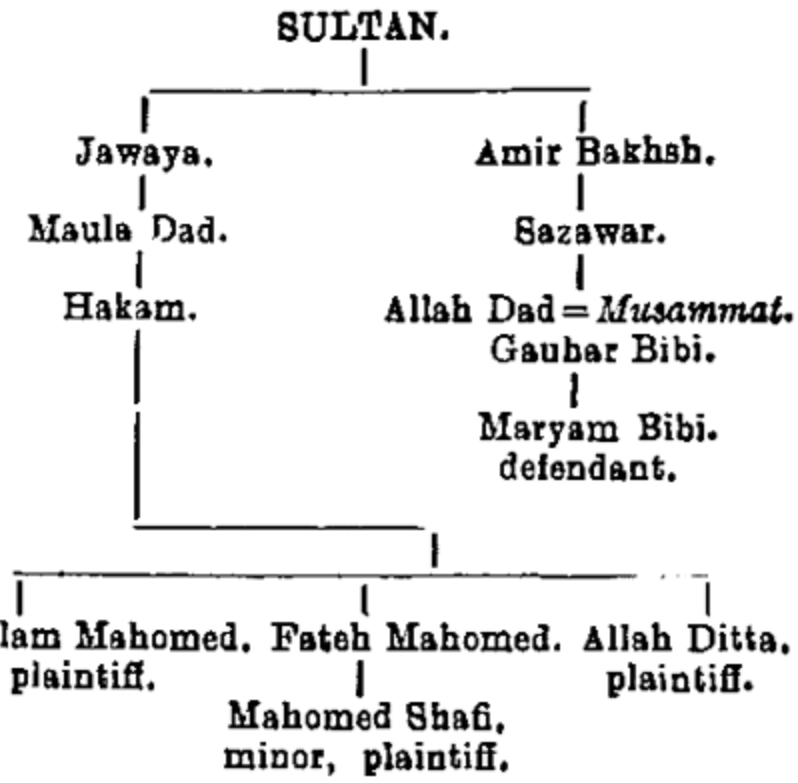
Custom (Punjab)—Succession—Collaterals' property equal to that of deceased—Common ancestor mentioned in pedigrees—Presumption is in favour of property being ancestral.

Where in a suit by collaterals for succession to the property of the deceased it was found that the property of the plaintiffs was just equal to that of the deceased and the name of the common ancestor was expressly recorded in genealogical trees prepared at different settlements and one of the *khata* was still joint: *Held* in the absence of any indication that the property was self-acquired, the presupmtion was that it was ancestral. (41 P.R. 1914, *Rel. on.*)

Aziz Ahmad and *Abdul Rashid*—for Appellant.

Zafar Ullah Khan and *Din Dayal*—for Respondents.

Judgment:—The dispute in this case relates to the estate of one Allah Dad, a Chinna Jat, of the Daska Tahsil, in the Sialkot District, whose relationship with the contesting parties is shown in the following pedigree table:—



The plaintiffs, who are the collaterals of the deceased in the fourth degree allege that the property is ancestral, and that they are entitled to inherit the estate in preference to the deceased's daughter, Maryam Bibi. The Trial Court has found in favour of the plaintiffs and decreed their claim.

The defendant has preferred an appeal to this Court, and the sole question argued before us is, that the plaintiffs have failed to establish that the land has descended from the common ancestor. The estate of the deceased consists of four plots of land, two situate in the village Manpur, and the remaining two in a neighbouring village called Kothi Channu. Now, the Manpur estate comprises two parcels,—

(1) Two *kanals* 3 *marlas* out of a small joint holding, which mainly consists of two disused wells, of which Allah Dad and the plaintiffs were joint owners.

(2) A holding of 262 *kanals* which corresponds to a holding of 259 *kanals* owned by the plaintiffs in this village.

Coming now to the property in Kothi Channu, we find that Allah Dad and the plaintiffs were joint owners in a *khata* of 659 *kanals* 10 *marlas* to the extent of $\frac{1}{8}$th share each, and that each branch of the family has also a separate holding of nearly 85 *kanals*.

The learned Subordinate Judge has, in view of the fact that the holdings of the parties are almost equal in each of the two villages, and that two of the *khatas* are even now jointly owned, reached the conclusion that the whole of the property descended from a common ancestor. This conclusion receives support from the fact that the common ancestor, Sultan, is expressly mentioned in the pedigree tables and it has been held by a Division Bench

in *Jiwan Singh* v. *Har Kaur* (1), that the express mention of the common ancestor in the genealogical tree furnished a presumptive proof that the land originally belonged to him.

The facts mentioned above do not entirely negative the theory that the two branches of the family jointly acquired all the plots otherwise than by succession from a common ancestor, but there is not a scintilla of evidence on the record in support of such acquisition. At any rate, the Trial Judge has drawn from these facts the inference that the property in dispute is ancestral and we are not prepared to hold that his conclusion is erroneous. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1914) 41 P.R. 1914=51 P.L.R. 1914=34 P.W.R. 1914=22 I.C. 415.

1924 Lahore 176

MARTINEAU AND BRASHER, JJ.

Munshi Ram—Defendant-Appellant

v.

Nauranga and others—Plaintiffs-Respondents.

S.A. No. 1130 of 1919, decided on 3rd August, 1922, from a decree of the District Judge, Hoshiarpur, dated 1st March, 1919.

Bengal Regulation (XVII of 1806)—Foreclosure proceedings—Mortgagee must prove that notice fulfilled all the conditions—Non-existence of notice is fatal to the proceedings.

The Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition. The mere fact of mortgagor's raising no objection to the validity of the notice does not warrant the presumption that the notice fulfilled all the necessary conditions. And the non-existence of the notice does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of the Regulation. On the other hand the non-existence of the notice is fatal to the validity of the foreclosure proceedings. (46 P.R. 1907, *Foll.*). [P. 177, C. 1.]

Mehar Chand Mahajan and *Tek Chand*—for Appellant.

Des Raj Sawhney—for Respondents.

Judgment:—In 1874 Kahna and Singhu mortgaged the land in suit to the defendant's father Kirpa Ram with possession for Rs. 402. The land was to be redeemed within 8 years, and there was a stipulation in the deed that if the mortgagors did not redeem the land they would sell it. Kahna and Singhu are dead and the present suit was brought by their heirs for redemption. The defendant pleaded that foreclosure proceedings had been taken in 1894, that a notice was served on Singhu, the surviving mortgagor, and that as Singhu had not paid the mortgage money within a year of the receipt of the notice the defendant had become absolute owner of the land.

The record of the proceedings of 1894 shows that on the application of Kirpa Ram a notice of foreclosure was issued to Singhu, who appeared in Court and admitted having received the notice and a copy of the application, and said that he had not paid the mortgage-money, but urged that Kirpa Ram cut down trees of the value of Rs. 352 without permission and that this sum should be deducted and said he would pay the balance.

The notice of foreclosure issued by the Court is, however, not on the record and the Munsif held that its validity could not be presumed and that the defendant was bound to prove that the foreclosure proceedings were valid, and as he had not done so the Munsif passed a decree for redemption.

The District Judge on appeal took a different view of the case, holding that the mortgage was not one by way of conditional sale, but a mortgage with an agreement that the mortgagors would sell the land if they failed to redeem it, and that, therefore, the mortgagee was not competent to take foreclosure proceedings, but that his remedy should have been to sue to enforce performance of the agreement to sell. The learned Judge also found that an oral sale to the defendant, which was alleged in the grounds of appeal, had not been proved, and he dismissed the appeal. The defendant has presented a second appeal to this Court.

We do not agree with the District Judge in his construction of the mortgage of 1874. Although the words entered in the mortgage deed were "*agar fakui-rahn-na karainge to bai kardenge*," we think there is no doubt that what the mortgagors really meant was that if they did not redeem the land it would be deemed to be sold. An agreement to sell would be useless without an agreement as to the price for

which the land was to be sold. Moreover the plaintiffs in the First Court admitted that the mortgage was one by conditional sale, and the lower appellate Court has put an interpretation on the mortgage-deed which the plaintiffs themselves had not put on it.

But although we differ from the lower appellate Court on that point we think that the suit must fail for the reason given by the Munsif. It is settled law that the Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition. There are numerous authorities on this point to which it is unnecessary to refer. It is argued for the appellant that as Singhu appeared in Court 1894 and admitted the receipt of the notice and took no objection to its validity it may be presumed that the notice fulfilled the requirements of the Regulation, but we cannot agree with the contention. Singhu may not have read the notice, and he may even have been illiterate. At any rate, the mere fact of his raising no objection to the validity of the notice does not warrant the presumption that the notice fulfilled all the necessary conditions. The notice is unfortunately not forthcoming, and this fact makes it impossible for the appellant to prove that all necessary formalities were observed. We recognize the difficulty of his position, but we are unable to hold that the non-existence of the notice relieves him of the burden of proving that the notice satisfied the requirements of Regulation XVII of 1806. It was in fact held in *Sochet Singh* v. *Dial Singh* (1) that the non-existence of the notice was fatal to the validity of the foreclosure proceedings. We must, therefore, decide that as the defendant had not shown that the foreclosure proceedings in 1894 fulfilled the requirements of the Regulation the mortgage subsists.

A plea of limitation has been raised based on the fact that in 1897 Kripa Ram got the land mutated in his own favour, Singhu's name being removed from the records. But Singhu was not present and there is nothing to show that he was informed of the mutation. Kripa Ram's possession, therefore, cannot be said to have become adverse to Singhu, and the plea that the suit is barred by limitation must be rejected.

There was also a plea of estoppel, but it is not pressed. Nauranga, one of the plaintiffs, was present at the mutation of 1897, and identified Kirpa Ram, but this fact does not debar the plaintiffs from suing for redemption. Nauranga had no title to the land in 1897 as Singhu was then alive.

We dismiss the appeal, but under the circumstances we leave the parties to bear their own costs in this Court.

Appeal dismissed.

(1) (1907) 46 P.R. 1907 = 199 P.L.R. 1908.

1924 Lahore 177.

SHADI LAL, C.J., AND ABDUL QADIR, J.

Umar Hayat—Plaintiff-Appellant

v.

Misri Khan and others—Defendants-Respondents.

S. A. No. 1717 of 1919, decided on 3rd August, 1922, from a decree of District Judge, Jhelum, dated 17th April, 1919.

Muhammadan Law—Legitimacy — Maximum period of gestation—Abnormal circumstances must be proved by party alleging them.

It is obvious that the varying maximum periods of pregnancy, given in books of medical jurisprudence, and the maximum period fixed by Muhammadan Law, relate to abnormal cases, and in each case it is for the plaintiff who alleges that there were abnormal circumstances attending his birth, to show that they existed. [P. 180, C. 1.]

Muhammad Iqbal—for Appellant.

Nand Lal—for Respondents.

Judgment:—The sole question in dispute in this case is whether the plaintiff, Umar Hayat, who claims to be a son of Muhammad Khan deceased, is a ligitimate son of the deceased or not. Umar Hayat is a minor, and sues through his next friend, Feroz Khan, who is his maternal uncle. Muhammad Khan died on the 27th December 1906 and the plaintiff was born on the 27th February 1908, *i.e.*, fourteen months after the death of his father. Muhammad Khan was a young man about 18 at the time of his death, and admittedly died after some illness. It is noted in the report made as to his death that he was ill for about a month before he died. He had been married to *Mt.* Nur Bhari, the mother of Umaray Hat, for about four years and they

had had no child before. The deceased was the owner of about 2834 *kanals* of land and a house and the land was mutated in the name of his widow, *Mt.* Nur Bhari, on the 10th April, 1907. Shortly after the birth of Umar Hayat, his mother applied for mutation of half the land in his favour, on the ground that he was the legitimate son of Muhammad Khan. The reversioners of the deceased objected to this mutation and it was not allowed. *Mt.* Nur Bhari died in 1910 and in 1913 the property was mutated in favour of the reversioners of Muhammad Khan. The plaintiff filed the suit out of which this second appeal has arisen on the 2nd August, 1917. The Subordinate Judge, First Class, who tried this suit, held that there was no inherent impossibility in a child being born fourteen months after the death of his father, in view of the fact that cases of the period of gestation being prolonged to that extent or even longer are recorded in books of jurisprudence. He also found that there was nothing to show that *Mt.* Nur Bhari was unchaste, and, coupling these facts together, he held that the plaintiff was proved to be legitimate and passed a decree in his favour for possession of the land and the house in dispute. The defendants appealed against this order and the learned District Judge accepted their appeal, holding "that the chance that the plaintiff is the son of Muhammad Khan is so indefinitely remote that it may safely be regarded as impossible." The second appeal before us is against the above decision of the lower appellate Court and has been argued at great length before us by Dr. Muhammad Iqbal. We have also heard Dr. Nand Lal for the respondents.

The learned Counsel for the plaintiff-appellant starts by pointing out that according to Muhammadan Law, if a child is born within two years after the dissolution of a marriage by death or divorce he is presumed to be legitimate. He contends that the above presumption, under the Muhammadan Law, is not merely a rule of evidence. Reference is made to section 2 of the Evidence Act, and it is argued that it has not touched the presumptions arising under the personal law of the parties in matters relating to inheritance and legitimacy, etc. Section 5 (*b*) of the Punjab Laws Act is also referred to, as providing that Muhammadan Law, in cases where parties are Muhammadan, shall be the rule of decision in questions regarding "bastardy and family relations," among other things. Reliance is placed on certain remarks made in various text-books of Muhammadan Law, to show that section 112 of the Indian Evidence Act, which lays down that any person who is born within 280 days after the dissolution of marriage between his mother and any other man is presumed to be legitimate, and implies that any one born after that period may be presumed to be illegitimate, does not apply to Muhammadans. A digest of Anglo-Muhammadan Law by Sir Roland Kynvet Wilson, as revised by Mr. Abdulla Yusaf-ally, in paragraph 83, expresses an opinion to the above effect. A book on "Principles of Muhammadan Law" by Mr. Tyabji (II Edition), page 267, is also referred to, where the author, referring to section 112 of the Evidence Act, says that that section does not purport to lay down that legitimacy cannot be established under any other circumstances than those mentioned in the section, nor that the absence of such circumstances shall be a conclusive proof that the child is illegitimate. The learned author is of opinion that unless words to the above effect are read into the section, there is nothing to prevent Muhammadan Law having its effect in the case of a birth after the expiration of 280 days. Dr. Muhammad Iqbal, after citing the above texts, relied on certain *dicta* of Mr. Justice Mahmood, in two decisions of the Allahabad High Court, namely, *Mazhar Ali* v. *Budh Singh* (1) and *Muhammad Alladad Khan* v. *Muhammad Ismail Khan* (2). He admitted that both of these cases relate to points other than the one arising in the appeal before us, but he referred to them for the principles enunciated therein. The case in *Mazhar Ali* v. *Budh Singh* (1) is that of a man who had been missing for more than seven years, in which it was held by Mahmood, J., that the rule of Muhammadan Law that a missing person is to be regarded as alive till the lapse of 90 years, from the date of his birth, is a rule of evidence. Dr. Muhammad Iqbal says that he is referring to this ruling only in order to show what is the proper test for judging whether a question is one of substantive law or merely a rule of evidence, and one test, suggested

(1) (1884) 7 All. 297 = (1884) A.W.N. 333 (F.B.).
(2) (1888) 10 All. 289.

by Mahmood, J., is to see whether Muhammadan Jurists have treated that question as one belonging to substantive law or otherwise. As Mahmood, J., found that the rule as to the missing man had not been treated as a matter of substantive law by Muhammadan Jurists, he too regarded it as purely a rule of evidence. The case reported in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (2) deals with the question of acknowledgment by a Muhammadan of another as his son and it was held by a Full Bench, which included Mr. Justice Mahmood, that the rules of Muhammadan Law governing this matter were the rules of the substantive law of inheritance. Dr. Muhammad Iqbal contends that on that analogy the rule as to legitimacy must be regarded as a rule of substantive law and that the presumption arising under it in favour of the plaintiff has not been, at all, rebutted by the evidence produced by the reversioners who question his legitimacy. He states that he is aware of the fact that the decision of the Punjab Chief Court in *Rahmat Ali* v. *Allahdi* (3) is against him, but, for the reasons discussed above he questions the soundness of the view taken in *Rahmat Ali* v. *Allahdi* (3). That case, he goes on to say, is distinguishable as there was proof of the unchastity of the woman in the said case, while in the present case the chastity of *Mt.* Nur Bhari has been found to be proved by the trial Court and there is no finding to the contrary in the judgment of the lower appellate Court. Moreover, the man in [*Rahmat Ali* v. *Allahdi* (3)] the 1884 case was an old man, who had no children before by either of his two wives.

The learned Counsel cites certain passages from Wharton and Stille's Medical Jurisprudence (Volume III), pages 33 and 34, to show that in some cases pregnancy may be protracted to 344, 365 and 372 days. One case cited by Meigs is mentioned, in which gestation extended to 420 days. The authors add that "less probable cases have been reported extending over 440 days, 476 days and 500 days." The authority for this last statement is a book known as "Anomalies and Curiosities of Medicine" by Gould and Pyle, page 71, which was cited in this case in the Courts below and has also been cited before us. Dr. Muhammad Iqbal bases an argument on these opinions and says that there being no inherent physiological impossibility in the protraction of pregnancy up to the limit recognised by Muhammadan Law, a child born within that limit must be presumed to be legitimate unless its mother is shown to be unchaste. In conclusion, he refers to a remark of the late Mr. Justice Rattigan, in *P.* v. *P.* (4) to the effect that the term of gestation has not yet been fixed by medical jurisprudence, as supporting his contention.

Dr. Nand Lal, in replying to the arguments summarised above, started by saying that the finding against the appellant's legitimacy was a finding of fact and there was no ground for second appeal. He also said that the question that Muhammadan Law should govern the decision of the matter in dispute could not be raised in second appeal without a certificate. He was asked, however, to deal with the merits of the case, as we could not see much force in these objections. He urges that even if the facts of the case reported as *Rahmat Ali* v. *Allahdi* (3) were in some respects distinguishable from the present case, as argued on the other side, the principle is clearly laid down in that decision that "the rule of Muhammadan Law of the Hanfia School, fixing two years as a maximum period of gestation is a rule of evidence within the meaning of section 2 of the Evidence Act, though also a part of the substantive Muhammadan Law, so that the effect of that section, when read with section 5 of the Punjab Laws Act, is that the Courts are not bound by the said rule under the last named Act." He refers to another decision of the Punjab Chief Court reported as *Waras Muhammad* v. *Ali Bakhsh* (5) which is to the same effect as *Rahmat Ali* v. *Allahdi* (3) and says that there is no reason why the above two authorities, which are clearly against the appellant, should not be followed. With regard to the views expressed on this subject by the writers of certain texts on Muhammadan Law, Dr. Nand Lal points out that some other writers have expressed views to the contrary. Mulla, for instance, is of opinion that the rule given in section 112 of the Evidence Act supersedes the rule given in Muhammadan Law (*vide* page 184 of Mulla's Muhammadan Law,

(3) (1884) 1 P.R. 1884.

(4) (1911) 77 P.R. 1911=260 P.W.R. 1911=11 I.C. 946.

(5) (1891) 76 P.R. 1891.

5th Edition). He adds that even according to an eminent Muhammadan writer like Mr. Ameer Ali, the modern view among Muhammadan Jurists is that ten months is the maximum period of gestation. The following passage from Mr. Ameer Ali's book (Volume II, page 228, 4th Edition) is cited in this connection :—

" Notwithstanding that the Shafee and Maliki doctrines are in force in Algeria, the Algerian *Qazis* have adopted the same view as D'Onsson, and in their decisions seem invariably to have held that ten months was the maximum term recognised by law. The Court of Algiers, by several decrees, dated the 16th of April 1861, the 13th of November, 1861, and the 1st of September, 1868, respectively, has supported and confirmed the *Qazi's* decisions. Although the early Henafi Jurists have laid down two years as the maximum period for gestation, the view of the Algerian *Qazis* is in accord with the modern rule recognised universally by Muhammadan Judges and Doctors of Law." He contends, moreover, that apart from the difference of opinion on this subject among the text-writers, the strongest point in favour of the respondents is that the *onus* of proving his legitimacy lay on the plaintiff, and he has not been able to discharge it.

After carefully considering the arguments on both sides, I think, this appeal must fail. The question whether the rule of Muhammadan Law as to the maximum period of gestation is a rule of evidence or a rule of substantive law, is, no doubt, a debatable question, on which much can be said on either side, but it seems to me that it is not possible to decide the present case simply on the presumption arising under that rule. I feel also that the passage cited above from Mr. Ameer Ali's standard work on Muhammadan Law is entitled to great weight, based as it is, on the modern view taken by Muhammadan Jurists themselves, which limits the presumption to ten months. Besides this, it is obvious that the varying maximum periods of pregnancy, given in books of medical jurisprudence, and the maximum period fixed by Muhammadan Law, relate, after all, to abnormal cases, and in each case it is for the plaintiff who alleges that there were abnormal circumstances attending his birth, to show that they existed. For instance, in the present case it was mentioned that *Mt.* Nur Bhari was suffering from some disease known as *Kurang* in the *Punjabi* language, which protracted the gestation, but there is no medical evidence to show either that she did suffer from any such malady or that the malady would have the effect of prolonging the pregnancy. It is admitted that no mention of her pregnancy was made by *Mt.* Nur Bhari throughout the mutation proceedings, when the land left by her husband was mutated in her favour. Dr. Muhammad Iqbal urges that this may have been due to unconscious pregnancy but this argument is untenable, inasmuch as the plaintiff produced evidence of a midwife to prove that the latter observed at the time of the death of Muhammad Khan that *Mt.* Nur Bhari had been with child for about a month. The question of the chastity of *Mt.* Nur Bhari is not beyond dispute. In the trial Court the plaintiff produced evidence that there was no suspicion of unchastity against her, while the defendant produced witnesses to prove that she had become unchaste after her husband's death. They even went the length of naming a man, called Sheru, who was her servant, as her paramour. It is true that the Court of first instance believed the evidence for the plaintiff on this point but unfortunately the lower appellate Court has given no definite finding on the point but is apparently inclined to draw an inference of *Mt.* Nur Bhari's immorality from the circumstances of the case, when it observes: "It might perhaps be remarked that the birth of a child after the normal period is usually regarded as *prima facie* a proof of immorality of a much stronger nature than any other evidence usually procurable in such cases." It must be remembered that the deceased young man, in this case, had been married to *Mt.* Nur Bhari for four years without their having any issue and that he was ill for some time before his death. Taking all the above circumstances into consideration I do not see any sufficient reason to differ from the conclusion arrived at by the learned District Judge that the legitimacy of the plaintiff is not proved.

There was a side issue in this case regarding an admission said to have been made by Sher Khan, defendant, as to the legitimacy of Umar Hayat (plaintiff) and it was pleaded by the latter that the sons of Sher Khan (who is now dead) were at least estopped from contesting his status. Both the Courts below have held that there

is no proof of any action by Sher Khan which may be binding on his minor sons and there is no evidence that he received any *quid pro quo* for waiving his right to inheritance. I agree with the above finding and hold that there is no estoppel. It may be added that this part of the case has not been pressed before us by the learned Counsel for the appellants.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

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ABDUL RAOOF AND LUMSDEN, JJ.

Bahadur Chand—Plaintiff-Appellant

v.

Muhammad Ismail and others—Defendants-Respondents.

F.A. No. 205 of 1920, decided on the 9th May, 1923, from the decree of the Sub-Judge, Lahore, dated 21st November, 1919.

Specific performance—Of a contract to sell—Against a minor—Minor's benefit must be proved.

One Budha, as guardian of three minors executed an agreement to sell minors' property to the plaintiff and received Rs. 100 as earnest money. He applied to the Court and got permission to effect the sale. A draft of the sale deed was prepared by the plaintiff but it was not approved of by Budha and therefore he sold the same property to one G after getting Court's permission to that effect, on the ground that plaintiff had committed a breach of the conditions of the contract of sale. The plaintiff then brought the present suit for specific performance of the contract in terms of the draft. It was found that the sale to G was more beneficial to the minors both in regard to the purchase money and in regard to the conditions of sale than the contract of sale with plaintiff.

Held: that there was no completed contract of which specific performance could legally be claimed by the plaintiff, and further that even if there had been a completed contract, the Court would not enforce it specifically against the minors unless it was more beneficial than the sale to G. (29 All. 213, 22 Cal. 545 and 45 I.C. 192, *Foll.*; 13 I.C. 673, *Expl. and Dist.*) [P. 185, C. 1 and P. 186, C. 1.]

Durga Das and *J. L. Kapur*—for Appellant.

C. Beven-Petman and *Muharam Ali, Chishti*—for Respondents.

Abdul Raoof, J.:—This is a first appeal arising out of a suit for the specific performance of a contract of sale. The property in dispute is 138 *kanals* and 13 *marlas* of land including certain appurtenances. Defendants Nos. 1 to 3, Muhammad Ismail, Muhammad Ibrahim and Muhammad Rafiq, the minor sons of Allah Din, are the owners of this property. Defendant No. 4, *Sheikh* Budha, is the guardian of the minors. The plaintiff's case is that on the 17th of January 1918 defendant No. 4 as the guardian of the minors executed an agreement of sale in his favour agreeing to sell the property in dispute for Rs. 11,000; that on the same date the plaintiff paid him Rs. 100 as earnest money for which a receipt was given in writing by *Sheikh* Budha. As the property belonged to the minors the guardian could not sell it without the sanction of the Court. Accordingly on the same date, *i.e.*, the 17th of January, 1918, a petition was presented to the Senior Subordinate Judge, Lahore, for permission to sell the property to the plaintiff. This application is translated and printed at pages 14 and 15 of the Paper Book. The agreement to sell is translated and printed at page 12 of the Paper Book. In paragraph 3 of this agreement the following condition is laid down :—

"If permission is not obtained from the Court, the agreement shall be cancelled and become null and void, and in that case I will return the earnest money to the vendee".

Paragraph 4 of the said agreement contains the following clause :—

"The land measures 138 *kanals* and 13 *marlas* inclusive of the village *shamilat*. If subsequently at the time of partition according to the revenue papers the land is found less, the vendee shall be competent to take back the earnest money by cancelling the agreement of sale."

By paragraph 7 it was provided that—

"In case permission is obtained the deed of sale shall be completed on the 25th January, 1918. During this period the vendee shall be bound to satisfy himself as to the quantity, deficiency or excess of the land sold with reference to the revenue papers."

On the application for permission order was made on the 21st of January, 1918 granting permission to the guardian to effect the sale. A stamp paper was purchased and on the 3rd of February, 1918 a draft of the sale-deed was prepared. These important allegations are contained in paragraph 3 of the plaint which runs as follows and it is necessary to state them here at the outset as a great deal of argument has been addressed to us on the facts contained therein :—

"On the 28th or 29th January 1918 defendant No. 4 purchased a stamp-paper worth Rs. 100 in order to execute a sale deed. On the 3rd February, 1918, defendant No. 4, with Sayad Hussan, a

petition-writer, came to the plaintiff and a draft sale-deed was prepared with the consent of the parties after their consulation. The said petition-writer and defendant No. 4 took away thatdraft and agreed to copy it out on the stamp-paper and to send for the plaintiff on the 6th February, 1918, in case Shankar Shah would come, and to get the sale-deed registered."

Further facts stated in the plaint are that defendant No. 4 did not send for the plaintiff on the 6th of February 1918 and when the plaintiff met him he said that he had made a bargain with defendant No. 5 and that he was going to sell the property to him. It appears that on the 6th February 1918 *Sheikh* Budha, defendant No. 4, presented an application to the Senior Subordinate Judge, Lahore, stating that the plaintiff had committed a breach of the conditions of the contract of sale and had refused to purchase the land and that a bargain regarding its sale had been made with *Malik* Ghulam Dastgir and that the latter bargain was more beneficial to the minors than the one originally arranged with the plaintiff. A detail of the benefits arising under the second bargain was given in this petition and the Court made the following order upon it:—

"*Sheikh* Budha has already been granted sanction to sell land. He is at liberty to sell it to Ghulam Dastgir."

On the next day, *i.e.*, the 7th of February 1918, the sale in favour of defendant No. 5 was registered. Before the registration of the deed the plaintiff served *Sheikh* Budha with a notice calling upon him to execute a sale-deed in his favour according to the agreement of the 17th of January 1918. *Sheikh* Budha replied to this notice and this is translated and printed at page 23 of the Paper Book. In his reply *Sheikh* Budha accused the plaintiff of having committed a breach of the contract himself and having cancelled the transaction. Later on, on the 12th of April 1918, the plaintiff gave a notice to the second purchaser *Malik* Ghulam Dastgir accusing him that he had colluded with *Sheikh* Budha and having deceived the Senior Subordinate Judge had purchased the land of the minors in spite of the fact that he knew that the said land had been sold to the plaintiff with the sanction of the Senior Subordinate Judge; that everything had been completed and that the guardian was only to put his signature on the deed of sale when he (Ghulam Dastgir) had dissuaded him from doing so. The plaintiff also made an application to the Senior Subordinate Judge on the 14th of February 1918 which is translated and printed in the Supplementary Paper Book on page 1 marked as item A. In this application he gives all the facts relating to his bargain and the subsequent sale-deed executed in favour of defendant No. 5 and draws the attention of the Court to the fact that it had been deceived by *Sheikh* Budha and had granted permission for the second sale on the misrepresentation that the plaintiff had refused to purchase the land. On this application the Court made an order calling upon Ghulam Dastgir and *Sheikh* Budha to appear on the 16th of March 1918 to file their objections and produce the second sale-deed. Thereupon *Sheikh* Budha replied by an application, dated the 16th of March 1918, which is translated and printed in the Supplementary Paper Book on page 2 marked as item B. In this petition are to be found all the circumstances which had induced *Sheikh* Budha to effect a sale-deed in favour of defendant No. 5. Ghulam Dastgir also put in objections in which he stated that he had purchased the land on the assurance given by *Sheikh* Budha that the plaintiff had refused to purchase and that he had only consented to enter into the bargain on the understanding that permission was granted by the Court and that when the Court had actally granted permission he had the sale completed in his favour. He totally denied that he had in any way combined with *Sheikh* Budha in deceiving the Court. The application for permission for sale in his favour was signed by him in good faith because he was anxious that the sale should be effected after due sanction by Court. He pleaded his *bona fides* and stated that he had entered into the bargain in good faith and without notice. The learned Senior Subordinate Judge made an order stating that as Ghulam Dastgir did not consent to cancel his agreement with *Sheikh* Budha the Court was unable to interfere. The plaintiff was directed to seek his redress in accordance with law.

The present suit was lodged on the 31st of July 1918 and a decree for the specific performance of the contract of sale was prayed for. The following note was appended at the end of the plaint:—

Defendant No. 5 has got 18 *kanals* and 2 *marlas* of land bearing *khasra* Nos. 614 and

615, included in the sale-deed by the other defendants on the ground that defendants Nos. 1 to 3 are owners thereof by adverse possession. But their possession is not shown in the papers, nor have they any concern with the said land. Hence that land has been excluded from the claim, nor does the plaintiff wish to get it entered in his sale-deed, it being not mentioned in the agreement."

Two separate written statements were filed in reply to the plaintiff's claim—one by *Sheikh* Budha, defendant, for himself and as guardian of Muhammad Ismail, Muhammad Ibrahim and Muhammad Rafiq, minors, and the other by Ghulam Dastgir, vendee, defendant No. 5. The Court framed nine issues in the case. The 7th issue was as follows :—

"7. Is the sale in favour of Ghulam Dastgir more beneficial to the minors than the sale to the plaintiff, and what is its effect on the plaintiff's rights?"

On this issue the opinion of the Court being against the plaintiff it dismissed the suit which has led to this first appeal.

In the arguments addressed to us the Counsel for the parties did not confine themselves to the various issues framed by the Court, but raised various other questions upon which the decision of the appeal to a large extent depends, and these may be summarised as below :—

(1) What is the contract of which the specific performance is sought by this suit? Is it the contract as contained in the agreement of sale, dated the 17th of January 1918, translated and printed at page 12 of the Paper Book, or is it the contract contained in the draft sale-deed translated and printed at page 29 of the Paper Book?

(2) Whether the agreement of the 17th of January contained the terms of a completed contract which could be specifically performed?

(3) Whether the terms and conditions given in the draft sale-deed were entered with the consent and knowledge of *Sheikh* Budha and whether the minor defendants could be forced to execute a sale-deed in accordance with those terms.

(4) Whether the conditions and penalties entered in the draft sale-deed were onerous and the guardian was justified in refusing to execute the sale-deed in accordance with those conditions and in procuring a better bargain with more beneficial terms in favour of the minors.

(5) Whether, as a matter of law, the performance of a contract could be ordered to be specifically performed against a minor without showing that it is to the benefit of the minors.

A reference to the following documents clearly shows that the plaintiff sought the performance of the contract as contained in the draft sale deed :—

(1) The notice sent by the plaintiff to *Sheikh* Budha, the guardian of the minor defendants, dated the 17th of February, 1918 (Ex. P. 6), printed at page 16 of the Paper Book; and

(2) The replication filed by the plaintiff on the 24th of October, 1918 to the *Jawab-i-dawas* filed by the defendants. It is translated and printed at page 46 of the Paper Book.

In the notice at page 17 of the Paper Book is to be found the following statement of the plaintiff's claim :—

"After the execution of the agreement you obtained permission for sale from the Senior Subordinate Judge, Lahore, and also purchased a stamp-paper for Rs. 120 for execution of the sale-deed. The draft sale-deed, which was prepared in consultation with both the parties, is lying with the petition-writer. The person giving this notice asked you to inform him after you had the sale-deed written *according to the draft*, so that the deed might be registered. . . . . Hence you are given one week's notice to the effect that you should execute the sale-deed and get it registered."

In the replication printed at page 46 the plaintiff in paragraph 4 makes the following allegation :—

"The petition-writer is not acquainted with me. His name might be Sayyad Ali Shah. He is a friend of defendant No. 4. The latter refused to get any document written by a petition-writer other than the said petition-writer, and got the draft prepared with his consultation. He brought him to my house for getting a draft sale-deed prepared and got the deed of sale reduced to writing on a stamp-paper in my absence."

In paragraph 5 it is stated that—

"It is wrong that I cancelled the draft sale-deed."

In paragraph 10 at the end the following statement is made :—

"A comparison of the sale-deed in my favour with that in favour of defendant No. 5 will show to the Court that the former contains no such conditions by which the defendant No. 4 or the minors were unlawfully burdened. Even if the condition as to responsibility of the minors be not entered, still they are, according to law, responsible to that extent."

From the above it is clear that the plaintiff by this suit wanted to enforce the contract entered in the draft sale-deed. This conclusion is further strengthened by the fact that the plaintiff in his supplementary cross-examination on the 25th of

June, 1919, made it quite clear that the agreement to sell was not a completed contract and stated as follows (*see* page 66 of the Paper Book) :—

"The agreement to sell is not meant to contain all the terms of the sale."

Again, in his further supplementary statement, dated the 16th of October, 1919, printed at pages 69 and 70 of the Paper Book, he stated that—

"All the terms of the sale-deed are not entered in the agreement to sell. I considered all the terms entered in the draft of the sale-deed as necessary with the exception of the last term to the effect that the person and the property of the guardian will be liable for any loss which I agreed to forego."

These admissions on the part of the plaintiff leave no doubt on the question that the specific performance of the contract contained in the draft sale-deed is sought to be enforced by the suit, and that the agreement to sell, dated the 17th of January, 1917, did not contain a completed contract and could not, therefore, be specifically performed.

The question then arises whether there was any completed contract at all in existence of which the specific performance could be ordered. The plaintiff first tried to make out that the draft sale-deed had been prepared by a petition-writer on instructions given by Budha, and it was brought to him in the form in which it is now put forward. Afterwards he tried to make out that the draft was prepared at his place with the consent of the parties after their consultation on the 3rd of February, 1918 (*see* paragraph 3 of the plaint). The defendants all along denied both these allegations and asserted that the draft had been prepared by the plaintiff himself, and that the moment *Sheikh* Budha, defendant, had come to know of the terms and conditions contained therein he had refused to accept them. The plaintiff apparently insisted upon the terms. He gave evidence to prove that the draft had been prepared in consultation with Budha, who had given his consent to all the terms. In his application, dated the 14th of February 1918, translated and printed in the Supplementary Paper Book at page 1 marked as item (A) the plaintiff made the following clear allegation :—

"On Sunday, the 3rd February 1918, *Sheikh* Budha, guardian, brought to the applicant a petition-writer and showed to him a draft of the sale-deed prepared by the said petition-writer. The applicant accepted it and told the guardian to execute and complete the sale-deed. They promised to do so."

It is to be regretted that in his anxiety to show that there was a fair dealing on his part the plaintiff was led to make this untrue statement. This is made apparently clear by his subsequent statements made as a witness in this case. At page 69 of the Paper Book the following statement is to be found :—

"Budha, Imam Din and Joti Parshad were present on the occasion when the terms were settled. Budha did not bring any draft of sale-deed prepared by himself to me, nor any draft prepared on his behalf. No other draft, with the exception of that prepared by me, was prepared. The statement written in my application, dated the 14th February 1918, to the effect that the draft prepared by the petition-writer brought by Budha is not correct. Similarly it is not correct that I directed him to prepare a fair copy of that draft and they promised to do so. . . . . when I drafted this application I was under the impression that the petition-writer had prepared a draft himself. But subsequently when that draft was filed in this Court and I inspected it I came to know that that draft was the one prepared not by the petition-writer, but myself."

The plaintiff was further compelled to admit that *Sheikh* Budha was illiterate and the draft prepared was not even read to him. His witness, Kala Ram (P.W. 3), stated that Budha went away after taking the draft. The plaintiff did not read it to Budha. On a question being put to him in cross-examination whether *Sheikh* Budha said on receipt of the draft that he would get it read and then reply whether he accepted the draft, the witness said "He said that he would get it read." It is made clear from the evidence that *Sheikh* Budha was not satisfied with the terms contained in the draft and refused to execute a sale-deed in accordance with those terms. Kesho Das (P.W. 4), speaking as to what took place on the occasion when *Sheikh* Budha came back with the draft after knowing its terms and raised his objections, has stated as follows :—

"I came to Lahore in February 1918. It was a Sunday. It was first Sunday of February. I went to see the plaintiff on (*sic*) at his residence. Two or three men came there. I am not sure whether they were there before me or came after me. They had a draft with them which I did not read, nor was it read out in my presence. I asked the plaintiff what it was. He told me in their presence that he had agreed to buy some land and these men wanted some amendment in the draft of the sale-deed. The amendment related to the liability of the guardian. The plaintiff agreed to the amendment so that the guardian might not remain

personally liable. The draft remained in their hands. I then went away. They were still there."

In the light of the above facts the conclusion is irresistible that the draft was prepared by the plaintiff without the knowledge or consent of *Sheikh* Budha as to its terms and further that after knowing its contents *Sheikh* Budha had at once raised objections. It follows that there was no completed contract between the parties, of which specific performance could legally be claimed by the plaintiff. Even if it be taken for granted for a moment that there was a completed contract, the terms of which were reduced to writing in the draft, the question which arises for consideration is whether the terms are such which a Court of Equity would be justified in enforcing against the minor defendants.

In the agreement, dated the 17th of January 1918, a clause was entered to the effect that—

"If subsequently at the time of partition or according to the revenue papers the land is found less, the vendee shall be competent to take back the earnest money by cancelling the agreement of sale."

This clause was amplified and a more onerous condition was entered in the draft sale-deed to the following effect :—

"We also agree that if any defect in our rights in respect of the land sold is found, or if any deficiency occurs in the land sold at the time of partition of village *shamilat*, the vendee will be entitled to recover the amount of damages for the loss sustained by him, from our persons and property, and also from the person and property of our guardian."

This, as already made clear, was done behind the back of *Sheikh* Budha, the guardian of the owners of the property, and without any authority. *Sheikh* Budha had no legal authority to make the minors personally liable and he of course objected to his property and person being made liable. No one could say what would happen at the partition and the covenant making the minors liable to pay damages in consequence of any loss might place the minors entirely in the hands of the vendee and lead to serious unforeseen consequences. It is true that the plaintiff has now offered to forego the stipulation, but at the time he insisted upon the insertion of this clause and by his plaint he asked for the specific performance of the entire contract contained in the draft-sale-deed. It is too late for him to withdraw from the position taken up by him and his case must be decided upon the plaint at it stands. By another condition entered in the draft sale-deed the plaintiff tried to withhold the payment of a portion of the consideration (Rs. 300) till mutation of the names. This was also a departure from what was agreed upon under the agreement of sale.

The next question to be decided is whether the bargain in favour of the plaintiff is beneficial to the minors.

As already stated the decision of the trial Court on this point is in the negative and against the plaintiff. We entirely agree in the decision of the learned Subordinate Judge on issue No. 7. A comparison of the terms contained in the draft deed with those in the sale deed in favour of *Malik* Ghulam Dastgir leaves no doubt on the point that the sale-deed in favour of *Malik* Ghulam Dastgir is decidedly more beneficial to the minors. Leaving aside the stringent conditions entered in the draft sale-deed the following benefits have accrued to the minors under this latter sale-deed :—

(1) They have saved Rs. 110, the price of the stamp ;

(2) Rs. 110 on account of the commission of the broker ;

(3) Expenses of registration and execution ; and

(4) Interest for one month payable to Shankar Shah, the previous mortgagee, which Ghulam Dastgir has undertaken to pay.

In the case of *Chhitar Mal* v. *Jagan Nath Prasad* (1), a similar question arose for decision under almost similar circumstances and the Court held that the contract sought to be specifically enforced against a minor not being shown to his benefit could not be ordered to be so enforced. The facts of the case and the decision thereon are fully brought out in the headnote appended to the report which runs as follows :—

"The certificated guardian of a minor, finding that it was necessary that some of the minor's property should be sold applied for permission to the District Judge, who sanctioned the sale for a price of Rs. 725. Subsequently the guardian discovered that this was an inadequate price, and having received an offer of Rs. 825 for the property, went again to the District Judge for sanction to the second contract, obtained sanction and sold the property for Rs. 825 : *Held* that the former contract being to the detriment of the minor could not be specifically enforced."

(1) (1906) 29 All. 213=4 A.L.J. 24=(1907) A.W.N. 25.

The facts of the present case are even stronger. Not only do the minors in this case save more than Rs. 250, but they also escape from very stringent conditions entered in the draft sale-deed.

In the case of *Jugul Kishori Chowdhurani* v. *Anunda Lal Chowdhuri* (2) it was not shown that the contract sought to be specifically performed was to the benefit of a minor and the Court held that the decree for the specific performance of a contract should not be made against him during his infancy. The learned Judges of the Calcutta High Court made the following observation at page 549 of the report:—

"We know of no case in which a decree for specific performance has been made against an infant. In *Flight* v. *Bolland* (3), it was held that an infant could not maintain a suit for specific performance of a contract, the remedy not being mutual, and it being a general principle of Courts of Equity to interfere only where the remedy is mutual."

Then they took into consideration the circumstance that the contract in that case was not made by the infant, but by the guardian on the infant's behalf and held that as it would be open to the minor to question the act of the guardian on attaining majority specific performance against him should not be decreed. They made the following significant observation:—

"In our opinion, if it is open to the infant on attaining majority to question the transaction, a decree for specific performance cannot, or at all events should not, be made against him while an infant."

They added—

"More than this. The jurisdiction to decree specific performance is discretionary, although the discretion must be judicially exercised. No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant, unless the contract was shown to be for the infant's benefit. It is not the case of any one that this contract should be enforced for the infant's benefit. The plaintiffs wish to enforce it against the infant for their own benefit, and the guardian says it is against the interest of the infant."

Every word of the passage applies to the facts of the present case and with greater force. Here a sale-deed has already been executed in favour of *Malik* Ghulam Dastgir on better terms and the object of the present suit is to have this sale set at naught and to get another sale-deed executed in favour of the plaintiff on terms and conditions detrimental to the minors.

In the case of *Puran Lal* v. *Venkatrao Gujar* (4), it is laid down that—

"No decree for specific performance of an agreement for transfer made by his guardian should be passed against a minor unless the Court is quite certain that the agreement was for the benefit of the minor, and that it would be for his benefit that it should be enforced."

Malik Ghulam Dastgir, the vendee, has pleaded that he is a purchaser for consideration in good faith without notice that there was any existing agreement to sell in favour of the plaintiff. *Sheikh* Budha represented to him that the agreement with the plaintiff had come to an end, and that he was free to sell the land to him. He believed in this statement and took the precaution of having the proposed sale in his favour sanctioned by the Court and it was then only that he got the sale-deed executed in his favour. *Sheikh* Budha has supported his statement and there is no evidence to the contrary showing that he had participated in a scheme to defeat the right of the plaintiff under the agreement. We see no reason to disbelieve the statement of *Malik* Ghulam Dastgir and hold that he has purchased the land in good faith.

Mr. Durga Das, the learned Vakil for the appellant relied on the case of *Lal Gopal Datta Chowdhury* v. *The Kharooriah Majozilla Zemindary Syndicate, Limited* (5), and contended that even if the sale in favour of *Malik* Ghulam Dastgir was more beneficial to the minors it was not open to the guardian to resile from the agreement to sell in favour of the plaintiff. He relied particularly upon the following passage in the judgment to be found at page 677, right hand column:—

"We do not think the case *Chhitar Mal* v. *Jagan Nath Prasad* (1), is an authority for holding that when a valid agreement has been lawfully entered into on behalf of a minor and is to the minor's benefit it cannot be repudiated if the guardian subsequently finds he can obtain more."

The learned Vakil has lost sight of the fact that this observation in the judgment was a mere *obiter dictum* as the following sentence clearly shows:—

"In any event, this question does not arise in the present case, for the terms offered by Lal Gopal have not been shown to be appreciably better than those conceded by the plaintiff company, and but for the prior contract with that company would never have been offered at all."

(2) (1895) 22 Cal. 545.
(3) 4 Russ. 298=28 R.R. 101.
(4) (1918) 45 I.C. 192.
(5) (1911) 16 C.W.N. 297=13 I.C. 673.

Moreover, it has not been shown in this case that the agreement is to the benefit of the minors. On the contrary it has been shown to be to their detriment. This ruling, therefore, cannot help the plaintiff.

For the reasons given in the judgment of the Court below and for the additional reasons set forth in our judgment we think that the Court below was right in refusing to decree specific performance of the contract in this case.

The plaintiff, however, is entitled to a refund of Rs. 100 paid by him as earnest money. We, therefore, grant a decree for Rs. 100 in his favour. The decree of the Court below will be accordingly modified. In other respects the appeal fails and is dismissed. As the appeal has substantially failed, the appellant must pay the costs of the respondents.

Appeal dismissed.

1924 Lahore 187.

LE-ROSSIGNOL AND MARTINEAU, JJ.

Nawaz Khan and others—Appellants

v.

Mt. Zohra Jan and others—Respondents.

S.A. No. 390 of 1920, decided on 19th February, 1923, from the decree of District Judge, Attock Cambellpore, dated 12th December, 1919.

Custom (Punjab)—Alienation by limited owner—Next female reversioner can object.

When a female is entitled to succeed on the death of the alienor and when the alienor holds only a limited interest in the estate such female is competent to control the alienations of the alienor. [P. 188, C. 1.]

Jai Gopal Sethi—for Appellants.

Sagar Chand—for Respondents.

Judgment:—One Feteh Ahmad by will devised his property to his widows and daughters. On his death his reversioners contested the validity of the will with the result that this Court in its decision—*Mowaz* v. *Gulab Jan* (1) held that the will should have no effect upon the ordinary rule of devolution of property in this family. Subsequently, *Mt.* Begam Ji, one of the widows of Fateh Ahmad, gifted her share in her late husband's estate to his reversioners, the plaintiffs in the earlier case, and the present suit was by the daughters for a declaration that the gift by *Mt.* Begam Ji was not binding upon them and for possession of Begam Ji's share of the estate which she had forfeited by re-marriage.

The trial Court dismissed the suit on the ground that the plaintiffs had not established any right to contest the alienation by *Mt.* Begam Ji because they had not been able to show the nature of the right under which they claimed. The plaintiffs are women and were represented by Counsel who had no clear idea apparently as to nature of the widow's title. In reply to the plea of the defendants he first stated that they succeeded on the re-marriage of *Mt.* Begam Ji by right of survivorship, then he opined that it was by right of succession, and finally elected for the right of survivorship. The learned District Judge on appeal went into the status of widows and unmarried daughters and found that, according to the custom obtaining among the parties, who are *Khatters* of Tabsil Attack, widows and unmarried daughters succeeded in equal shares and, on the death of a widow or daughter, the survivor or survivors succeeded to her share. The term 'survivor' appears to have caused confusion. It does not mean that the survivor succeeds under the technical rule of survivorship, it means simply that the survivors succeed under custom to the estate of deceased. In second appeal we are asked to interfere on the ground that the claim to succeed was based on the rule of survivorship and the appellate Court had decided according to custom, but in our opinion, there has been no confusion in the minds of the parties as to the question in issue between them. It is noteworthy that in their earlier suit reported as *Mowaz* v. *Gulab Jan* (1), the reversioners admitted the right of the widows and daughters to possession up to the time of death or marriage or re-marriage in the case of the widows, and this admission confirms the finding of the lower appellate Court that till death or marriage widows and daughters succeed in equal shares to the estate of the deceased. The real question in dispute between the parties was, whether the daughters were competent to contest an alienation by a widow. This question had been answered in the affirmative by the lower appellate Court, following *Maqsud-un-nisa* v. *Kaniz Zohra* (2), which provides

(1) (1914) 97 P.R. 1914=220 P.L.R. 1914=121 P.W.R. 1914=24 I.C. 920.

(2) (1908) 185 P.R. 1908=194 P.W.R. 1908.

that when a female is entitled to succeed on the death of the alienor and when the alienor holds only a limited interest in the estate, such female is competent to control the alienations of the alienor. This rule is based upon common sense and general principles of equity and we accept it without hesitation.

For these reasons we find the decree the Court below worthy of affirmation and dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 188 (1).

SCOTT-SMITH AND FFORDE, JJ.

Ali Ahmad—Plaintiff-Appellant

v.

Said Mian and another—Defendants-Respondents.

Civ. App. No. 890 of 1920, decided on 6th February, 1923, from the decree of the District Judge, Gujranwala, dated 23rd December, 1919.

Civ. Pro. Code, O. 32, r. 2—Plaintiff minor suing without next friend—Plaint should not be rejected but proceedings should be suspended.

Where during the course of suit, the Court finds that plaintiff is a minor and has filed the suit without a next friend, the proper procedure is not to reject the plaint but to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend.

Mukund Lal Puri—for Appellant.

Gobind Ram—for Respondents.

Scott-Smith, J.:—This is a second appeal from the decree of the Subordinate Judge rejecting a plaint on the ground that it was instituted by the minor plaintiff without a next friend. The suit was instituted on the 29th August, 1919, and on the 9th October, 1919, the date fixed for hearing, the defendant appeared and pleaded that the plaintiff could not sue as he had agreed to the transaction out of which the suit arose. He made no application under Order 32, rule 2 (1), Civil Procedure Code, that the plaint should be taken off the file. The Court itself noted that the plaintiff appeared to be under age and took his statement in which he admitted that he was 15 years of age. Upon this the Court rejected the plaint; and also pointed out that the plaintiff had not deposited 1/5th of the purchase-money as required by section 22 of the Punjab Pre-emption Act, I of 1913. This order was upheld on appeal by the District Judge and the plaintiff has filed a second appeal to this Court.

In our opinion the order rejecting the plaint is clearly erroneous. It is not an order contemplated by Order 32, rule 2, Civil Procedure Code, and moreover there was no application by the defendant to have the plaint taken off the file. It was pointed out in the case of *Beni Ram* v. *Ram Lal* (1), that a case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice must be considered to be in force. This practice was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. In the present case there is no ground at all for supposing that the plaintiff knowingly instituted the suit without a next friend with intention to deceive. Mr. Gobind Ram urges that on the 9th October, 1919, the date on which the plaint was rejected, the suit, if then instituted, would have been barred by time. We have nothing to do with the question of limitation at present which can be decided by the trial Court to which this case will be sent back.

We accept the appeal, and, setting aside the order of the lower appellate Court, remand the case to the Court of first instance for re-decision. The plaintiff should be given a reasonable time for remedying the defect in the plaint. Stamp in this Court and the lower appellate Court will be refunded and other costs will be costs in the case.

Appeal allowed. Case remanded.

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(1) (1886) 13 Cal. 189.

1924 Lahore 188 (2).

SHADI LAL, C.J., AND ZAFAR ALI, J.

Mt. Nawab Bibi and others—Appellants

v.

Allah Ditta and others—Respondents.

S. A. No. 1068 of 1920, decided on 5th March, 1923, from the decree of District Judge, Gurdaspur, dated 21st February, 1920.

(a) *Civ. Pro. Code, S. 100.*

Whether a valid marriage took place between the parties is a question of fact.

(b) *Restitution of conjugal rights.*

Where the husband did not care to bring the wife to his house some two years after puberty : *Held* the claim for restitution should be refused.

Mehr Chand Mahajan—for Appellants.

Mul Chand—for Respondents.

Judgment:—This second appeal arises out of a suit for restitution of conjugal rights. The parties are Mussalmans of a low caste known as Bharai. The first Court dismissed the suit finding that the alleged marriage was not proved. On appeal the learned District Judge came to the contrary conclusion and decreed the suit. It is contended in this Court on behalf of the alleged wife (appellant) that even if she was married, the plaintiff, under the circumstances of the case, was not entitled to a decree for restitution of conjugal rights. We are of opinion that this contention must prevail though the finding of the learned District Judge on the question of marriage being one of fact cannot be interfered with on second appeal. According to the plaintiff's own showing the marriage took place so far back as the 21st March, 1905, when she was a child less than three years of age, and he was only about one year older than she. Her mother was dead and her father, in order to procure for himself the hand of the plaintiff's sister in marriage, married this infant daughter to the plaintiff by way of exchange. Therefore, it is clear that he made a sacrifice of her to serve his own selfish purpose without any regard to her future welfare. The plaintiff did not lay claim to her and did not care to bring her to live with him even after she had attained puberty. The age of puberty is generally fixed at 14 in the male and 12 in the female but, according to Muhammadan Law, a girl must be presumed to have reached puberty on completing the fifteenth year of her life which the appellant did in June, 1917. The plaintiff neglected her all this time and did not institute the suit till the 4th March, 1919. She is at present over 20 years of age and is, therefore, quite justified in denying the plaintiff's claim to conjugal right against her. Therefore, we accept the appeal and dismiss the plaintiff's suit. The parties to bear their own costs throughout.

Appeal allowed.

1924 Lahore 189.

ABDUL RAOOF, J.

Nanak Chand and others—Petitioners

v.

Sajad Hussain and others—Respondents.

Civ. Mis. No. 430 of 1921, decided on 27th June, 1922, from C.A. No. 933 of 1921.

Civ. Pro. Code, O. 41, r. 19—Pleader unable to attend owing to change in the list—Dismissal in consequence, cannot be set aside.

Where a judge for any reason orders a case which is before him for hearing, to be put down lower in the list, he need not give notice to the pleader of the parties. Counsel are expected to be present within the compound of the Court if they have got any case in the list. If an appeal is dismissed for default in such case it cannot be reinstated.

G. C. Narang—for Petitioners.

Muhammad Iqbal—for Respondents.

Order.—This appeal was dismissed for want of prosecution on the 18th October, 1921. This application is made for restoration mainly on the ground stated in paragraph (2) of the petition which runs as follows :—

"That an important case in which *Pandit* Sheo Narain and Mr. Noad, Government Advocate, were engaged was fixed at No. 3, but was without the consent of the appellant's Counsel and without notice to him, put down lower in the list, so that the above noted appeal was taken up much before the expected time in the absence of the petitioner's Counsel."

There is no rule laying down that where a Judge for any reason orders a case, which is before him for hearing, to be put down lower in the list he must give notice to the Counsel of the parties in other cases. On the other hand, Counsel are expected to be present within the compound of the Court if they have got any case in the list. It is admitted that the Counsel for the appellant was not in the Court compound when case was called for hearing. Having regard to the present practice regulating the hearing of cases the plea, put forward by the petitioner, if accepted, would bring the work of the Court to a standstill. On principle I must refuse to accept this application. I accordingly reject it with costs, as the opposite party is represented by Counsel and opposes the petition.

Application rejected.

1924 Lahore 190.

ABDUL RAOOF, J.

Bhagwan Das—Plaintiff-Petitioner

v.

Jalal Din and anther—Defendants-Respondents.

Civ. Rev. Pet. No, 800 of 1921, decided on the 16th March, 1922.

Civ. Pro. Code, O. 2, r. 2—Mortgage and lease on the same day—Separate transactions—Suit for rent alone does not bar suit for principal money.

Where *S* executed a mortgage in favour of *N* and on the same day obtained from him a lease of the mortgaged property providing that in case of default of payment of rent *S* would be liable to ejectment and that *N* would be at liberty to terminate the tenancy by giving 15 days' notice to *S Held*, the lease should be considered as a separate transaction from the mortgage and in such a case a fifth suit for rent alone would not be barred under O. 2, r. 2 because of four previous suits for rent alone and the suit for rent would not bar the suit for mortgage money. (69 P.R. 1918 and 19 P.R. 1910, *Dist.*).

Tirath Ram and *Kahan Chand*—for the Petitioner.

Sheik Asim Ullah—for the Respondents.

Judgment:—This is a petition for revision which has arisen under the following circumstances:—

On the 16th January, 1903, Siraj Din mortgaged his house to Narain Das, father of the plaintiff, for Rs. 800 agreeing to pay interest at annas 14 per cent. per mensem. Under the mortgage Narain Das was entitled to possession. The plaintiff, however, executed a lease in his favour promising to pay Rs. 7 per mensem as rent. On the 5th May 1903 Siraj Din borrowed a further sum of Rs. 400 and gave a further mortgage over the same house stipulating under clause 5 of the mortgage-deed that principal and interest could be a charge on the property mortgaged, the rate of interest remaining the same. This document was registered on the 6th May, 1903, and on this last date the mortgagor executed a *kirayanama* in favour of the mortgagee, agreeing to pay rent at the enhanced rate of Rs. 10-8 per mensem. The following covenants were entered in the deed of rent, namely, (1) that in case of default of payment of rent Siraj Din would be liable to be ejected from the house, and (2) that the landlord would be at liberty to terminate the tenancy by giving 15 days' notice to Siraj Din.

Previous to this, Narain Das sued for rent on four occasions and obtained decrees. The present suit is the fifth suit brought for recovery of the arrears of rent. It was resisted upon various pleas, one of which being that the suit was barred by the provisions of Order 2, rule 2. The ground upon which the above provisions of law were said to apply to the suit was stated as follows: That the suit for rent was virtually a suit for recovery of interest and inasmuch as the mortgagee did not claim the mortgage money along with interest which had become due by reason of the expiration of the period for payment fixed in mortgage, the claim with regard to principal has become barred under Order 2, rule 2, and that as the present claim is also virtually a claim for interest which is accessory to the principal mortgage money this claim is also barred by the rule abovementioned.

This contention has found favour with the learned Judge of the Court below with the result that the suit has been dismissed. The plaintiff has accordingly come up in revision to this Court.

The principal question to be decided in a case of this nature is whether the two transactions, namely, of the mortgage and of the lease, are to be treated as one transaction or as two separate transactions. This question is to be decided upon the special facts of each particular case. Having regard to the terms of the deed of rent I am clearly of opinion that it was intended by the parties that the contract of tenancy was to stand by itself, otherwise I fail to understand why a right should have been given to the mortgagee to terminate the tenancy by giving 15 days' notice. Sheikh Azm Ullah has relied on *Natha Singh* v. *Chuni Lal* (1) and *Kundan Mal* v. *Allah Dad Khan* (2) in support of his contention that the two transactions in this case must be looked upon as constituting one transaction. It is, however, admitted by the learned Counsel that no question of a lease giving the right to eject under the terms of that lease arose in those cases. Therefore, the decision in those cases cannot be a guide for a decision in this case.

I accordingly set aside the decision of the lower Court on this preliminary point and

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(1) (1918) 69 P.R. 1918=112 P.W.R. 1918=117 P.L.R. 1918=47 I.C. 364.

(2) (1910) 19 P.R. 1910=36 P.W.R. 1910=167 P.L.R. 1910=5 I.C. 821.

remand this case under Order 41, rule 23, with direction that it should be restored to its original number in the register of pending suits and be decided according to law. Costs will abide the result.

Case remanded.

1924 Lahore 191.

CHEVIS, J.

Ram Kishan—Plaintiff-Petitioner

v.

Mula—Defendant-Respondent.

Civ. Rev. No. 872 of 1921, decided on 8th April, 1922, from an order of Munsif, 1st Class, Jagroon, dated 10th June, 1921.

Civ. Pro. Code, O. 5, r. 20—Failure of plaintiff to make enquiries—Substituted service should not be ordered.

Where plaintiff knew all along that the defendant had left the village two or three years before the suit was brought and further he had left his brother in the village with whom he had all along been in communication and the plaintiff could well have obtained defendant's address from him so that personal service might be effected but the plaintiff made no enquiries. *Held* that the plaintiff was in no way justified in stating that the defendant was intentionally keeping out of the way for the purpose of avoiding service and therefore it was not a case in which substituted service should have been ordered.

Fakir Chand—for Petitioner.

Zufrulla Khan and *Madan Gopal*—for Respondent.

Judgment:—The plaintiff in this case sued for Rs. 120 principal and interest due on a *bahi* account. Summonses were issued to the defendant for the 15th October 1914. They were returned unserved with a note that the defendant had gone away somewhere and that there was no clue to his whereabouts. On the 15th October 1914 the plaintiff applied to the Court for service to be made by proclamation declaring that the defendant was evading service. (*Amdan ruposh ho jata hai aur dida danista tamil-i-saman se gurez karta hai*). The Court then ordered service to be effected by affixing a copy of the summons to the house in which the defendant had last resided and also by proclamation. The peon's report is that proclamation was issued and notices were affixed to the defendant's house. Whether the notices were also affixed to the Court house is not clear. At the next hearing the Munsif gave the plaintiff an *ex parte* decree. Later on in execution proceedings the house was attached and sold in spite of objections by Khudayar, brother of the judgment-debtor. It appears from the certificates which have been put in that the defendant had gone to Karachi and had left his village a considerable time before the suit was lodged, and worked under some contractors at Karachi for some years. On the 24th June 1920 the defendant put in an application asking for the *ex parte* decree to be set aside. The learned Munsif has held that this application was put in within thirty days from the date of the defendant's having obtained knowledge of the decree and has, therefore, set it aside.

The plaintiff applies to this Court for revision, and on his behalf it is urged, first, that the summons was duly served and that time runs from the date of the decree and not from the date of the suit. Under O. 5, r. 20, substituted service may be effected by order of the Court where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. From certain statements made by the plaintiff in execution proceedings there can be no doubt that the plaintiff knew all along that the defendant had left the village two or three years before the suit was brought, and I think that the plaintiff was in no way justified in stating that the defendant was intentionally keeping out of the way for the purpose of avoiding service. Further, it is clear that the defendant had left his brother in the village, and ground No. 1 (*b*) of the application for revision in this Court has stated that the defendant had all along been in communication with his brother. If this be correct the brother could at any time have given the defendant's address and personal service could have been effected. But it does not appear that any enquiries were ever made from the brother. I do not think, therefore, that it was a case in which substituted service should have been ordered. The finding that the defendant had no knowledge of the decree within thirty days of filing the application is one of fact. In such a case substituted service has been made in consequence of unjustifiable assertions by the plaintiff. I certainly should not dream of exercising my revisional powers. The application is dismissed with costs.

Application dismissed.

1924 Lahore 192 (1).

HARRISON AND ZAFAR ALI, JJ.

The Punjab Cotton Press, Company—Plaintiff-Appellant

v.

The Secretary of State for India—Defendant-Respondent.

F. A. No. 1305 of 1921, decided on the 31st May, 1923, from the decree of the Sub-Judge, Labore, dated 11th March, 1921.

Northern India Canal and Drainage Act, VIII of 1873, Ss. 6 and 15—Suit for damages on account of construction of a branch—Tail distributary—Limitation Act, Art. 2—Suit must be brought within 90 days.

Where the construction of the Raya Branch Tail Distributary of the Upper Chenab Canal caused the flood water to go to the plaintiff's property in the high floods of 1917, and thereby caused them serious damage: *Held*, that action of the Canal Officers in constructing this channel came under S. 6 of Act VIII of 1873, and whether that action was wise or unwise, any suit for damages consequent thereon must be brought within 90 days of the date of damage.

Tek Chand, B. R. Puri and *Umar Baksh*—for Appellant.

Jai Lal—for Respondent.

Harrison, J.:—In the two suits which have given rise to these appeals (1305 and 1306 of 1921) the plaintiffs claimed damages on account of the construction of the Raya Branch Tail Distributary of the Upper Chenab Canal in consequence of which it is alleged that the flood water was driven on to the plaintiff's property in the high floods of 1917 and caused serious damage. The suits have been dismissed as barred under article 2 of the Limitation Act and the first point to be decided is whether that article applies.

The learned Government Advocate has pointed out that the action taken by the Canal Officers in constructing this channel comes under section 6 of Act VIII of 1873, and whether that action was wise or unwise any suit for damages consequent thereon had to be brought within 90 days of the date of the damage. It has not been contended that the necessary notifications precedent to the undertaking of this work were not duly issued, and in our opinion there can to be no doubt whatever that the work done which is said to have caused the damage in this case is covered by the words "or do any other thing necessary for such application or use of the said water." If it be contended, and this is not the case as instituted, that the cause of action consists of the construction of the channel combined with the failure of the Canal Department to deal with the situation which arose in 1917 in consequence of flood, the action or failure to take action at this later stage would be covered certainly by section 15 and we think by section 6 also. Anyhow the suits are clearly barred and have rightly been dismissed.

We therefore dismiss the appeals with costs.

Appeal dismissed.

1924 Lahore 192 (2).

HARRISON, J.

Amir and another—Appellants

v.

Wazir and others—Respondents.

S. A. No. 1310 of 1921, decided on 26th June, 1922, from the decree of District Judge, Hosbiarpur, dated 21st April, 1921.

Custom (Punjab)—Adoption—Bhatti Rajputs of Dasuya Tahsil, District Hoshiarpur can adopt brother's son.

Among the Muhammadan Bhatti Rajputs of the Dasuya Tahsil in the Hoshiarpur District, a sonless proprietor can adopt by custom his brother's son. (110 P.R. 1919, *Ref.*) [P. 193, C. 2]

Mool Chand for *A. Aziz*—for Appellants.

S. A. Razzaq—for Respondents.

Judgment:—The defendants in this case present this second appeal relying on a certificate granted by the District Judge regarding the existence of a custom, amongst the Muhammadan *Bhatti Rajputs* of the Dasuya Tahsil in the Hoshiarpur District, as to whether a sonless proprietor can adopt his brother's son. Counsel also wishes to argue the question of whether in this case it has been proved that the sonless proprietor actually did adopt his nephew. On this point there is a clear finding of fact and he can only urge that the whole of the evidence on the subject was not considered by the District Judge. His only reason for saying so is that the District Judge has not recapitulated in his judgment every piece of evidence which is on the record. In the first place, this is not in my opinion, a sufficient reason for holding that the District Judge did not consider every piece of evidence and, even if it could be shown that he did not do so, there would still be no justification for

attacking in second appeal the findings of fact which are certainly based on evidence.

As to the existence of the custom, the onus doubtless lay upon the plaintiff and in support of his case he produced the *Riwaj-i-am* of the Hoshiarpur District relying more especially on the answer to question 69, three decided cases described as page 6, page 7 and page 8 on the record, article 35 of the Rattigan's Customary Law. *Beg* v. *Allah Ditta* (1), *Hassan* v. *Samma* (2), and the various instances quoted by Mr. Humphreys in his *Riwaj-i-am*, of the existence of the custom amongst Muhammadan *Rajputs* in this and other Tahsils of this district. Both sides rely on *Umar Bakhsh* v. *Sohne Khan* (3) which appears to me to be of special value to the plaintiff, for in that case, in spite of the general entry made by Mr. Humphreys in the *Riwaj-i am*, to the effect that the Muhammadan *Rajputs* of the Garhshankar Tahsil did not follow custom in this matter, the Chief Court held that it was established by instances that they did. It is true that in the course of that judgment the value of the *Riwaj-i-am* was discounted, but on the whole I think the judgment helps the plaintiff more than it does the defendants. The answer to question 69 in the *Riwaj-i am* regarding adoption by Muhammadan *Rajputs* runs as follows:—

'*Rajputs* of Tahsil Dasuya. In the absence of collaterals, only a daughter's son and sister's son can be adopted; no other persons outside the *got* are eligible."

Counsel contends that this means that a man who has collaterals cannot adopt at all and, if he has none, can adopt his daughter's son or sister's son. The wording is not very happy but, if the answer be read with the context, it is clear that it means that the sonless proprietor can adopt a collateral and, if he has no collateral, can go further a field and adopt his daughter or sister's son. Article 35 of Rattigan's Customary Law explains the position generally as regards Muhammadan agriculturists in the Central and Eastern Punjab. It is clear that, amongst the purer Muhammadan tribes, especially those residing in the North-Western districts, the influence of their religion has been more marked, but in the Central Punjab, Muhammadan agriculturists as a whole have retained the custom of adoption. This is more especially the case with regard to Muhammadan *Jats* converted from Hinduism, and Sir William Rattigan definitely places the onus of disproving the existence of the custom among such *Jats* on the man who denies it. The position with regard to Muhammadan *Rajputs* is not so strongly established but even amongst them in this area of the Province the more general practice is clearly to recognise the right of adoption. Out of the decided cases page 6, page 7 and page 8 one only is among *Bhatti Rajputs*, namely, page 6, and comes from this very village, but, as pointed out by the learned District Judge, it is of no value inasmuch as the property was self-acquired. Page 7 and page 8 are instances of Muhammadan *Rajputs* but not of *Bhattis*. Counsel urges that, unless it can be shown by instances that *Bhatti Rajputs* have adopted the custom, the evidence of its existence among other Muhammadan Rajputs is of no value. With this contention I cannot agree, for it appears to me that the Muhammadan *Rajputs* of this area must be taken as a whole and it is clearly established by the many instances given by Mr. Humphreys in his *Riwaj-i-am* as well as by the reported cases amongst Ghorewaha and other *Rajputs* quoted in article 35 of Rattigan's Customary Law that the custom clearly exists amongst Muhammadan *Rajputs* in this tract. The case for the defendants-appellants rests entirely on challenging the plaintiff's case and it is not even seriously contended before me that the contrary has been proved, namely, the non-existence of the custom or the observance of strict Muhammadan Law in this matter by *Bhatti* or any other Muhammadan *Rajputs* of this district. I find, agreeing with the learned District Judge, that the custom is fully established and I dismiss the appeal with costs.

Appeal dismissed.

(1) (1917) 44 Cal. 749=44 I.A. 89=45 P.R. 1917 =12 P.W.R. 1917=21 M.L.T. 310=32 M. L.J. 615=19 Bom. L.R. 888=15 A.L.J. 525=21 C.W.N. 842=26 C.L.J. 175=38 I.C. 354 (P.C.).
(2) (1874) 54 P.R. 1874.
(3) (1919) 110 P.R. 1919=53 I.C. 404.

1924 Lahore 194.

ABDUL RAOOF, J.

Darshan Ram-Ganesh Das of Okara—Appellant

v.

Firm of Khair Din-Allah Bakhsh of Kasur—Respondent.

Mis. F. A. No. 1652 of 1921, decided on 12th June, 1922, from an order of Senior Sub-Judge, Montgomery, dated 4th July, 1921.

Contract Act, S. 133—Variation—Compromise decree for instalments—Surety for instalments on strength of property attached before judgment—Permission for private alienation given after decree—Surety discharged.

Where a compromise decree was passed against the debtor providing for the payment of debt by instalments and a certain person stood surety for the due payment of such instalments on the strength of the property that was attached before judgment and subsequently permission to mortgage and sell the property privately was granted to the judgment-debtor, *held* the moment permission was granted to the judgment-debtor to effect private mortgages or sales, the whole position was changed and the surety was justified in applying to the Court to be relieved of his undertaking.

G. C. Narang—for Appellant.

Jagan Nath—for Respondents.

Judgment:—The facts giving rise to this appeal may be summarised as below:—

On the 31st August, 1920, the Firm of Darshan Ram-Ganesh Das brought a suit against the Firm of Khair Din-Allah Bakhsh for the recovery of Rs. 3,250. The 7th October, 1920, was fixed for final hearing. On that date the parties put in a compromise, and a decree was passed in accordance with the terms of the compromise. The judgment-debtors were ordered to pay the decretal amount by certain instalments. One Fateh Mohamed stood surety for the performance of the agreement relating to the payment by instalments. It appears that an attachment of the property of the defendants had been effected before judgment. The decree, therefore, provided that the property already under attachment must continue to remain under attachment until the realization of the decretal amount, and, further, that in case the amount was not realized from the judgment-debtors, it was to be realized from Fateh Mohamed, the surety. Apparently, after the decree, on the same date, an application was put in by Abdullah and others of the defendant firm asking the Court's permission to effect mortgage and sale of the hypothecated property, and pay the proceeds into Court to the credit of the decree-holders. This led to the present dispute. The decree-holders sought to recover the first instalment from Fateh Mohamed, and the latter applied to the Court on the 20th June to be relieved of his liability as surety, as the decree-holders and the principal judgment-debtors had brought about a change in the original agreement without his consent or knowledge. This application has been allowed by the Court below, and Fateh Mohamed has been absolved from his liability as a surety.

The decree-holders have appealed against the order of the lower Court and have contended, firstly, that no change has taken place in the original undertaking and the things are still the same as they were before; and, secondly, that the application for permission to effect mortgages and sales privately had already been made and granted before the surety undertook the liability.

As regards the second contention, I may at once observe that there is nothing on the record to justify this assertion. Having regard to the various applications made on the 7th October, 1920, and the orders passed thereon, the only legitimate conclusion that is possible is that the application for permission was made after the decree had been passed. This contention may, therefore, at once be dismissed.

As regards the first contention, it is idle to contend that no change has taken place. When the surety undertook the liability to pay, the entire property belonging to the judgment-debtors was under attachment and the surety must have felt secure when he undertook the liability. The moment permission was granted to the judgment-debtors to effect private mortgages or sales the whole position was changed, and, in my opinion, the surety was justified in applying to the Court to be relieved of his undertaking. There is no force in this appeal and it is dismissed with costs.

Appeal dismissed.

1924 Lahore 195.

BROADWAY, J.

Hayat—Appellant

v.

Ali Mohammad and others—Respondents.

S. A. No. 1799 of 1921, decided on 22nd November, 1922, from the decree of District Judge, Multan, dated 6th May, 1921.

(a) *Burden of proof—Question as to, is one of law—Second appeal.*

The question of onus is one of law and so can be taken up in second appeal.

(b) *Custom (Punjab)—Succession—Makowal jats of Isan Mahar, Tahsil and district Muzaffargarh—Collaterals and sister—Burden lies on collaterals to show that they have preferential right.*

The position of a sister in the District of Muzaffargarh is a strange one as against the collaterals of the last male holder and the burden lies on the collaterals to prove that they have a preferential right as against sisters.

Anant Ram—for Appellant.

Hargopal—for Respondents.

Judgment:—The plaintiff in this case Hayat, a Makwal Jat of Isan Mahar, Tahsil and District Muzaffargarh, instituted a suit challenging certain gifts made by Illam Din and Mubarak in favour of their sisters Alam Khatun and Mt. Roshan and the latter's son Ali Muhammad. The plaintiff's suit being dismissed he preferred an appeal to the District Court. This appeal having proved unsuccessful he has come up to this Court in second appeal armed with a certificate from the learned District Judge under section 41 (3) of the Punjab Courts Act, III of 1914. The certificate in question states that there is a question regarding the validity of a custom, *viz.*, the validity of a gift in favour of sisters and sister's sons as against collaterals.

Mr. Anant Ram on behalf of the appellant frankly and rightly admitted that, so far as the evidence on the record was concerned, the appellant had failed entirely to prove that such gifts were invalid by custom. He, however, contended that the onus of proving the custom had been wrongly placed on him. Now, in the primary Court the onus was placed on him without any objection on his part. In the lower appellate Court it was never alleged that the onus had been wrongly placed. This is apparent from the grounds of appeal to the lower appellate Court as also from the judgment of the learned District Judge itself. The question of onus is, however, one of law and so can be taken up in second appeal. In support of Mr. Anant Ram's contention that the onus should have been placed on the other side, he drew my attention to the Customary Law of Muzaffargarh District, page 32, and particularly to the answer to question No. 10. As, however, this question does not relate either to the succession by sisters or gifts to them it does not appear to have any bearing on the matter before me. On the other hand, the answer to question No. 26, read with the answer to question No. 21 (pages 37 and 36) renders it perfectly clear that all the tribes of this District recognise that on a man dying without male lineal descendant and leaving neither widow nor daughters nor daughter's sons the property passes to his (1) father, (2) brother or their descendants, and (3) sisters or their descendants. The position of a sister, therefore, in this District in matters of succession is a strong one Mr. Anant Ram then referred me to *Hayat* v. *Rustam* (1). That decision refers to Makwal Jats of Tahsil Alipur and, as the judgment shows, the decision was confined to that particular tribe in that particular Tahsil. At the same time, in that case itself it was recognised that the onus lay on the collaterals to establish a custom by which they excluded sisters. Mr. Anant Ram then cited *Raniha* v. *Jindwaddi* (2) in which it was held that among Bilooches of the Muzaffargarh District collaterals in the 5th and 6th degree had failed to prove that they excluded sisters. It was specifically held that the entry in the *Riwaj-i-am* in favour of sisters threw the *onus probandi* on the collaterals. I have, therefore, no hesitation whatever in agreeing with the Courts below that it was for the plaintiff in this case to show that he had a preferential right to succeed as against the sisters of Mubarik and Ilam Din. Admittedly, the appellant has adduced not a single instance in support of his case, whereas on the other side there are several instances established. Further, in the Muzaffargarh District the Jats, especially the Muhammadan Jats, have very large powers

(1) (1917) 48 P.R. 1917=118 P.W.R. 1917=41 I.C. 299.

(2) (1914) 101 P.R. 1914=221 P.L.R. 1914=122 P.W.R. 1914=24 I.C. 942.

of alienation and gift, and Mr. Anant Ram admitted that he was unable to press the matter with regard to this portion of the case. I confess I am unable to see on what grounds the certificate was granted and the appeal is dismissed with costs.

Appeal dismissed.

1924 Lahore 196 (1).

LE ROSSIGNOL, J.

Tulsi Ram and others—Appellants.

v.

Ganwa and others—Respondents.

Mis. S.A. No. 1930 of 1921, decided on 7th February, 1922, from an order of District Judge, Ambala, dated 6th July, 1921.

Limitation Act, Art. 10—Land in possession of vendee—Time for pre-emption runs when physical possession was taken.

Where land sold was in the possession of tenants at the date of sale, *held* that constructive possession was taken by the vendee at the time of the sale and physical possession he took some time later when he ousted the tenants. And therefore limitation began to run from the date when physical possession was taken.

Devi Dayal—for Appellant.

Abdul Ghani—for Respondent.

Judgment:—The question in this appeal is of limitation only.

The trial Court dismissed the suit which is for pre-emption as time barred finding that the sale was complete in February, 1918, that at the time tenants were in possession but were evicted in June 1918, that the sale-deed was registered in September, 1918, and the suit brought in August, 1919.

The District Judge agreed on all the facts but held the suit within time on the ground that as at the time of the sale the land sold being in the possession of tenants did not admit of physical possession by the vendees, the second part of article 10, Limitation Act, governed the case.

Respondent supports the decree of the Court below by reference to *Ghulam Mustafa* v. *Sahab-ud-din Khan* (1) but in that case physical possession was never taken before suit.

I find myself quite unable to agree that land sold does not admit of physical possession. If I have given a horse on hire for a month, and then sell him, my vendee cannot get physical possession before the month is over, yet the horse can be physically possessed. Physical possession may be refused by some other interested person, but obviously the right of ownership sold admits of physical possession. The taking of possession is an overt act which the law has ordained shall be notice to all concerned of the change of ownership.

Possession, *i.e.*, constructive possession was taken by the vendee at the time of the sale physical possession he took some time later when he ousted the tenants.

I hold that the land sold did admit of physical possession, and that limitation began to run from the date when physical possession was taken in June, 1918 and therefore, the suit brought in August, 1919 was too late.

I accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

(1) (1908) 63 P.L.R. 1908=1 P.W.R. 1908=49 P.R. 1908 (F. B.).

1924 Lahore 196 (2).

ABDUL RAOOF, J.

Mt. Durgo—Appellant.

v.

Premsingh and others—Respondents.

S. A. No. 1656 of 1921, decided on 31st March, 1922, from the decree of District Judge, Hoshiarpur, dated 15th March, 1921.

(a) *Construction of documents—Will of gift 'Wasiat', use of—Does not necessarily imply a will.*

In constructing a document no part of it as far as possible should be left out as redundant. The mere use of the word 'Wasiat' cannot make a transaction a will if it was really intended that the property should vest in the donee immediately during the lifetime of the donor. [P. 197, C. 2.]

(b) *Custom (Punjab)—Alienation — Widow in possession of immoveable property of her husband has no power to alienate permanently.*

In the Punjab, under the customary law, a widow in possession of immoveable property of her husband has no power to alienate it permanently. There is no distinction in this respect whether the property is ancestral or self-acquired. (1922 Lah. 217, *Ref.*) [P. 198, C 2.]

M. C. Mahajan—for Appellant.

Jagan Nath—for Respondents.

Judgment:—The facts of this case are few and simple. The land in dispute

belonged to one Diala, a Kotoch Rajput, of the Kangra District. On his death it came into the possession of his widow Mt. Bidia Devi. The Musammat is said to have alienated the land in favour of the plaintiff, Prem Singh, by a document, dated the 5th August, 1919. She died on the 15th August, 1919, and on her death the land was mutated in the name of the defendant Mt. Durgi, widow of Devi Ditta, a cousin of Diala. Prem Singh sued for possession of this land on the strength of the above document which is marked as Ex. P-3 on the record. The document is alleged by him to be a will. The suit was resisted by the defendant, who is in possession, mainly upon two pleas, namely, (i) that the document, the basis of the suit, is a deed of gift and being unregistered is inadmissible in evidence, and (ii) that Mt. Bidia Devi being entitled to a life-estate only as a widow, she had no power to make a permanent alienation by a will in favour of the plaintiff. The trial Court found on both these points in favour of the plaintiff. It held the document to be a will and on the question of the validity of the alienation it held that inasmuch as the land in suit was not ancestral and as Mt. Durgi had no power under the custom to contest the alienation the plaintiff acquired a valid title under the will. It also held that it was proved that Mt. Bidia Devi had the customary power of making a will in favour of the plaintiff. On all these grounds the trial Court granted a decree for possession to the plaintiff.

The defendant, Mt. Durgi, appealed, but the decree of the trial Court was upheld by the learned District Judge.

The defendant has preferred this second appeal and two contentions have been raised on her behalf :—(i) relating to the nature and character of the document sued upon, and (ii) in respect of the power of Mt. Bidia Devi to make a will. The document is, no doubt, styled as a will, but in order to decide whether it is a deed of gift or a will it is necessary to find out the intention of Mt. Bidia Devi. If she intended that the transfer should take effect immediately in her lifetime the document must be held to be a gift. If, on the other hand, the lady intended that the provisions of the document were to take effect upon the death of the lady it must be held to be a will. Reading the document as a whole, in my opinion there can be no possible doubt that the lady intended that the property should vest in the donee immediately. In spite of the fact that the transfer is styled as a *wasiat*, I find the following clause which leaves no manner of doubt what the Musammat intended :—

"*Aur agar zindgi muzhar reh gai to bhi ainda guzara ki mustahaq hungi.*

If the document was intended to take effect after the death of the lady there was no necessity for this clause. In my opinion the lady was quite conscious that she had parted with the property in favour of the plaintiff and that was why she made a provision for her maintenance in case of her continuing to live. According to the general rule of construction, no part of a document as far as possible is to be left out as redundant. Both the Courts below have ignored the effect of this clause abovementioned. The learned Judge of the Appellate Court has referred to this clause in his judgment and to the contention put forward on behalf of the plaintiff on the basis of that clause, but he has not tried to meet the argument. All that he has said in his judgment on this point is "But I consider that the tone and meaning of the document taken as a whole is that it is in fact a will and not a deed of gift." This finding entirely ignores the contention based upon the clause. It is not necessary to refer to the various authorities cited before me to support the proposition that the mere use of the word '*wasiat*' cannot make a transaction a will if it was really intended that the property should vest in the donee immediately during the lifetime of the donor. I am, therefore, clearly of opinion that the document is a gift and as such required registration under clause (*a*) of section 17 of the Registration Act, and that being unregistered was inadmissible in evidence. On this finding alone the suit of the plaintiff must fail.

On the second point Mr. Mehr Chand Mahajan has argued that no female in possession of immoveable peprorty inherited from her husband can permanently alienate such property and that no distinction can be made between an ancestral property and self-acquired property in this respect. In support of this argument he has relied on paragraph 64 of Rattigan's Digest of Customary Law in which the rule is thus stated: "Except as provided in paragraph 39 or paragraph 62, no female in possession

of immoveable property acquired from her husband, father, grandfather, son or grandson otherwise than as a free and absolute gift can permanently alienate such property."

In the case of *Dalipa* v. *Dallu*, Civil Appeal No. 2163 of 1916, a Division Bench, of which the learned Chief Justice was a member, described that under Hindu Law a widow takes only a limited life-interest in the estate and the nature of her interest can never alter even though there be a complete want of heirs. The learned Judges went on to observe that, "so far as we are aware, it has never been suggested that the life-interest in an estate which custom grants to a widow is in any way wider than the interest which she takes under the Hindu Law."

So far as the parties to the present case are concerned, the *riwaj-i-am* of the Kangra District prepared by Mr. Middleton also supports the proposition. At page 70 of Volume XXVIII is to be found the question and answer on the subject. Question No. 45 embracing almost all the questions arising in connection with this matter was put in the following words:—

"Question No. 45. What is the nature of the widow's interest where she succeeds? What rights of alienation has she?

"(i) Under what special circumstances or for what special purposes can she alienate?

"(ii) Is any distinction made in this matter between moveable and immoveable ancestral and acquired property, or in respect of alienations to the kindred of the deceased? Supposing alienations to be permissible, whose consent is necessary to make it valid?"

The custom was thus stated in the answer:

Answer.—The widow succeeds to a limited life-interest in the estate only. There is no restriction on her power to alienate moveable property. She can, however, only alienate ancestral immoveable property or immoveable property acquired by her husband, temporarily and for legal necessity, *i.e.*, for payment of her husband's just debts, or Government Revenue, to defray the expenses of her daughter's marriage or family or for any other special and sufficient reason. She has, however, no power to effect a permanent alienation. No distinction is drawn between ancestral property and property acquired by her deceased husband. The widow making an alienation should first offer to do so to the collaterals and only on their refusal should she alienate to a stranger."

In the case of *Govinda* v. *Nandu* (1), Letters Patent Appeal No. 136 of 1921, the learned Chief Justice, sitting with Mr. Justice Martineau, made the following observation:—

"In this case, however, we are dealing with alienations made by females whose power of disposition over the property was admittedly restricted, and it has been held by a Division Bench in Civil Appeal No. 128 of 1917 [*Diyal Kuar* v. *Mehtab Kaur* (2)] that the estate of a widow under Customary Law is subject to the same restrictions as that of a widow under Hindu Law."

These are two recent decisions of this High Court which have a direct bearing on the question to be decided in this case. In accordance with the rule laid down in these cases I must hold, that *Mt.* Bidia Devi had no power to make the alienation relied upon by the plaintiff. The plaintiff, therefore, has acquired no title under the document sued upon. On this ground also the suit of the plaintiff must fail. In view of the above findings this appeal must succeed.

I accordingly accept the appeal and, setting aside the judgments and decrees of the Courts below, dismiss the suit of the plaintiff with costs in all Courts.

Appeal accepted.

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(1) 1922 Lah. 217.
(2) (1921) 3 L.L.J. 458=74 I.C. 639.

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* 1924 Lahore 198.

SCOTT-SMITH, J.

Firm Udho Ram-Chandi Ram—Appellants.

v.

Firm Hem Raj Tej-Bhan and others—Respondents.

S. A. No. 2681 of 1921, decided on 20th June, 1922, from the decree of District Judge, Mianwali, dated 29th August, 1921.

(a) *Negotiable Instruments Act, S. 64—Loss of hundi—Presentment is not dispensed with.*

The loss of a bill or note does not excuse non-presentment.

(b) *Negotiable Instruments Act, S. 45 (a)—Hundi payable at sight—Loss of, does not give a right to demand duplicate.*

Where a hundi is payable at sight, the holder is not as of right entitled to demand a duplicate under S. 45 (*a*). Moreover as it is payable at sight it cannot be said that it was lost before it was overdue. But a duplicate may be demanded on equitable principles where a bill is lost whether before or after maturity as the right to demand duplicate is a part of the merchantile laws of the countries.

(c) *Negotiable Instruments Act, S. 76(a)—Hundi lost—Duplicate not supplied—No presentment is necessary.*

Where a hundi is lost and the drawer refuses to supply a duplicate, no presentment is necessary under S. 76 (*a*). [P. 200, C. 1.]

M. S. Bhagat—for Appellants.

M. L. Puri and *Nanak Chand*—for Respondents.

Judgment:—This is a second appeal from the order of the District Judge, Mianwali, dismissing the plaintiff's suit for Rs. 994-8-0 based upon a *hundi*. The *hundi* was payable at sight and was drawn by the firm, defendant No. 3, upon a Bombay firm not a party to the suit. It was drawn in favour of defendant No. 2, who endorsed it in favour of defendant No. 1. Defendant No. 1 firm in its turn sold it to the plaintiff, plaintiff stated that the *hundi* had been lost. According to the plaintiff's allegation the *hundi* was sent to their Commission Agents in Amritsar in January, 1919, and in May, 1920, when the latter came to settle up accounts, it was ascertained that the *hundi* was never received by them. As against defendants Nos. 1 and 2 the learned District Judge dismissed the suit on the ground that as the *hundi* had been lost there had been no presentment thereof for payment in accordance with the provisions of section 64 of the Negotiable Instruments Act. As regards defendant No. 3 he dismissed the suit as it had not been shown that the drawer, *i e.* defendant No. 3 could not suffer damage from the want of such presentment. Plaintiffs stated that when it was discovered that the *hundi* had been lost he asked defendant No. 3 to supply a duplicate, which, however, defendant No. 3 refused. In the Negotiable Instruments Act by Bhashyam and Adiga, 2nd Edition, at page 284 it is stated that " neither bankruptcy nor death of the party dispenses with presentment under section 64 and that even the loss of the bill or the note does not excuse non-presentment." I am, therefore, clearly of opinion that the learned District Judge has rightly held that defendants Nos. 1 and 2 are not liable. Mr. M. S. Bhagat on behalf of the appellant says that no plea was raised in the trial Court about non-presentment and that, therefore, such a plea should not be allowed at the present stage. It appears, however, from the pleas of defendant No. 1 that he urged that the drawee should have been asked by the plaintiff for the payment of the amount due, in other words, he meant that there should have been presentment to the drawee. Moreover, from the judgment of the learned District Judge it appears that the point which is a legal one, was fully argued before him.

As regards defendant No. 3, the drawer of the *hundi*, it appears to me that as the *hundi* was payable at sight the holder was not as of right entitled to demand a duplicate under section 45 (*a*) of the Negotiable Instruments Act. Moreover, as it was payable at sight it cannot be said that it was lost before it was overdue. Messrs. Bhashyam and Adiga in the work referred to above at page 214 state the following rule. Power to obtain duplicate in case of loss is a part of the mercantile laws of countries and ample scope is given to it by Court of Equity in England both on bills lost before and after maturity and on notes as well." The learned authors go on to say that "the section is not so wide as the proposition of law laid down in the above passage; for it is confined in its operation to bills only, and that, too, before they arrive at maturity; moreover, the remedy given by the section to the loser is against the drawer alone. But the Indian Courts administering rules of equity, justice, and good conscience will adopt the above rule as being not only in consonance with the spirit of the section but also as being the rule applied to similar cases in England." Defendant No. 3 never appeared in the trial Court. There was, therefore, no plea by him that the plaintiff was not entitled according to mercantile usage to demand a duplicate of the lost *hundi*. I have no doubt that he was so entitled and as defendant No. 3 refused to supply him with one it was impossible for the plaintiff to make any presentment to the drawees. Therefore, I am of opinion that, under section 76 (*a*) of the Negotiable Instrument Act, no presentment for payment was

necessary as against defendant No. 3 because, owing to his own refusal to supply a duplicate, none was presented to drawee.

I, therefore, accept the appeal on equitable grounds so far as defendant No. 3 is concerned and give the plaintiff a decree for the sum claimed with costs against him in all the Courts. As against defendants Nos. 1 and 2 the appeal is dismissed with costs.

Appeal accepted in part.

1924 Lahore 200.

RAOOF AND FFORDE, JJ.

Mahomed Shafi and another—Appellants.

v.

Mt. Kalsum Bi and others—Respondents.

Civ. App. No. 2 of 1922, decided on the 23rd July, 1923, from the decree of the Senior Sub-Judge, Delhi, dated 6th June, 1921.

(a) *Mahomedan Law—Sale by mother as guardian is void.*

A mother under the Mahomedan Law has no power to dispose of the immoveable property belonging to her minor children and a sale by her of their property is void. (45 Cal. 878 (P.C.), *Foll.*) [P. 203, C. 1.]

(b) *Pardhanashin lady—Suing as plaintiff and alleging fraud and deception, must prove it.*

If a transferee from a pardanashin lady comes into Court to enforce a deed executed by a lady, it lies upon him to prove that it was obtained from her fairly, that the terms of the deed were explained to her, that she had independent advice before executing the deed and that she had benefited by it. But when a pardhanashin lady comes into Court as a plaintiff with specific allegations of fraud and deception it lies upon her to make out a *prima facie* case, before the transferee can be called upon to show that the deed had been properly obtained from her. (1899 A.W.N. 25, *Foll.*) [P. 204, C. 2.]

(c) *Pardhanashin lady—Literate and litigating lady cannot claim the same privileges.*

Where a pardhanashin lady is literate and there is evidence to show that the lady has been carrying on litigation and has been entering into money transactions and is far from being inexperienced in such matters. *Held*; that such a lady does not come under the description given in 8 All. 267 and 11 M.I.A. 551 of a pardhanashin lady who ought to be protected by special privileges. [P. 207, C. 1.]

Muhammad Iqbal—for Appellants.

Aziz Ahmad, *Ghulam Rasul* and *Mohsin Shah*—for the Respondents.

Abdul Raoof, J.:—This appeal has arisen out of a suit brought by Mt. Kalsum Bi and others for the cancellation of two sale-deeds executed by her and others in favour of the appellants Mohamad Shafi and Abdul Rashid. The parties to the suit belong to a class of *Musalmans* called *Punjabi* Mahomedans. They carry on trade and are well known for their keen business instinct. Besides carrying on trade some of them own lands and houses also. The pedigree table given in the judgment of the trial Court shows the relationship between the parties concerned in this appeal. Abdul Rashid, Mahomad Shafi and Riaz-ud-Din were three brothers being the sons of Aziz-ud-Din. Riaz-ud-Din had married two wives. By his first wife Mt. Mohd-ul-Nisa, who pre-deceased him, he had two sons and two daughters, namely, Bashir-ud-Din, Shuja-ud-Din, Mt. Sughra Jan and Mt. Ashraf-ul-Nisa. By his second wife Mt. Kalsum Bi he had five children, namely, Iqbal Ahmad, son, and Mt. Mussarat Begum, Mt. Kudsia Begum, Mt. Amat-ul-Basit and Mt. Zubaida Begum, daughters. Riaz-ud-Din died on the 9th of March, 1914. In the year, 1913, in his lifetime he stood in need of money to pay off certain creditors. Under a deed, dated the 1st of July, 1913, he borrowed Rs. 6,000, from his wife Mt. Kalsum Bi. The document was written in the shape of a conditional sale-deed. Mt. Kalsum Bi had to go to Lahore to her brother *Sheikh* Muhammad Naki, an Honorary Magistrate, to get money from him in order to pay her husband Riaz-ud-Din. On her arrival at Lahore she did not find her brother there but succeeded in raising Rs. 2,000 in his absence and returned to Delhi. Later on *Sheikh* Muhammad Naki went to Delhi and handed over to his sister on the 11th of July, 1913, six currency notes of Rs. 1,000 each out of which the balance of Rs. 4,000 was paid to Riaz-ud-Din. *Sheikh* Muhammad Naki obtained a written receipt from his sister, Mt. Kalsum Bi, who signed it with her own pen in Persian character. This is translated and printed at page 8 of the paper book in First Appeal No. 2784 of 1915. Shortly after this the joint property of the three brothers was partitioned and one-third was allotted to each of the brothers. On the death of Riaz-ud-Din the property conditionally sold to Mt. Kalsum Bi was mutated in her name, in spite of objections raised by her step-sons. Thereupon Bashir-ud-Din and Shuja-ud-Din, the step-sons, brought a suit against her for the recovery

of their share (28-96) of inheritance in the property left by their father. That suit was resisted by Mt. Kalsum Bi on the ground that the property had been sold to her absolutely for Rs. 6,000 by a sale-deed, dated the 1st of July, 1913. Mr. Dundas, the District Judge, however, held that the property had been only conditionally sold as a security for the Rs. 6,000 lent by her to her husband Riaz-ud-Din. It was found by the learned District Judge that a sum of Rs. 7,400 was due to Mt. Kalsum Bi, namely, Rs. 6,000 paid by her under the conditional sale-deed and Rs. 1,400 which she had paid to Mt. Muhammadi Jan and Mt. Shamas-ul-Nisa to adjust the partition of the property in suit. A decree was passed in favour of the plaintiffs on the 29th June, 1915, for joint possession by redemption of 28/96 of the property in suit on payment of 28/96 of Rs. 7,400, *i.e.*, Rs. 2,158-5-4, together with the defendant's costs in this suit. Against this decree Mt. Kalsum Bi filed an appeal in the Chief Court which was registered as First Appeal No. 2784 of 1915. Under the conditional sale-deed of the 1st of July, 1913, to which the litigation just referred to, related four properties were mortgaged, namely :—

(1) ⅓rd of a house called Jamanwala.

(2) ⅓rd of a house called Nibwala.

(3) ⅓rd of two plots of agricultural land in Chandrawal Chah, Danishmand Khan.

(4) ⅓rd share in a garden called Dolawa in Ladhaura Kalan.

In addition to the first appeal pending in the Chief Court Mt. Kalsum Bi was carrying on litigation against her husband's brothers, both in the Civil and the Revenue Courts. She had brought two suits for accounts—one in the Revenue Court and the other in the Civil Court. On the 30th of August, 1918, Mt. Kalsum Bi on her own behalf and as the guardian of her minor children, Iqbal Ahmad, Mt. Mussarrat Begum and Mt. Kudsia Begum, executed two sale-deeds in favour of Abdul Rashid and Muhammad Shafi in respect of their shares in the entire property left by Riaz-ud-Din. Mt. Amat-ul-Basit, Mt. Zubaida Begum, her adult daughters, Bashir-ud-Din, Shaja-ud-Din, and Mumtaz Ahmad also joined her in the execution of the deeds by which they transferred their shares in the estate. As Mumtaz Ahmad had purchased the shares of Mt. Sughra Jan and Mt. Ashraf-ul-Nisa, the step-daughters of Mt. Kalsum Bi, he as their representative-in-interest joined in executing the sale-deeds in respect of their shares. Thus Abdul Rashid and Muhammad Shafi acquired the whole of the estate left by Riaz-ud-Din. The list of the property sold to Abdul Rashid is translated and printed at page 5 of the paper book in Civil Appeal No. 2 of 1922 as list 'A' and the list of the property sold to Muhammad Shafi is translated and printed at page 4 of the paper book as list 'B'. The consideration for the sale in favour of Abdul Rashid was Rs. 8,975 and that for the sale-deed in favour of Muhammad Shafi was Rs. 5,475 as stated in the two sale-deeds. Under one of the conditions entered in the two sale-deeds Mt. Kalsum Bi accepted the correctness of the decision of Mr. Dundas and undertook to present an application to the Chief Court for the withdrawal of the appeal.

The suit which has given rise to this appeal was instituted on the 19th of March 1919 by (1) Mt. Kalsum Bi, (2) Iqbal Ahmad, minor son, (3) Mt. Kudsia Begum, and (4) Mt. Mussarrat Begum, minor daughters of Riaz-ud-Din through Muhammad Sultan, (5) Mt. Amat-ul-Basit, and (6) Mt. Zubaida Begum principally against the two vendees Abdul Rashid and Muhammad Shafi, and Shuja-ud-Din, Bashir-ud-Din, Mumtaz Ahmed, Mt. Shamshad Jan and Mt. Putli Jan as *pro forma* defendants. The last named two defendants were impleaded because they were said to have obtained a contract for sale from Abdul Rashid and Muhammad Shafi in respect of a portion of the properties purchased by them. As already stated the suit was for the cancellation of the two sale-deeds on the grounds mentioned in the petition of plaint. Those grounds are set forth in paragraphs 4 and 5 of the plaint in the following words :—

"4. Defendants Nos. 1 to 5 deceived the plaintiffs saying that the property entered in paragraph No. 2 of the plaint, a plot of culturable land known as Lariwali, which is *muafi*, measuring *bighas* 5 —8 entered at *khewat* No. 2, *khatauni* No. 28 with a well situate at *Mauza* Sadhaura Kalan, are of a very small value and that therefore all the disputes should be settled. Accordingly the property entered in the list A was sold to Abdul Rashid for Rs. 8,975-13-0 and the property in the list B was sold to Muhammad Shafi for Rs. 5,475-13-0 under deeds, dated the 30th August, 1918.

"5. The plaintiffs and the minors were deceived. Defendants Nos. 5 and 6, having taken advantage of the fact that the plaintiffs were inexperienced

and *pardanashin* ladies, got the property which was of very high value sold to them for a very low price and also got such conditions as were never accepted by the plaintiffs entered in the sale-deed. A heavy sum was shown as due to Mumtaz Ahmad. All these proceedings were fictitious. The plaintiffs were never informed of them."

In paragraph 10 the plaintiffs prayed that it might be declared that the documents in question had been got executed through fraud and were unauthorised and detrimental to the interests of the minors so far as they concerned them and that they be cancelled as against all the plaintiffs. The suit was resisted by the defendants on various grounds. The *jawab-i-dawa* of the defendants Muhammad Shafi and Abdul Rashid is printed at pages 66 and 67 of the paper book and contains the following plea on the most material questions arising for decision in the case :—

"The plaintiffs were not deceived in any way. According to law the plaintiffs should state distinctly in the plaint what fraud was exercised on them and how it was exercised. The petition of plaint is liable to be amended. The plaintiffs may be directed to state the fraud in detail and also state the conditions which were not accepted by them (plaintiffs) and which were got entered in the deed according to their statement. Plaintiff No. 1 is a literate and an intelligent woman. She has often chances of litigation. She understands matters fully. There was conversation with plaintiff No. 1 and other plaintiffs who after duly consulting the matter and fully enquiring about the price got the sale-deed registered in favour of defendants Nos. 4 and 5. The receipt for the earnest money was executed on the 13th August, 1918. The sale-deeds were registered on the 31st August, 1918. The receipt marked D. I is attached to this *jawab-i-dawa*. Moreover, plaintiff No. 1 sent a notice marked D. II to defendant No. 4 on the 11th December, 1918 and notice marked D. III to defendant No. 5 making a demand for the money and the *hundis* executed in lieu of the earnest-money and recovered the amount of the *hundis* from defendant No. 4. The sale-deeds bear the signatures of the plaintiff's advisers and relatives. The sons-in-law of plaintiff No. 1 and the husbands of plaintiffs Nos. 5 and 6 indentified them at the time of registration."

It was also pleaded that the sale was for the benefit of the minors and that the other adult co-sharers had executed this sale deed after due consideration for their own benefit as well as for the benefit of the other plaintiffs-minors who are their descendants and sisters and that they were bound thereby according to law. Defendants Nos. 6 and 7 disclaimed all connection with the property in suit and it is admitted before us that they dropped out of the suit and had no concern with it. The other defendants supported the pleas urged by Muhammad Shafi and Abdul Rashid. On the 8th of July, 1919 the Court made the following order which is translated and printed at page 72 of the paper book :—

"The plaintiff contends that she was deceived. But she has not stated what sort of fraud has been practised on her. It is therefore her duty to file correct and detailed plaint • • • • "

In compliance with this order Mt. Kalsum Bi filed a further statement of her claim setting out the points regarding which the fraud was alleged to have been practised :—

"(1) It was stated with regard to the property that it was of a very small value, that the value, for which it was being sold was much more than the market price.

"(2) No mention about the payment of any item to Mumtaz Ahmad was made to plaintiff No. 1.

"(3) Plaintiff No. 1 never agreed that she would withdraw from her appeal case pending in the Chief Court of the Punjab.

"(4) Every undue advantage was taken of the fact that plaintiff No. 1 was a *pardanashin* lady. She trusted the defendants, and put her signature on the document. She did not understand all the conditions."

The defendants Muhammad Shafi and Abdul Rashid filed an additional *jawab-i-dawa* to meet the case set up by the plaintiff Mt. Kalsum Bi in which they stated that the plaintiff, having herself fully ascertained from her sons-in-law, other relatives and advisers the value of the property, had sold it for the highest market value ; that she knew all about Mumtaz Ahmad ; that she had agreed to withdraw her appeal pending in the Chief Court ; and that although the plaintiff was apparently a *pardanashin* lady she was literate, she had been fighting cases ; she had in every way obtained full information from her advisers and relatives and that she fully understood all the terms of the sale-deeds. Before issues were framed in the case the appeal of Mt. Kalsum Bi (Civil Appeal No. 2784 of 1915) came up for decision before the High Court on the 9th of February, 1920, and it was urged on behalf of the respondents that in consequence of a compromise the terms of which were incorporated in the deeds of sale Mt. Kalsum Bi had agreed to withdraw the appeal and that, therefore, it could not be heard. Mt. Kalsum Bi's Counsel replied that the sale-deeds were being contested. Thereupon the learned Judges before whom the appeal had come up for decision directed the Court to take evidence, and

decide whether a valid agreement had been arrived at between the parties under which Mt. Kalsum Bi had agreed to withdraw the appeal. By consent of parties evidence was recorded in the inquiry held according to the orders of the High Court and the evidence taken in the inquiry by consent of parties was to be read as part of evidence in this case. On the 13th of January the statement of Abdul Rashid, defendant No. 4 was recorded under Order 10, rules 2 and 3, Civil Procedure Code, and he made the following statement which is to be found printed at page 86 of the paper book :—

"The price of the property at the time of the sale was the same for which it was purchased. I did not purchase property of a higher price in 1918. The price of the property has not risen as yet and is the same as before. The conditions given in the sale-deed were settled with Mt. Kalsum Bi. The same conditions as were settled were got witten in the deed. The sale-deed was read over and her sons in-law were present. Local Commissioner was appointed by *Kazi* Fazl-ul-Rahman, Revenue Assistant. They got a settlement made. Muhammad Mian was also one of the persons who got the settlement made. An agreement was made to sell a plot of 5,000 yards to Mussammat Chhamma Jan for Rs. 15,000, a receipt was executed, but she made a refusal. The plaintiffs had a share according to the Muhammadan Law before the sale. Raiz-ud-Din had 1/3rd share."

Counsel for the plaintiff Mt. Kalsum Bi on the same date made the following statement which is to be found on the same page :—

"The defendants took advantage of the fact of Mt. Kalsum Bi and the other females, vendors, being *pardanashin* ladies and said that in spite of the property being of a small value they were giving the price asked for from them. The females agreed, being thus deceived. But such conditions as were not settled were got entered in the sale deed. The sale is quite adverse to the rights of the minors. Hence it is prayed that it might be declared null and void. Mt. Kalsum Bi is prepared to give back the money received by her."

The following issues were framed by the Court after recording the statements of the parties, namely :—

(1) Was the sale made for the benefit of the minors?

(2) Was the sale got made after the plaintiff has been fully informed of its objects?

(3) Was the property of a higher value?

Subsequently when the case was taken up by Mr. Som Nath, Senior Subordinate Judge, Mr. Abdul Aziz, the plaintiff's counsel, on being questioned as to the nature of the fraud which was alleged to have been committed by the defendants-vendees stated that the fraud was that the defendants gave Mt. Kalsum Bi to understand that the property in suit was of a very little value and it would be better to sell it to them and it would be beneficial to the plaintiffs. It was further represented that Mt. Kalsum Bi's sons-in-law were uselessly deceiving her. In consequence of this statement the issues originally framed by Mr. Abdus Samad, Subordinate Judge, 2nd Class, were recast as follows :—

(1) Was the sale in suit for the benefit of the minors?

(2) Was it duly executed by Mt. Kalsum Bi after properly understanding its terms?

(3) Is it tainted with fraud and undue influence?

After considering the evidence produced on behalf of Mt. Kalsum Bi, the Lower Court held that the fraud and the deception pleaded by her were not established, but that being a *pardanashin* lady she was entitled to the protection afforded to *pardanashin* ladies under several Privy Council rulings. On the basis of this view the learned Judge of the Court below proceeded to examine the evidence given on behalf of the defendants and came to the conclusion that the requirements of the rules laid down by their Lordships of the Privy Council were not satisfied. In the case of the minor plaintiffs the learned Subordinate Judge rightly held that the sale was *ab initio* void as a mother under the Muhammadan Law has no power to dispose of the immoveable property belonging to minor children. This has been authoritatively settled by the latest Privy Council ruling in the case of *Imambandi* v. *Mutsaddi* (1). As regards the two major daughters of Mt. Kalsum Bi the learned Subordinate Judge held that they had exercised no independent judgment in selling their shares and that they had acted as told by their mother. There being no evidence on the record to show that the terms of the sale-deed were ever explained to them or that they had received any sums the learned Judge held that the sale could not be held to be binding upon them. In the opinion of the learned Subordinate Judge the decision of the whole

(1) (1918) 45 Cal. 878 = 45 I.A. 73 = 35 M.L.J. 422 = 16 A.L.J. 600 = 24 M.L.T. 330 = 28 C.L.J. 409 = 23 C.W.N. 50 = 5 P.L.W. 276 = 20 Bom.L.R. 1022 = (1919) M.W.N. 91 = 9 M.L.W. 518 = 47 I.C. 513 (P.C.).

case turned upon the point whether the sale deed should be upheld as against Mt. Kalsum Bi. Then having come to the conclusion that they were not binding even upon her the Court granted a decree in favour of the plaintiffs and against the defendants cancelling the sale-deeds as far as they related to the plaintiffs' share on payment of Rs. 7,432-13-0 to Abdul Rashid and Rs. 232-13-0 to Mahomad Shafi.

Against this decision the present appeal has been preferred by the defendants Mahomad Shafi and Abdul Rashid and Dr. Sir Muhammad Iqbal has argued their case before us. He has very frankly admitted the correctness of the decision of the Court below as regards the minor plaintiffs. He has addressed a feeble argument as regards the adult daughters of Mt. Kalsum Bi, but as he is unable to point out any evidence on the record to prove that the terms of the sale-deeds were settled with them or that any one besides Mt. Kalsum Bi had looked after their interest, his argument cannot be accepted. The terms of the sale-deeds are not shown to have been explained to them nor is there any evidence to show that they were in any way benefited by the transaction. We must, therefore, hold that the sale-deeds so far as they affect the shares of Mt. Kalsum Bi's children have been rightly cancelled. The real question to be decided in this appeal is whether the sale-deeds should be cancelled as against Mt. Kalsum Bi also or whether they should be allowed to stand. A careful examination of the plaint makes it quite clear that Mt. Kalsum Bi attacked the sale-deeds on the grounds of fraud, deception and undue influence. Before the framing of the issues counsel for the plaintiffs made it quite clear that the plaintiffs wanted to have the sale-deeds cancelled on the ground of fraud. In the supplementary statement of their claim printed at page 72 of the paper book the particulars of the fraud were set out. *Prima facie* therefore, the claim of Mt. Kalsum Bi should stand or fall on her success or failure to establish the allegations made in the plaint and in the pleadings.

The only question that requires consideration is whether a *pardanashin* lady who comes into Court with specific allegations of fraud can be relieved of the necessity of establishing those allegations on the mere ground that she is entitled to special consideration and protection if a document executed by her is sought to be enforced against her. There can be no doubt that if a transferee from a *pardanashin* lady comes into Court to enforce a deed executed by a lady it lies upon him to prove that it was obtained from her fairly, that the terms of the deed were explained to her, that she had independent advice before executing the deed and that she had benefited by it. We are on the other hand clearly of opinion that when a *pardanashin* lady comes into Court as a plaintiff with specific allegations of fraud and deception it lies upon her to make out *prima facie* case before the transferee can be called upon to show that the deed had been properly obtained from her. This view is fully supported by the decision of the Allahabad High Court in the case of *Naushani Begum* v. *Intizar Begum* (2). That was a case in which the plaintiff a *pardanashin* lady sought to set aside a power of attorney executed by her on the 17th of November, 1892, in favour of one Inayat Husen Khan and a sale-deed, dated the 21st of November, 1892, which purported to have been executed on behalf of the plaintiff in favour of the vendee. The plaintiff alleged in her plaint that her attorney had led her to believe that a certain person was willing to purchase her share in *Mauza* Samaria Anup for a consideration in excess of the real value of the property; that the plaintiff believing this statement of the attorney to be true had agreed to sell the property; that after she had agreed to effect the sale it was represented to her that a power of attorney was necessary for the purpose of registration and mutation proceedings, and that thereupon she had executed the power of attorney, dated the 17th of November, 1892. She averred that she neither understood the purport of the deed nor was it explained to her. She added that the attorney had executed a sale-deed of the property in favour of the vendee for a consideration of Rs. 5,000 without the knowledge or consent of the plaintiff. She failed to prove the allegations made by her in the plaint, but the trial Court holding that the plaintiff being a *pardanashin* lady the burden of proof lay upon the vendee to prove that the sale-deed was fairly obtained from the plaintiff and that she had understood the nature and

(2) (1899) A.W.N. 25.

effect of it, decreed the claims and set aside the document. On appeal Banerji and Aikman, JJ., reversed the decision of the trial Court and made the following pertinent observations in their judgment:—

"His (the appellant's *Vakil*) main contention before us is that the burden of proof was improperly cast upon the defendant-appellant, and that it was the duty of the plaintiff to prove by some *prima facie* evidence the allegations made by her in her plaint. In our opinion this contention is well founded. No doubt, their Lordships of the Privy Council and the Courts in this country have been jealously watchful of the interest of *pardanashin* ladies, and it has been held that where a transaction by a *pardanashin* lady is relied upon it is the duty of the person who relies upon such transaction not only to prove that it was entered into by the *pardanashin* lady, but also that she understood the nature and effect of it. Where a plaintiff comes into Court and seeks to enforce a contract made by a *pardanashin* lady that principle would apply in all its force, but, as observed by their Lordships of the Privy Council in *Kali Prashad Tewari* v. *Raja Sahib Perhlad Sen* (3) a party who comes into Court to set aside a contract under which there has been possession and enjoyment is in a very different position from a person who comes into Court to enforce a deed. In the former case the burden of establishing at least a good *prima facie* title to the relief sought by the plaintiff lies on the plaintiff. In the case of a *pardanashin* lady the quantum of evidence which would be required from the plaintiff would, in our opinion, not be the same as that required from any other plaintiff seeking to avoid his deliberate act, but that some *prima facie* evidence is necessary, even in the case of a *pardanashin* lady, is a proposition which cannot be disputed."

We entirely agree in every word of the passage quoted. In the present case, as found by the Court below, Mt. Kalsum Bi entirely failed to establish the allegations made in her plaint on the strength of which she had asked the Court to set aside the sale-deeds. It was not denied that the sale-deeds were executed by her with a view to settle all the disputes which had taken place between the parties. After referring to this matter in paragraph 4 of her plaint the plaintiff went on to state that—

"Accordingly the property entered in the list A was sold to Abdul Rashid for Rs. 8,975-13-0 and the property entered in the list B was sold to Muhammad Shafi for Rs. 5,475-13-0 under deeds dated the 30th August, 1918."

It is admitted that the contract was carried out and the vendees, who were already in possession of the property sold, became the owners of those properties. Thus the object of the suit was to get rid of the sale-deeds which the plaintiff had deliberately executed and for which she had at any rate received the full price from Abdul Rashid. The grounds upon which she had sought the relief being deception and fraud, she was bound to produce some *prima facie* evidence to support them. Upon this ground alone her suit ought to have been dismissed and the Court below ought not to have called upon the defendants to prove that the sale-deeds had been fairly obtained from her and that she had entered into the bargain after obtaining independent advice, etc., etc. The learned Judge of the Court below has cited in his judgment the case of *Shambati Koeri* v. *Jogo Bibi* (4) to justify the course adopted by him. That was a case brought against a *pardanashin* lady on a motgage bond which purported to be signed in her name "by the pen of Soondar Lal, son-in-law, and *ammukhtar*" which was not produced and secondary evidence to account for its non-production was held to be inadmissible or at any rate insufficient to show that Soondar Lal had authority to execute the bond. Under those circumstances the lady was held not to be bound by the deed as it was not shown that it was explained to her or that she understood its conditions and effect. That was an entirely different case. The suit had not been brought by the lady to set aside the deed, and it was not proved in that case that the deed had been executed with her consent. That case, therefore, can have no bearing upon the facts of the present case. Moreover, as we shall presently show, the plaintiff in this case is not an ordinary *pardanashin* lady and she thoroughly understood what she was about. She gave evidence in both the suits, namely, (1) brought by her step-sons against her, and (2) her own suit against the vendees appellants. Her evidence shows remarkable intelligence and business capacity. She is admittedly literate and can read and write. According to her own evidence she can carry on correspondence with others. The receipt Ex. D-1, printed at pages 6, 7 and 8 of the paper book in Civil Appeal No. 2 of 1922 is admittedly signed by Mt. Kalsum Bi in her own hand in Persian character. This is another receipt Ex. D. W. 2 printed at page 8 of the paper book in Civil Appeal No. 2784 of 1915

(3) (1869) 12 M.I.A. 282=2 B.L.R. 111=12 W.R. 6=2 Sar. 490=2 Suth. 225 (P.C.).

(4) (1902) 29 Cal. 749=29 I.A. 127=6 C.W.N. 682=4 Bom. L.R. 444=8 Sar. 304 (P.C.).

which is also signed by her in her own hand in Persian character. There is a letter Ex. D-3 printed at page 9 of the paper book in Civil Appal No. 2 of 1922 addressed by Mt. Kalsum Bi to *Sheikh* Muhammad Shafi which is also signed in her own hand in Persian character. There are two *Hundis* Ex. D-5 and D 6 printed at pages 14 and 15 of this paper book in which there is an endosement in her own hand-writing to the effect "that the amount of this *Hundi* is received. (Sd.) Mt. Kalsum Bi, in her own hand in Persian characters and with her thumb mark." Besides these there are other documents which have admittedly been signed by her to which it is unnecessary to refer in detail. We have looked at her hand-writing which is in good *nastalik* (set hand) and appears to have been written by a practised hand. There is evidence to show that lady has been carrying on litigation and has been entering into money transactions and is far from being inexperienced in such matters.

Mumtaz-ud-Din, plaintiffs' witness No. 4, at pages 110 and 111 of the paper book in Civil Appeal No. 2 of 1922 has stated that he knew Mt. Kalsum Bi. He visited her house three or four years back and he had a mutation of the suit property attested in his presence, Mt. Kalsum Bi attended herself. *Hafiz* Abdul Aziz, her counsel, was not present. Mt. Kalsum Bi had herself mutation attested. At page 49 of the paper book is to be found the mutation entry relating to one of the properties conditionally sold to her by her husband, and the order of the *Naib-Tahsildar* effecting the mutation contains the following statement:—

"This case came on before me in a public meeting. Riaz-ud-Din, vendor, has died. Mt. Kalsum Bi, his widow, is the vendee. She having made an appearance verifies the sale. *Babu* Abdul Aziz, pleader for her is also present. • • • • Mumtaz-ud-Din, *Lambardar*, testifies to the fact that the revenue and the water rate are paid by Mussammat Kalsum Bi, vendee, and that she is also in possession."

There is a little discrepancy between the statement of Mumtaz ud-Din and the mutation entry as regards the presence of *Babu* Abdul Aziz, Mt. Kalsum Bi's pleader, at the mutation proceedings; but it is possible that the lady went there herself and *Babu* Abdul Aziz, pleader, joined her afterwards. One thing, however, is clear that, according to the mutation entry, the proceedings were carried on in a public meeting and the lady herself went there. This is not usual with *pardanashin* ladies. It is, however, explained that the mutation took place at the house of the *Naib-Thasildar* and that therefore there was nothing strange if the lady went there accompanied by her relations and friends. But Revenue Officers at times do hold their Courts at their private residences. The meeting, though held at the *Naib-Tahsildar's* house, may yet be a public meeting as described in the order.

The principle to be deduced from the rulings of their Lordships of the Privy Council relating to documents executed by *pardanashin* ladies is thus stated at page 270 by Mr. Justice Mahmood in the case of *Behari Lal* v. *Habiba Bibi* (5).

"It is an estimate which I, from my acquaintance with the facts of Muhammadan life to which it refers, accept as in keeping with the rulings of the Privy Council in such matters, which have done for the *pardanashin* women what their life requires, which is, that they should be placed, by analogy, on a footing somewhat similar to that of persons *non compotes mentis*. The doctrines of equity which relate to such persons have been stated in S. 228 of Story's work on Equity Jurisprudence, where it is laid down that Courts of equity deal with the subject upon the most enlightened principles, and watch with the most jealous care every attempt to deal with persons *non compotes mentis*. Wherever from the nature of the transaction, there is not evidence of entire good faith (*uberrima fides*), or the contract or other act is not seen to be just in itself, or for the benefit of these persons, Courts of equity will set it aside, or make it subservient to their just rights and interests."

The learned Judge quoted a passage from the judgment of their Lordships of the Privy Council in the case of *Buzloo Ruhreem* v. *Shumsoonnissa Begam* (6) in which the following observation is to be found:—

"In India the *Musalman* woman of rank, like the Hindu, is shut up in the *zenana*, and has no communication, except from behind the *pardah*, or screen, with any male persons, save a few privileged relations or dependants."

Now, can Mt. Kalsum Bi be said to come under this description? Can she be placed on the same footing as persons *non compotes mentis*, and can it be said in her case that she was shut up in the *zenana*, had no communication, except from behind the *pardah* or screen, with any male persons, save a few privileged relations or dependants? In view of the circumstances

(5) (1886) 8 All. 267 = (1886) A.W.N. 91.
(6) (1867) 11 M.I.A. 551 = 8 W.R. 3 = 2 Suth. 59 (P.C.)

disclosed in the evidence we are emphatically of opinion that Mt .Kalsum Bi does not come under the description given above. Even if she be taken to be a *pardanashin* woman of the kind contemplated by their Lordships of the Privy Council weare of opinion that there is sufficient evidence on the record, which goes to show that she had full knowledge of the nature and character of the transaction in which she had entered, that she had independent advice in the matter, and that she had executed the documents for very good reasons, fully understanding what she was doing. The vendees, Muhammad Shafi, and Abdul Rashid, had ⅓rds share in the property. The lady had difficulty in getting her share of profits from them. She had filed suits for accounts and she had to prosecute an appeal in the High Court against her two step-sons. At this juncture *Sayad* Mohamed Mian, plaintiff's witness No. 5, intervened and brought about a settlement of the disputes between the parties. The account given by him is as follows :—

"Riaz-ud-Din, Mahomad Shafi, Abdul Rashid and Mumtaz Din were four brothers. Kalsum, wife of Riaz-ud-Din had dispute with the brothers of her husband. I was appointed sole arbitrator. Riaz-ud-Din was then living. I gave my award there. Later on, after the death of Riaz-ud-Din there were other cases between the parties. I suggested to them that they should come to a settlement. The parties met and the share in the property of Riaz ud-Din was valued at about Rs. 15,000. Abdul Rashid agreed to purchase that share at Rs. 15,000. Kalsum Bi agreed to withdraw her cases pending in Courts."

In his cross-examination he stated that—

"At first Mt. Kalsum Bi demanded Rs. 20,000 for her husband's share of the property. But she agreed to accept Rs. 15,000, after much consultation with her relations and friends."

Haji Fazl Rahman (P.W. 4) also had taken part in bringing about the settlement. This is what he stated :—

"I know Kalsum Bi by voice. Her huband Riaz-ud-Din was my collateral. The Revenue Assistant sent me to examine Kalsum Bi in a case by her against respondents for account of land produce. I took down the statement. Later on I intervened and a settlement was effected. One of the terms of the settlement was that all cases of Mt. Kalsum Bi and her children would be withdrawn, one of those cases was then pending in the Chief Court, and perhaps two in Delhi. The terms were settled in my presence, but the settlement was not reduced to writing in my presence because I left for Mahrauli. The property left by the husband of Kalsum Bi, excluding the Ranipur factory was valued at Rs. 15,000, and respondents agreed to purchase it all at this price."

Abdul Rashid (P.W. 7.), one of the vendees, has also spoken as to the settlement. He has stated that Fazal Rahman (P.W. 4) was appointed Commissioner by the Revenue Extra Assistant Commissioner to take down the statement of Mt. Kalsum Bi, and that (the Commissioner) had called him, Mahomad Shafi, Shuja-ud-Din, the two plaintiffs, Mt. Kalsum Bi, her two daughters, Mt. Amat-ul-Basit and Mt. Zabida Begam, Mumtaz Ahmad, son of Muzaffar Hussain, and Abdul Wahab. He has described the different stages of the consultation and the final settlement. He says that ten days after the first consultation the persons mentioned above, except Abdul Wahab, collected at Mt. Kalsum Bi's, Mahomad Sultan, another of her sons-in-law, was present. It was then that the final terms of the sale-deed were settled, and "Mt. Kalsum Bi agreed to withdraw from the appeal, and the other suits pending locally in the Courts of the Munsif and the Revenue Extra Assistant Commissioner." As already mentioned Mt. Kalsum Bi had filed two suits in Delhi Courts for accounts. The final proceedings in one of them are translated and printed at page 6 of the paper book. The case was taken up on the 9th of August, 1918 in the presence of *Hafiz* Abdul Aziz, pleader for the plaintiff, and of Mahomed Shafi and Abdul Rashid, defendants. The parties stated that a compromise was going to be made between them and asked for time. The Court made the following order :—

"The case should, therefore, come off on the 15th August 1918. If no settlement is arrived at by the 15th August 1918, the account should be filed in the Court according to the previous order."

The receipt, Exhibit D-1, dated the 13th of August, 1918 translated and printed at pages 6 and 7 of the paper book shows that the settlement was made, and Rs. 99 were paid as earnest money. The principal terms of the sale were embodied in the receipt which is signed by Mt. Kalsum Bi for herself, and as the guardian of her minor children and by the other vendors. This receipt is witnessed by Mahomad Shafi and Mahomed Sultan, the sons-in-law of Mt. Kalsum Bi. When the case came up before the Court on the date fixed (15th August 1918) the Court made the following order:—

"The case came off to-day in the presence of *Hafiz* Abdul Aziz, Pleader for the plaintiff. None of the defendants is present. The pleader for the plaintiff states that a mutual settlement has perhaps been made, but that he will make a statement to-morrow after making an enquiry into

the matter. He asks for time till to-morrow. The case should, therefore, come off to-morrow.

On the 16th of August, 1918, when the case was again taken up none of the parties appeared. The Court, therefore, ordered the case to be consigned to the record room in default. After reading this evidence no doubt is left on the point that the sale-deeds in question were the result of mutual settlement between the parties, and the statements of the witnesses, to which we have already referred, are strongly corroborated by this documentary evidence.

The following facts show that the sale-deeds were not obtained in a hurry and that Mt. Kalsum Bi had sufficient opportunity and time to consult her friends and relations, and after doing so had deliberately entered into the contract and had completed the sale-deeds. It has been pointed out that the receipt for the earnest money was executed on the 13th of August 1918. The sale-deeds were executed on the 30th of August, 1918. They were presented on 5th September, 1918, for registration by Mt. Kalsum Bi at her residential house for herself and as guardian of her minor son Iqbal Ahmad and Mts. Musarrat Begam and Kudsia Begam, her minor daughters. The registration endorsements at pages 21 and 28 of the paper book show that the contents of the two sale-deeds were read out and explained to Mt. Kalsum Bi, who after hearing them, admitted them to be correct. She was identified by Mahomad Sultan and Mahomad Shafi, her sons-in-law, the husbands of her two adults daughters. Under each of the documents a *hundi* for Rs. 3,500, part of the consideration, was secured by Mt. Kalsum Bi. As some delay took place in getting the *hundi* money she served the vendees with notices, dated the 11th of December, 1918, and pressed them for payment. These notices are translated and printed at pages 8 and 9 of the paper book. Payments were subsequently made as is shown by the endorsement made on the *hundis* by Mt. Kalsum Bi. These are translated and printed at pages 14 and 15 of the paper book. The sale-deeds are written in an ordinary simple language. They do not contain any involved provisions or technical language such as would not be ordinarily understood by a *paradnashin* lady, especially by a lady of the intelligence and education of Mt. Kalsum Bi. From the endorsements on the deeds it is made clear that they were explained to her in her own language; that she fully understood them, and that she admitted the execution thereof. The endorsements further recited that Mt. Kalsum Bi was identified by her two sons-in-law, who were, themselves, interested in the transaction as their wives were among the executants. Under section 60 of the Registration Act, III of 1877, a certificate of the registering officer like the one to which we have referred is admissible to prove the facts mentioned in it. There is thus *prima facie* evidence that the sale-deeds were explained and understood by Mt. Kalsum Bi, and that she admitted the execution thereof. This *prima facie* evidence has not been rebutted by her by any evidence whatsoever. Thus the execution of the sale-deeds by Mt. Kalsum Bi, after consultation with relatives and friends, and after understanding their terms, has been satisfactorily established, beyond all reasonable doubt.

Now, let us see if the transaction was a fair transaction and adequate price had been paid for the property sold. In the sale-deed in favour of Abdul Rashid the detail of the consideration Rs. 8,975 (sale money) is given. The items therein given may be divided under two heads, namely :—

(*a*) Items which were to be paid to Mt. Kalsum Bi in her own right and on behalf of her children; and

(*b*) Items which were to be paid to creditors and Mumtaz Ahmad, the executant No. 9.

The total of the items to be received by her comes to Rs. 6,932-13-0, and the total of the items to be paid to creditors, including Rs. 250 half of Rs. 500 kept in trust with *Sheikh* Abdul Wahab, sister's son, on account of pilgrimage expenses (*haj-i-badl*) for Riaz ud-Din comes to Rs. 2,042 3 0. Deducting this from the total amount of the consideration (Rs. 8,975) we get a balance of Rs. 6,932-13-0 which was the amount to be received by Mt. Kalsum Bi. Instead of this she received Rs. 7,432-13-0 as admitted in paragraph 8 of the plaint. Thus she received (Rs. 7,432-13-0—Rs. 6,932-13-0) = Rs. 500 extra. The defendants alleged that Rs. 600 were paid on account of the expenses incurred in filing suits for accounts in Delhi Courts, and Appeal No. 2784 of 1915 in the Chief Court which she had undertaken to withdraw according to the settlement. To prove this extra payment of Rs. 600 the defendants filed a receipt,

dated the 15th of August, 1918, executed by Mt. Kalsum Bi, but objection was taken to its admission in evidence as it was produced at a late stage. We have compared her signature on the receipt with her signatures on documents which were admittedly executed by her and we have no doubt that the receipt was executed by her. Even if the receipt be ruled out as inadmissible there is some other evidence to show that it was very likely that this amount was paid. Fazal Rahman (P.W. 4), whose evidence is translated and printed at page 105 of the paper book, has stated that the property left by the husband of Mt. Kalsum Bi, excluding the Rampur factory was valued at Rs. 15,050 and the respondents had agreed to purchase it all at this price. Now, the total of the price agreed upon under the two sale-deeds is Rs. 14,450. If we add Rs. 600, the total comes Rs. 15,050. This, in a remarkable manner, corroborates the case set up by the defendants. Another corroboration is to be found in the circumstance that though Mt. Kalsum Bi was entitled to Rs. 6,932 13 0 only she, as admitted in the plaint, actually received Rs. 7,432 13 0, *i.e.*, Rs. 500 extra. This is not exactly Rs. 600 but the payment of this Rs 500 extra can be explained only on the hypothesis that she had received something extra on account of the expenses of the appeal. It has been shown above that one of the account suits pending in Delhi was abandoned on the 15th of August, 1918, and the receipt relied upon is also dated the 15th of August, 1918. This also in a way goes to show that there is truth in the defendant's allegation as to the payment of the costs of the suit.

It has been contended that the items of Rs. 1,192-3 0 payable to Mumtaz Ahmad, Rs. 500 payable to Jamil Ullah, Rs. 250 kept in trust for *haj-i-badl*, and Rs. 100 paid to Mt. Muhammadi Jan are fictitious and have not been proved. Now, as regards the Rs. 1,192 3-0, the plaintiff stated in her plaint that a heavy sum was shown as due to Mumtaz Ahmad. In her statement later on she stated that nothing was due to Mumtaz Ahmad, and when she filed additional pleas, which are printed at page 72 of the paper book, she stated in paragraph 2 that no mention about the payment of any items to Mumtaz Ahmad was made to her. She did not take any objection as to the payment or existence of the other debts. If those items were fictitious she would have taken objection to those in her plaint, or in her further pleas, or in her statement in Court. In a way she admitted those items, and it is too late now to object to them. Objection, no doubt, was taken in respect of the item of Rs. 1,192 paid to Mumtaz Ahmad. This gentleman appeared as a defendant and stated on oath that his *jawab-i-dawa* and pleas were the same as those of Mahomad Shafi and Abdul Rashid (page 90 of the paper book) in which there was a clear statement that the whole consideration, including the amount due to Mumtaz Ahmad was real. Again at page 13 of the paper book there is to be found an endorsement by Mumtaz Ahmad, dated the 30th of August, 1918, admitting the payment of the debt due to him under the mortgage, dated the 12th January, 1915 executed by Bashir-ud-Din and Shuja-ud-Din. The amount paid included the amount of Rs. 1,192. This was paid on the same date on which the sale-deeds were executed, *i.e.*, the 30th of August, 1915.

A question as to the market value of the property was raised and a Commissioner was appointed to report as to the market price of the property. He estimated the price to be at Rs. 19,350. It is not easy always to estimate the exact price of a property with reference to the market value of other properties, but taking the estimate even to be tolerably correct the difference between the price paid for the two sale-deeds and the price estimated by the local Commissioner does not come to much. The total of the price paid under the two sale-deeds is Rs. 14,450. Rs. 500 extra were paid to Mt. Kalsum Bi as admitted in her plaint, namely, these two items amount to Rs. 14,950. Deducting this from Rs. 19,350 we get a balance of Rs. 4,400. This balance may be fairly set off against the following circumstances:—

(1) Mt. Kalsum Bi and her children were not in possession of the properties and they had difficulty in realizing their share of profits;

(2) Litigation for profits was going on in the Delhi Courts;

(3) An appeal by Mt. Kalsum Bi was pending in the Chief Court. The sum decreed in her favour in the decree passed by Mr. Dundas, namely, Rs. 7,400 was to be realized by her from her step-children. By executing the sale-deeds

she was purchasing peace and getting all this money by one stroke.

As already stated the sale-deeds were the result of a family settlement and must be looked upon as such. The difference of Rs. 4,400 was, therefore, not very great.

After carefully considering all the circumstances mentioned in our judgment we have unhesitatingly come to the conclusion that so far as Mt. Kalsum Bi is concerned the sale-deeds must stand. We, therefore, accept the appeal in part and dismiss the suit of Mt. Kalsum Bi with costs in all Courts. The decree in favour of the other plaintiffs will stand. The appeal against them is dismissed with costs.

Appeal accepted in part.

1924 Lahore 210.

CAMPBELL, J.

Ahmad Khan—Appellant.

v.

Jang Baz Khan and another—Respondents.

S.A. No. 49 of 1922, decided on 5th June, 1922, from the decree of District Judge, Attock at Campbellpur, dated 5th October, 1921.

Punjab Pre-emption Act (1913), Ss. 21 and 15 (a), (b)—Occupancy tenancy - Landlord cannot pre-empt.

The landlord of an occupancy tenancy is not entitled to sue under S 21 of the Act for pre-emption of that tenancy against a person having a right of pre-emption under S. 15 (*a*) or (*b*) of the Act. [P. 211, C. 1.]

Badruddin Qureshi—for Appellant.

Judgment:—This judgment will dispose of three Second Appeals Nos. 49, 50 and 51 of 1922 in all of which the question for decision is the same, *viz.*, whether the landlord of an occupancy tenancy is entitled to sue under section 21 of the Punjab Pre-emption Act, 1913, for pre-emption of that tenancy against a person having a right of pre-emption under section 15 (*a*) or (*b*) of the Act.

There were two sales and three suits as follows:—

(1) Nadir, one of several joint occupancy tenants, sold two *kanals* of the tenancy to Mir Baz, his nephew and a co-sharer in the tenancy, for Rs. 40. Sardar Khan, landlord, sued to pre-empt. His suit was dismissed by the First Court but was decreed on appeal by the District Judge who held, on the authority of *Akbar Hussain* v. *Ali Ahmad* (1), that the landlord has a right of purchase against all the world.

The vendee's second appeal is No. 50 of 1922.

(2) Jang Baz, a co-sharer in a joint occupancy tenancy, sold 1 *kanal* 15 *marlas* out of the tenancy to Saadulla, a stranger, for Rs. 350. Two pre-emption suits were brought one by Hasan Khan and Sardar Khan, landlords, and the other by Ahmad Khan, nephew of the vendor and co-sharer in the tenancy. Both the Courts below concurred in finding, on the strength of *Akbar Hussain* v. *Ali Ahmad* (1), that the landlords had the superior right and decreed in their favour relegating Ahmad Khan to the position of inferior pre-emptor. The latter has preferred two Second Appeals Nos. 49 and 51 of 1922.

All three appeals have been heard *ex parte* against the respondents.

The records do not show under which section of the Punjab Tenancy Act the tenancies are held but the point is not material. The lower appellate Court appears to me not to have appreciated the significance of the difference in situation between the present cases and that reported as *Akbar Hussain* v. *Ali Ahmad* (1).

In *Akbar Hussain* v. *Ali Ahmad* (1) there was no suit by a landlord to claim and enforce a right of pre-emption. The landlord had purchased the tenancy and the vendor's collaterals sought to utilize the provisions of the Punjab Pre-emption Act, 1913, to turn him out. It was held that the landlord's position as a vendee was unassailable by any one claiming to pre-empt under the Punjab Pre-emption Act, because he (the landlord) had power under another Statute (The Punjab Tenancy Act), to prevent any sale whatsoever of the tenancy, and because, by purchasing himself, when the tenant wished to sell, he had in effect done no more than exercise that power. It was pointed out, for example, that to interpret the law otherwise would lead to absurdities, for example, if a statutory pre-emptor were allowed to pre-empt, the defeated landlord might annul the sale by having recourse to a Revenue Court.

In the present cases the landlord is not in possession as a vendee resisting attempts

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(1) (1916) 116 P.R. 1916=38 I.C. 712.

to oust him by the heirs or relatives of the vendors. He has come into Court as a plaintiff to assert a right which he does not possess under the law of pre-emption. His rights are perfectly clear under the Punjab Tenancy Act. He can sue in a Revenue Court to annul any sale of a right of occupancy held under him, which, if under section 5, has not been offered to him under section 53 at a price to be fixed by a Revenue Officer, or if under one of the other sections, has not been sanctioned previously by him in writing. The practical effect of this power to set aside transfers is that, if an occupancy tenant finds himself forced to sell, the landlord can acquire the tenancy at a bare market-price, if under section 5, or on his own terms, if under sections 6 or 8. His position is much more favourable than that of any pre-emptor, and this is why we find that section 15 of the Punjab Pre-emption Act confers a right on an occupancy tenant to pre-empt his landlord's proprietary land, but confers no right on the landlord to pre-empt in that capacity his occupancy tenant's rights in land owned by himself, and confers a right to pre-empt those rights upon other persons, who are owners in the same estate but otherwise are in no way connected with the tenancy.

A decree for pre-emption of an occupancy tenancy can only be passed by a Civil Court in this Province in favour of a person declared entitled to a right of pre-emption by the Act of 1913. The landlords in the cases before me are so entitled but only under sub-section (*c*) of section 15 as owners in the sub-division in which the land is situate. The rights of the vendee in one case and of the rival pre-emptors in the other are superior, they being collaterals and coming under sub-section (*b*) of section 15. As landlords, Hasan Khan and Sardar Khan have no rights at all under the Act, and hence in these suits they cannot succeed against the co-sharers.

The respective positions of a defendant and of a plaintiff differ. A defendant in a pre-emption suit can resist the claim on any and every possible ground and is not restricted to showing that he has a superior right under the section 15 of the Act. A plaintiff must depend for success upon the letter of the Act. He cannot seek the aid of another Act, the administration of which is not in the hands of the Civil Courts. Herein lies the distinction between the present cases and *Akbar Hussain* v. *Ali Ahmad* (1).

All three appeals are accepted with costs and the decrees of the lower appellate Court are set aside and varied as follows:—

The suit *Sardar Khan* v. *Nadar and Mir Baz* is dismissed with costs throughout.

In the suit *Ahmad Khan* v. *Jang Baz Khan* the plaintiff is given a decree directing that, on payment into Court of Rs. 350 less costs due to him from the defendants in this and the two Courts below, on or before 1st December, 1922, the defendants shall deliver to him possession of the land in suit and his title thereto shall be deemed to have accrued from the date of such payment, and that, on failure to make such payment by the date fixed, the suit shall stand dismissed.

In the suit *Hasan Khan and Sadar Khan* v. *Jang Baz and others* the decree in the plaintiff's favour is modified to the extent of declaring that it shall not take effect unless and until the superior pre-emptor Ahmad Khan has failed to comply with the provisions of the decree in the suit *Ahmad Khan* v. *Jang Baz and others*. In that event, the date for payment of Rs. 350 by the plaintiffs will be extended to the 15th January, 1923.

Appeals accepted.

1924 Lahore 211.

SHADI LAL, C.J. AND FFORDE, J.

Firm Darshan Ram-Ganesh Das—Appellant.

v.

Firm Khair Din-Allah Baksh and others—Respondents.

L. P. A. No. 159 of 1922, decided on 2nd December, 1922, from an order of Abdul Raoof, J., passed on 12th June, 1922.

Contract Act, S. 123—Principal and surety—Agreement allowing order of attachment to remain in force made with surety's consent—Subsequently liberty to sell given to judgment-debtor—No variation is caused.

Parties entered into an agreement to compromise a suit for the recovery of a debt. The terms of the agreement were that the indebtedness in question should be discharged by certain instalments, and that meanwhile an attachment order made against the property of the defendant in the course of the suit should remain in force until the terms of the compromise had been complied with. On the same date a decree was made in accordance with this compromise. All this happened in the presence of A who stood as surety for the defendant's part of

the agreement but again on the same day an order was made giving the judgment-debtor liberty to sell the property attached.

Held, the attachment order itself carries with it power in the Court to order a sale of the property attached. It cannot be said that a further order giving liberty to sell under the Court is a variance of the contract between the principal and the creditor. Even if the order giving liberty to sell did in fact alter the contractual relations between the parties as embodied in the decree, this order was never acted upon, and therefore upon the facts of the case there was no variance in the terms of the compromise and accordingly the surety was not entitled to be discharged.

G. C. Narang—for Appellant.

Durga Das for *Tek Chand*—for Respondents.

Judgment:—The relevant facts in this case are these:—An action to enforce a debt was fixed for hearing on the 7th October, 1920. On that date the parties appeared in Court together with one Fateh Muhammad and there entered into an agreement to compromise the suit. The terms of the agreement were that the indebtedness in question should be discharged by certain instalments, and that, meanwhile, an attachment order made against the property of the defendant in the course of the suit should remain in force until the terms of the compromise had been complied with. On the same date a decree was made in accordance with this compromise and again on the same day an order was made giving the judgment-debtor liberty to sell the property attached. The property was subject to a mortgage and the order of sale provided that it should not be sold for less than the amount of the mortgage, and further ordered that the sum realised in excess of the mortgage by the sale should be lodged in Court. The only material issue of fact was, whether or not the order giving liberty to sell was made with the knowledge and approval of the surety. The judgment-creditor contends that the compromise, the order giving liberty to sell, and the decree in terms of the compromise, were recorded in the above order, and that the surety was present during the whole of the time and was fully cognisant of all that took place. The surety, on the other hand, contends that, though he was present when the compromise was entered into and when the decree was made on foot of that compromise, he was not present when the order was made giving liberty to sell and knew nothing about this order.

Upon these facts three questions arise for determination,—

(1) Was there a variance in the compromise to which the surety had subscribed?

(2) If so, was that variation made with the knowledge and consent of the surety?

(3) Has the variation the effect of discharging the surety?

So far as question (2) is concerned, the issue of fact has been inferred both in the inferior Court and before the Single Judge on appeal in favour of the surety without investigation. It would rather appear from the various orders made that the surety was cognisant of the order for liberty to sell. However, it may be assumed for the purposes of this appeal, that the surety was not so cognisant. It remains then to be considered whether the order giving liberty to sell amounts to a variance in the terms of the compromise, and, if so, whether such variance discharges the surety from all liability as from that date. The compromise decree constitutes the contract between the principal and the creditor. It is clear on the fact of the compromise decree that the surety was aware of the attachment order and approved of its continuance. The attachment order itself carries with it power in the Court to order a sale of the property attached. How then can it be said that a further order giving liberty to sell under the Court is a variance of the contract between the principal and the creditor?

Even if the order giving liberty to sell did in fact alter the contractual relations between the parties as embodied in the decree, this order was never acted upon. It may at the most amount to an agreement to vary the contract, but it certainly does not amount to an actual variance of its terms. We, therefore, hold that, upon the facts of this case, as they appear before us, there has been no variance in the terms of the compromise and accordingly the surety is not entitled to be discharged.

The appeal must, therefore, be allowed and the objections of the surety stand dismissed. The parties to pay their own costs.

Appeal allowed.

1924 Lahore 213 (1).

MARTINEAU, J.

Wadhawa Mal—Appellant.

v.

Lachman Das and others—Respondents.

Mis. S. A. No. 285 of 1922, decided on 10th July, 1922, from the order of District Judge, Ferozepore, dated 17th November, 1921.

Punjab Pre-emption Act, S. 5 (a)—Shop—Building used for storage is not shop.

Shop denotes a building or an apartment which is primarily used for buying and selling goods and therefore a building used for storage of goods is not a shop. (69 P.R. 1915, *Foll.*; 113 P.R. 1906, *Dist.*)

Hargopal—for Appellant.

Badri Das—for Respondents.

Judgment:—This is a pre-emption case and the question in dispute is, whether the building which the plaintiff seeks to pre-empt is a shop as described in the sale-deed. The lower appellate Court has held, differing from the view taken by the first Court, that it is not a shop, and it has remanded the case for the decision of the remining issues. The vendee has presented a second appeal to this Court.

It is pointed out that in a plan which the plaintiff got prepared in 1917, when he applied to the Municipal Committee for sanction to some additions that he wished to make to his house, the building in dispute was mentioned as a shop. This is, however, of no importance as the plaintiff very likely signed and filed the plan without troubling to see how the building adjoining his house had been described in it. The same remarks apply with regard to a plan filed by the plaintiff in 1905. What has to be determined is simply the purpose for which the building in suit was used, and this purpose is clear from the evidence produced on both sides, which shows that the building has been rented by the firm of Ram Lal-Ishar Das, who stored their sleepers in it, and that, formerly, it was used for storing grain. No goods were sold in the building, and, this being so, the building cannot be said to be a shop, which, as was stated in *Bhamba Ram* v. *Allah Bakhsh* (1) denotes a building or an apartment which is primarily used for buying and selling goods. Counsel for the appellant has referred to *Attar Singh* v. *Sant Singh* (2) in which warehouses attached to shops were regarded as being in the nature of shop property, but the building now in dispute is not attached to a shop, although some shop-keepers have rented it and have been using it for storing their goods.

It is urged that if, as was held by the lower appellate Court, the vendee had to prove that the building was a shop he should have been given an opportunity of producing further evidence since the onus had been placed by the first Court on the plaintiff, but I do not see that there is any necessity for a remand since it is not disputed that the building has been used merely for the storage of goods, and the question is only whether a building used for such a purpose is a shop.

I agree with the lower appellate Court that the building in suit is not a shop, and I accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1915) 69 P.R. 1915=156 P.W.R. 1915=31 I.C. 191.

(2) (1906) 113 P.R. 1906=99 P.L.R. 1907.

1924 Lahore 213 (2).

ABDUL RAOOF, J.

Makhan Singh and another—Plaintiffs-Appellants.

v.

Kishen Singh—Defendant-Respondent.

S. A. No. 297 of 1922, decided on 14th February, 1923, from the decree of Additional District Judge, Lahore, dated 5th December, 1921.

(a) *Custom—Alienation by female owner—Consent of reversioner if bona fide, binds his sons.*

The assent of a reversioner to the alienation by a female in possession, if made *bona fide*, without collusion or intention to injure the other reversioners, is binding upon his sons and they cannot challenge the alienation. [P. 214, C. 2.]

(b) *Custom (Punjab)—Succession—Widow can succeed collaterally in the district of Lahore.*

In the district of Lahore the widows among all tribes do possess the right of succeeding collaterally. (68 P.R. 1912, *Foll.*) [P. 215, C. 1.]

Tara Singh Narula and *Mehr Chand*—for Appellants.

Amar Nath Monga—for Respondent.

Judgment:—These are two connected appeals which have arisen under the following circumstances. From the pedigree table

given in the judgment of the lower appellate Court it appears that Jawala Singh and Kharak Singh were two brothers. The latter died leaving a widow Mt. Jindi. Jawala Singh had two sons Wasawa Singh who died leaving Mt. Malan, plaintiff No. 3 in this suit, as his widow and Wadhawa Singh whose sons are plaintiffs Nos. 1 and 2. The two brothers Jawala Singh and Kharak Singh owned and possessed jointly certain landed property and a house. On the death of Kharak Singh Mt. Jindi succeeded to a half share in the properties. The land appertaining to the half share of Mt. Jindi was 151 *kanals* and 9 *marlas*. Out of this she gifted 80 *kanals* in favour of Kishen Singh, her daughter's son, by a deed, dated the 1st of May, 1914. Wadhawa Singh gave his consent to the gift and attested the deed. On the same day, that is on the 1st of May, 1914, Mt. Jindi and Wadhawa Singh made a gift of the house in favour of Kishen Singh the reason probably being as found by the Appellate Court that the donee Kishen Singh from the time of his infancy had been brought up by Wadhawa Singh and Mt. Jindi. The other half of the property belonged to Wasawa Singh and Wadhawa Singh the two sons of Jawala Singh, out of which 1/4th had come by succession to Mt. Malan, plaintiff No. 3. The present suit was instituted by the sons of Wadhawa Singh and Mt. Malan for possession of the gifted land and of the house on the allegation that Mt. Jindi had no power under the custom to make the gift. The suit was registered on the ground that plaintiffs Nos. 1 and 2, being the sons of Wadhawa Singh, with whose consent the gift in respect of the land had been made, were not entitled to question the alienation, and that Mt. Malan, plaintiff No. 3, being a widow had no right to challenge an alienation made by Mt. Jindi with the consent of the male reversioner Wadhawa Singh.

The Trial Court, relying on *Lahori* v. *Radho* (1), held that Mt. Malan having succeeded collaterally had a right to challenge the alienations and that plaintiffs Nos. 1 and 2 were also entitled to question the alienation as the consent given by their father, Wadhawa Singh, was not proved to be *bona fide*. The suit was accordingly decreed by that Court.

On appeal, the learned Judge of the Court below agreed with the Trial Court in respect of the finding that Mt. Malan had a right to challenge the alienation. As regards the suits of plaintiffs Nos. 1 and 2 the lower appellate Court has taken a different view, and has found that the consent given by Wadhawa Singh is proved to have been *bona fide* and that it was not established that it was collusive. Relying on *Habib Khan* v. *Muhammad* (2) the learned Judge has set aside the decree in favour of plaintiffs Nos. 1 and 2. The result is that the claim of Mt. Malan has been decreed and that of plaintiffs Nos. 1 and 2 has been dismissed.

Two second appeals have been preferred to this Court: one by Makhan Singh and Ujagar Singh, sons of Wadhawa Singh, against the dismissal of their claim and the other by the donee, Kishen Singh, challenging the decree in favour of Mt. Malan. The appeal on behalf of plaintiffs Nos. 1 and 2 has been argued on their behalf by Dewan Mehr Chand and it has been very strongly contended by him that, having regard to the custom stated in Rattigan's Digest of Customary Law, paragraphs 64 and 68, the gift made in favour of Kishen Singh cannot stand. The question to be decided, however, is whether, having regard to the ruling in *Habib Khan* v. *Muhammad* (2), the plaintiffs in spite of the consent given by their father can challenge the gift. The rule is stated in the head-note attached to the ruling in the following words:—

> "That the assent of the plaintiff's father to the alienation by a female in possession, if made *bona fide*, without collusion or intention to injure the reversioners, is binding upon the plaintiff in a suit for a declaration that the alienation shall not affect his reversionary rights."

Now, in this case the learned Judge of the Court below has found upon the evidence that the consent was given *bona fide* the reason being that the donee had been brought up by Wadhawa Singh and Mt. Jindi from his infancy. The reversioners in the present case were the sons of Wadhawa Singh himself and it is difficult to believe that Wadhawa Singh should have colluded with Mt. Jindi and should have given his consent with the intention of injuring his own sons. Over and above

(1) (1906) 72 P.R. 1906=108 P.L.R. 1907=125 P.W.R. 1906.

(2) (1912) 68 P.R. 1912=194 P.W.R. 1912=210 P.L.R. 1912=16 I.C. 463.

this, there is the circumstance that out of 151 *kanals* and 9 *marlas* only 80 *kanals* have been gifted and the rest of the land has been left intact for the reversioners. In my opinion the view taken by the learned Judge of the Court below is fully supported by the authority relied upon by him and the gift in respect of the land cannot be challenged by the plaintiffs Nos. 1 and 2. It was, however, contended by Mr. Mehr Chand that, as regards the gifted house, the alienation by Wadhawa Singh in respect of his share was challenged by plaintiffs Nos. 1 and 2 as the reversioners of their father and that by an oversight the lower appellate Court had not taken this phase of the claim of the plaintiffs into consideration. It was open to the plaintiffs to have supported in appeal the decree of the Trial Court upon this ground. From the judgment of the lower appellate Court it does not appear that this question was ever raised before it. It is too late now for the appellants to urge this question in second appeal. The appeal of the plaintiffs appellants, therefore, must fail

As regards the appeal of Kishen Singh, it has been contended by Mr. Amar Nath Monga that it has not been established by custom that Mt. Malan had a right to succeed collaterally and that, in any case, even if she had a right of collateral succession she had no right to challenge the alienation as a widow. As found by the learned Judge of the Court below in the District of Lahore the widows among all tribes do possess the right of succeeding collaterally. It is quite manifest from the answer to question No. 53 in Bolster's Customary Law of the Lahore District that it is so. It is admitted that, when Mt. Jindi died the balance of the landed property in her possession was mutated half and half in the names of Wadhawa Singh's sons and Mt. Malan respectively. This fact strongly corroborates the custom as stated in Bolster's Customary Law. The evidence produced to prove a contrary custom is wholly inadequate and has rightly been disregarded by the lower appellate Court.

As regards the widows's right to challenge the alienation, it was rightly held by the learned Munsif that the rule laid down in *Lahori* v. *Radho* (1) should apply. Some authorities were quoted before me by the learned Vakil showing that a widow's right to challenge an alienation by a male was not recognised.

Those cases are altogether irrelevant in the present case, as in this case the alienation challenged has been made by a widow. This appeal also must fail.

The result is that both the appeals are dismissed with costs.

Appeals dismissed.

1924 Lahore 215.

ABDUL QADIR, J.

Mahan Singh and another—Accused-Petitioners.

v.

Emperor.

Cr. Rev. No. 313 of 1922, decided on June 26, 1922, from Sessions Judge, Hoshiarpur, in No. 267, dated 23rd February, 1922.

Crim. Pro Code, S. 256—Provisions are imperative.

The provisions of S. 256 are imperative and the accused has a right to be given an opportunity of further cross examining the prosecution witnesses, if he so desires (11 P.R. 1914 Cr., *Fol.*; 26 I.C. 309 *Not Foll.*) [P. 216, C. 1.]

T. D. Khanna—for the Petitioners.

Order:—This case has been reported by the Sessions Judge of Hoshiarpur. Two persons, Mahan Singh and Mt. Shahdo, were prosecuted by one Taloka, under section 500, Indian Penal Code. They were tried by an Honorary Magistrate, First Class, who framed charges against them but omitted to ask them at that stage if they wanted to re-call any witnesses for cross-examination. They produced their witnesses in defence and were fined Rs. 10 each. They applied to the Sessions Judge on the revision side attacking their convictions. Their grounds for revision were confined to objections to the case for the prosecution on the merits; and the legal ground that the provisions of section 256, Criminal Procedure Code, were not carried out, was not expressly taken by them. It appears, however, that it was argued before the learned Sessions Judge, and he has forwarded the proceedings to this Court with a recommendation that the case should be remanded to the Honorary Magistrate or a re-trial before a different Magistrate ordered.

Mr. Trilochan Das Khanna appears before me to support the petition and

relies on *Moola* v. *Emperor* (1), where it is laid down that the omission to follow section 256 usually involves remand and re-trial of the case from the point of drawing up of the charge. A different view has been taken by the Madras High Court in a case published as *Munian Chetty* v. *Emperor* (2), which says that the omission to ask the accused whether he wants to cross-examine the prosecution witnesses again or not is a mere irregularity and does not vitiate a conviction.

But I am inclined, on the whole, to agree with the learned Sessions Judge that the provisions of section 256, Criminal Procedure Code, are imperative, and the petitioners have a right to be given an opportunity of further cross-examining the prosecution witnesses, if they so desire.

I, therefore, remand this case to the Honorary Magistrate concerned, with the direction that he should re-try it from the stage at which the charges were framed, and dispose of it according to law, after giving the petitioners a chance of re-calling the prosecution witnesses and further cross-examining them.

Case remanded.

(1) (1915) 16 Cr. L.J. 146=205 P.L.R. 1915=11 P.R. 1914 (Cr)=27 I.C. 210.
(2) (1915) 16 Cr. L.J. 5=26 I.C. 309.

1924 Lahore 216.

ABDUL QADIR, J.

Inder Singh and others—Appellants.

v.

Emperor.

Cr. A. No. 421 of 1922, decidad on 27th June, 1922, from an order of Additional Sessions Judge, Lahore, dated 29th April, 1922.

Penal Code, Ss. 34 and 326—Joint assault with deadly weapons—Common intention is presumed—The section applies.

There was a quarrel over a turn of water in which several persons arrived with *Chhavis* and assaulted *A* who died of the injuries caused to him. It was not certain as to who inflicted the fatal blow. All the accused were convicted under S. 326 with S. 34 and inflicted equal punishment.

Held that considering the nature of the assault and the nature of the weapons, it cannot be said with regard to any one of them that he did not mean to cause serious injuries and S. 34, makes them equally responsible in such cases and each one of them was rightly given the same sentence. [P. 218, C. 1.]

Sheo Narain and *Narinjan Das*—for Appellants.

Zafrullah Khan—for the Crown.

Judgment:—Inder Singh, Tek Singh, Waryam Singh and Arjan Singh have been convicted under section 326, Indian Penal Code, read with section 34, Indian Penal Code, and have been sentenced to ten years' rigorous imprisonment each by the Additional Sessions Judge, Lahore. They have appealed against their convictions and sentences through Pandit Sheo Narain, whom I have heard, and I have also heard Mr. Zafrullah Khan for the Crown.

On the 29th October, 1921, there was a quarrel, between the party of the appellants on the one hand and of Sudh Singh deceased on the other, over a turn of water. The turn of the appellants was to finish at 1 P.M. and that of Sudh Singh was to begin. Sudh Singh and his sons and some others went to take their turn and began to cut off the water that was flowing into the field of the appellants.

The latter resisted saying that one of their fields remained yet to be watered and that they would allow the other party its turn after watering that field. Thereupon a quarrel ensued, in which injuries were caused to Sudh Singh, father of Kundan Singh, and as a result of those injuries, Sudh Singh died in hospital on the 3rd November, 1921. The six persons were then committed to the Sessions for trial under section 302, Indian Penal Code, read with section 149, Indian Penal Code. Two of them have been acquitted, because they were not said to have taken any part in the beating of Sudh Singh and had only beaten Kundan Singh, but there was no separate charge framed against them under section 323, Indian Penal Code. The charges of the remaining four persons were altered by the learned Sessions Judge to those under section 326-34, Indian Penal Code as he took the view that the case was not one of murder but was either one of culpable homicide or fell under section 326, Indian Penal Code, and as he thought the culprits could be punished as heavily under section 326, Indian Penal Code, as under section 304, part II, he thought it safer to convict them under the former section, because the evidence showed that it was uncertain who had struck the fatal blow.

According to the evidence of the Assistant Surgeon (P.W. No. 1), no less than

eight injuries were found on the body of the deceased, of which four were caused by some sharp edged weapon, and others by a blunt weapon. The most dangerous injury of these was an incised gaping wound 1½ inches *by* ¾ inch about the middle of the head. The bone underneath it was cut and the membrane and the brain were lacerated. There was a compound fracture under this wound. Kundan Singh (P.W. No. 3), his brother Kehr Singh (P.W. No. 8) and Jaimal Singh (P.W. No. 9) give direct evidence as to the occurrence and name the four appellants as the persons who assaulted the deceased with *chhavis*. The main contentions of Pandit Sheo Narain on behalf of the defence are the following:—

(1) That the fight was propably due to a misunderstanding and being a sudden and unpremediated fight a lenient view of the case should have been taken:

(2) The party of the appellants were entitled to resist the taking of water by the other side and have done nothing more than executing the right of self-defence;

(3) Arjan Singh, appellant, should have been given the benefit of the doubt because of the material difference between the version in the first report and the version given by the deceased in the statement made by him on the 31st October, 1921;

(4) All the appellants, should not have been awarded the same amount of punishment because three of them who admittedly did not strike the deceased on the head did not deserve to receive the same punishment as those who were alleged to have struck him on the head.

I have considered all the above contentions along with the arguments addressed to me respecting them, but I think this appeal must fail. With regard to point No. 1 Pandit Sheo Narain says that admittedly the clock, which the parties used to consult for ascertaining time, was not available on the day in question, as the shop where the clock used to be was closed. He adds that probably what happened was that the party of the prosecution got to the spot earlier than the proper hour and wanted to take water before the time of the appellants' was up, or at least the appellants thought so. This, however, does not appear to be correct, because Kundan Singh deposes clearly that though the shop was shut, they sat outside the shop and started off for their fields only when they heard the clock strike one. Therefore, while the quarrel appears to be sudden and unpremediated one, yet the fact of the shop in which the clock is placed, having been closed that day, cannot help the appellants in any way.

As regards point No. 2, in view of the opinion expressed by me above, it can hardly be urged that the appellants were within their rights in resisting the cutting off water by the party of Sudh Singh. There was no right of self defence and there is no question as to the exercise of that right or the exceeding of that right.

Point No. 3 is, however, arguable. It is stated in the first reports that Arjan Singh gave the first blow on the head of the deceased and Inder Singh gave the second blow on the head and Waryam Singh and Tek Singh struck the deceased when he fell down. According to the statement of the deceased, dated the 31st October, 1921, which was made before Khan Bahadur Sher Baz Khan, Honorary Magistrate, and which is duly proved by him, it was Inder Singh, who struck the first blow on the head, and Tek Singh who gave another blow on the head, and it was Kishen Singh, brother of Arjan Singh, who is mentioned along with Waryam Singh as joining the assault. Pandit Sheo Narain lays great stress on this discrepency between the first information report and the dying declaration, and argues that Arjan Singh deserves an acquittal on the ground that the deceased does not mention him as his assailant. This point has been duly considered by the learned Sessions Judge and he has come to the conclusion that the first report is entitled to much greater weight than the statement of the deceased. The report was made by Kundan Singh who was himself present and injured. He, therefore, knew all about the affair. The parties were well known to one another as they are related collaterally, and it is not likely, in such circumstances, that Kundan Singh would mistake Arjan Singh for Kishen Singh, when describing an offence committed in broad daylight. On the other hand, a confusion can possibly arise as to which of the two brothers Kishen Singh or Arjan Singh took part in the fight, when the injured man began to give his version after having received a serious injury to his head and having been unconscious for some time. The Sessions Judge has come to the conclusion that the name of Kishen Singh is given by mistake by the deceased

in his statement and it was probably Arjan Singh who was in the mind of the deceased when he mentioned Kishen Singh. I think this is a reasonable view of the case and as Kundan Singh is not the only man who names Arjan Singh, but is supported by the other eye-witnesses, I agree with the learned Sessions Judge in holding that Arjan Singh was the man present in the fight and not Kishen Singh, and that, in this respect, the first report is certainly more worthy of reliance than the statement of the deceased.

Coming to the last point, I think the decision of the Court below is correct, so far as the giving of equal punishment to all the four men is concerned. As has been seen from a comparison of the version as given in the first report and the version in the dying declaration, it is difficult to say who struck the fatal blow. It may have been Arjan Singh or it may have been Inder Singh and if the dying declaration is to be accepted, even Tek Singh is mentioned as giving a blow on the head. There are only two blows on the head and it is only one of them which is serious. Under such circumstances, it is not possible to hold definitely about any one of these four individulals that he caused the particular blow. If it was possible to decide that definitely, there would be reasons for giving the man responsible for that blow a heavier sentence than that awarded to his companions; but the state of things that has been found here is, that all the four appellants are said to have been armed with sticks to which they fixed *chhavi* blades when they began this assault and, no matter what part of the body any of them struck, they all seem to have joined the assault armed with their deadly weapons and, considering the nature of the assault and the nature of the weapons, I do not think it can be said with regard to any one of them that he did not mean to cause serious injuries. There is very little to differentiate between them, and section 34, Indian Penal Code, makes them equally responsible in such cases. I think each one of them has been rightly given the same sentence.

It is contended that the sentence is a severe one, but I do not agree with this argument and hold that the sentences though deterrent, appear to be fully justified by the circumstances of this case. I, therefore, dismiss the appeal of all the four appellants and maintain their convictions and sentences.

It may be added that Kundan Singh has filed an application for revision, praying that the sentences of the appellants should be enhanced and urging that the Court was not right in convicting them under section 326, Indian Penal Code, instead of convicting them under section 304, Indian Penal Code. I have explained above the reason why the Trial Court has preferred the use of section 326, Indian Penal Code, instead of section 304, Indian Penal Code, and I do not think any material difference is made to the case by the adoption of this course by the learned Sessions Judge. Taking all the circumstances into consideration, I do not see any sufficient reason for enhancing the sentences or for altering the section applied. The revision is, therefore, rejected.

Appeal dismissed.

1924 Lahore 218.

SCOTT-SMITH, J.

Bhajan Das and others—Appellants.

v.

Emperor.

Cr. A. No. 428 of 1922, decided on 11th October, 1922, from an order of Sessions Judge, Hoshiarpur, dated 6th April, 1922.

(a) *Penal Code, S. 366—Abduction to compel marriage—Woman living willingly with accused before abduction—Intent necessary under the section is not complete.*

Where the abducted woman has voluntarily lived with the accused for a couple of months before abduction as his wife, and whom the accused had intended to marry. *Held* the intention which is a necessary ingredient to constitute offence under S. 366 was absent and hence no offence was commited under the section. [P. 220, C. 2.]

(b) *Penal Code, Ss. 304 and 323—Death caused by beating amounting to simple hurt—Accused ignorant of diseased spleen of the deceased—Conviction under S. 323 only is legal.*

Where death is caused as a result of simple injuries and where it is shown that the accused person had no knowledge that the deceased's spleen was diseased, he could only be convicted of causing simple hurt. [P. 221, C. 1.]

Mul Chand for *Abdul Aziz*—for Appellants.

Public Prosecutor—for Respondent.

Judgment:—This is a joint appeal by six persons Bhajan Das, Haku, Ganga Jat, Fakiria, Ganga Barber and Arjan, who have

been convicted by the Sessions Judge of Hoshiarpur of offences under sections 366-149, 325-149 and 148, Indian Penal Code, and have been sentenced to various terms of imprisonment for each offence.

The facts are briefly as follows :—

Mt. Ishri, daughter of Mt. Kirpo, is the widow of Bhagat Ram of Ram Nangli. She has three sisters married in the village of Jandoli where Fakiria and Haku live. Fakiria is married to one of those sisters and Haku is the uncle of Fakiria. Mt. Kirpo and subsequently Mt. Ishri herself brought complaints against one Khushia charging him with having fraudulently got Mt. Ishri's thumb-mark affixed to an entry in the Marriage Register making out that she had been married to him. For some time whilst these cases were pending Mt. Ishri was living with Haku, appellant, in Jandoli village. Before the date of the occurrence, the 8th December, 1921, Mt. Kirpo had taken her daughter away to live with her. On the 8th December there was a hearing of the complaint against Khushia in a Magistrate's Court at Hoshiarpur. Fakiria and Haku, knowing that Mt. Kirpo and Mt. Ishri would be at Hoshiarpur on the 8th of December, met Mt. Kirpo in the *Kutchery* compound and asked her to send Mt. Ishri back to Jandoli with them. Mt. Kirpo refused to do so. After the hearing of the case was over Mt. Kirpo and Mt. Ishri, accompanied by Santu, deceased, were going along the road in Hoshiarpur where the six appellants are said to have overtaken them and to have forcibly carried off Mt. Ishri and to have beaten Santu who tried to prevent them. Santu was knocked down and died on the spot shortly afterwards and the medical evidence shows that his death was due to rupture of the spleen which was enlarged owing to disease. In addition to the rupture of the spleen, Santu received two or three other simple injuries one being on the head; but it is quite clear that the beating received by him was in no sense a severe one. The Police after receiving the First Information Report recorded a charge under section 304, Indian Penal Code, and eventually *chalaned* the six appellants under that section. They did not *chalan* them under section 366 at all apparently considering that no offence had been committed under that section. After the abduction, Mt. Ishri was taken to Jandoli village where, on the morning after the occurrence, she was found in the house of her sister, the wife of Fakiria. Haku and Fakiria admit that they took away Mt. Ishri from her mother. They also admit that they had a fight with Santu to whom they gave some blows. Their main defence is (1) that Mt. Ishri had been married to Haku by *chadar andazi* and (2) that she went with them voluntarily though she made a show of resistance. The learned Sessions Judge in an exhaustive judgment has held that the alleged *chadar andazi* marriage with Haku has not been proved, that Mt. Ishri did not go voluntarily with Haku and Fakiria that all the appellants took part in the assault, that they constituted an unlawful assembly and that though they had no knowledge that they were likely to cause the death of Santu, yet as they struck him blows upon a vital part of the body they must be held to have intended or known that they were likely to cause grievous hurt. He accordingly convicted them under the sections aforesaid.

Mr. Mul Chand has taken me through the evidence on the record. His contentions are: (1) that Mt. Ishri was the married wife of Haku, (2) that she went voluntary with the appellants or some of them, (3) that even if she was not the married wife of Haku, still the ingredients necessary to constitute an offence under section 366 have not been established, and (4) that it cannot be said that the appellants intended to cause or knew that they were likely to cause grievous hurt to Santu. After a persual of the evidence I agree with the learned Sessions Judge, that the occurrence took place substantially in the way deposed to by Mt. Kirpo and the prosecution witnesses. The story told by them is in accordance with that put forward by Mr. Kirpo in the First Information Report with the exception that she tried to exonerate her son-in-law Fakiria. It was natural on her part, but having regard to the evidence I have no doubt that he took part in the occurrence as he himself admits.

The next point is, whether Mt. Ishri was the wife of Haku or not. In the First Information Report Mt. Kirpo said that Mt. Ishri had been settled in the house of Haku without her (Mt. Kirpo's) permission. The words used in the report were *bithla diya tha*. For the defence it is urged that this meant that Mt. Ishri had become the *karewa* wife of Haku, and having regard to their actions at least it was

probable that this was what they understood also. The learned Sessions Judge says that the expression possibly conveys the idea of treatment as wife but without any formal ceremony having taken place. He also admits that formal ceremony of *chadar andazi* is, as alleged, not necessary but goes on to say that "although marriage is sometimes presumed from long connection as man and wife, I do not think such a connection for a couple of months could be held to establish a valid marriage under any circumstances." Evidence has been produced of an actual *chadar andazi* ceremony having taken place, but having regard to the facts that no entry is made in the Marriage Register and that the question whether Mt. Ishri was the wife of Khushia or not was at that time *sub judice*, I agree with the learned Sessions Judge in thinking that it is not likely that any *chadar andazi* ceremony took place, but that Haku and Fakiria intended that if Khushia's marriage was not established, a regular ceremony would be performed.

I algo agree with the learned Sessions Judge that Mt. Ishri was not taken away with her consent. Certainly, at first, she was unwilling to go with the appellants but she very soon gave up resistance and went along with them more or less willingly. This, I think, may be gathered from the evidence of Mr. Manual, P.W. No. 8, and from that of P. Ws. Nos. 11 and 12, which shows that the abductors took Mt. Ishri past the Police lines and actually halted there to get her a drink of water. It is hardly likely that they would have done this, had the girl been still unwilling to go with them. At the same time, I have no difficulty in holding that the appellants constituted an unlawful assembly, their object being by criminal force to enforce their right or supposed right to the possession of Mt. Ishri.

Now, the learned Sessions Judge after holding that Mt. Ishri was not the wife of Haku and was taken away by force appears to hold that these findings alone are sufficient to constitute an offence made punishable under section 366. The section, however, also requires that such abduction must be (*a*) with the intent that the woman may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or (*b*) in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. Now, having regard to the facts that Mt. Ishri had already lived apparently quite willingly with Haku for some two months as his wife, that two of her sisters were already married in Haku's village, and that on the morning following the abduction she was found living in the house of her sister, the wife of Fakiria, I do not see how it can be held that the abduction was with the intent and knowledge necessary to constitute an offence under section 366. So far as I can judge the intention of the appellants was to get Mt. Ishri again to live in Jandoli until the case against Khushia should be decided. If the case was decided against Khushia they probably intended that she should be married to Haku but I see no reason to suppose that such a marriage would have been against her will, she having already lived with him for two months as his wife. Even in the First Information Report it was not said that she had been made to live with Haku against her will. Mt. Kirpo's complaint was that she had been settled in the house of Haku without asking Mt. Kirpo's permission. It is also noteworthy as appears from Mr. Manual's evidence, that when he met the abductors, Fakiria was saying to Mt. Kirpo that she had already received money once for Mt. Ishri and wanted to sell her again. This is not like the case of a young unmarried girl who is abducted for the first time from the house of her parents or guardian and made to marry a stranger or seduced or forced to illicit intercourse. The case is one of a widow who has been settled in a man's house and has lived with him as his wife, for some time apparently with her own consent. In these circumstances, I do not think it can be held that the appellants had the intention or knowledge required as one of the ingredients to make up an offence made punishable under section 366.

The next point to consider is, whether they can be considered guilty of causing grievous hurt to Santu. A good many cases where death has been due to a diseased spleen are referred to by Mr. Rattan Lal in his Law of Crimes, 9th Edition, pages 615 and 616. In most of these cases it was held that where it was shown that the accused person had no knowledge that the deceased's spleen was diseased, he could only be convicted of

causing simple hurt. No doubt one injury was caused to Santu's head but it was quite a trivial one. There were only four injuries altogether on Santu's body and, as already stated, he was not given a severe beating. From the injuries caused to him I am of opinion that it cannot be held that those who attacked him intended or knew that they were likely to cause grievous hurt. They can, however, be convicted of simple hurt under section 323, read with section 149, Indian Penal Code.

In my opinion the learned Sessions Judge has taken much too serious a view of the occurrence. It is an unfortunate circumstance that Santu had a diseased spleen; if he had not, he would not have died as the result of the beating received by him, and the probability is that the Police would not have taken cognizance of the case at all. The case was rendered serious in the opinion of the Police by the fact that Santu died as the result of the beating received by him. His death, however, was an unfortunate accident seeing that his spleen was enlarged.

I accept the appeal and set aside the convictions and the sentences under the sections specified and convict them instead of causing hurt under sections 323-149, Indian Penal Code. It is not clear exactly what sort of weapons they were carrying and, therefore, I do not think that they can be convicted under section 148. They have already suffered more than six months' rigorous imprisonment and I think that they have been sufficiently punished. I accordingly sentence them to the term of imprisonment already undergone and direct that they be released from custody.

Appeal accepted.

1924 Lahore 221.

BROADWAY, J.

Ali Bakhsh—Appellant.

v.

Ghulam Muhammad and another—Respondents.

S. A. No. 431 of 1922, decided on 31st July, 1922, from the decree of Additional District Judge, Jhelum, dated 23rd November, 1921.

Pre-emption—Pre-emptor is not bound by personal covenants entered into between vendor and vendee after the execution of sale.

B sold certain lands to *A* for Rs. 650 and executed a deed of sale which was duly registered. On the same day an agreement was executed by *A* in favour of *B* under which he undertook to reconvey the said lands to *B* if he repaid him the sum of Rs. 650 within a period of 10 years. This document was drawn up on eight-annas stamped paper but was not registered.

One *G* brought a suit for possession of the lands so sold claiming to be entitled to pre-empt and was granted a decree. Then *B* brought a suit against *G* and *A* asking for a decree for specific performance of the agreement to reconvey entered into by the original vendee *A*, urging that it was binding on the pre-emptor. *Held* that no doubt the pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound. However these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document which does not create any interest in the lands sold. *Held further* that the sale was a complete transaction in itself and that any subsequent agreement (though entered into immediately after the execution of the sale-deed) cannot be read into the conveyance so as to vary its terms and in fact conditions or obligations which would be binding on the pre-emptor. (74 P. R. 1918 and 35 Bom. 259, *Ref.*) [P. 222, C. 1.]

Gulam Rasul—for Appellant.

Judgment:—On the 29th January, 1913 one Ali Bakhsh sold certain lands to Allah Dad for Rs. 650 and executed a deed of sale which was duly registered.

On the same day an agreement was executed by Allah Dad in favour of Ali Bakhsh under which he undertook to re-convey the said lands to Ali Bakhsh if he repaid him the sum of Rs. 650 within a period of 10 years. This document was drawn up on an eight-annas stamped paper but was not registered.

One Ghulam Muhammad brought a suit for possession of the lands so sold claiming to be entitled to pre-empt and was granted a decree.

On the 7th February, 1920 Ali Bakhsh brought a suit against Ghulam Muhammad and Allah Dad asking for a decree for specific performance of the agreement to re-convey entered into by the original vendee, Allah Dad, urging that it was binding on the pre-emptor, Ghulam Muhammad.

The trial Court held that the agreement was entirely separate from the sale and did not in any way affect it, and that it was not binding on Ghulam Muhammad being a personal covenant affecting Ali Bakhsh alone. It also held that the document was inadmissible in evidence for want of registration and that the *bona fides* of the transactions was doubtful. The plaintiff's suit was, therefore, dismissed and he appealed to the District Court.

The learned District Judge, without going into the question of the admissibility or otherwise of the said agreement, held that the pre-emptor was only bound by the liabilities and obligations created by the deed of sale and upheld the decree of the trial Court.

Ali Bakhsh has now come up to this Court in second appeal through Mr. Ghulam Rasul. It seems to me that the view taken by the learned District Judge is correct. The sale of the land was an out and out one as evidenced by the deed. No doubt the pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound. It seems to me, however, that these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document which does not create any interest in the lands sold.

In the present case it is admitted that the agreement does not create any right, title or interest in the land and is purely a personal covenant. It is on this ground that immunity from registration is claimed for the document.

Mr. Ghulam Rasul, however, contended that it was the intention of the vendor and vendee to create a mortgage by conditional sale, but that as that was illegal and prohibited by the law in the Punjab, this device was entered into. If I am to be guided by the intention, then it seems to me that I am bound by the finding of the learned District Judge on the question and he has held that the parties intended and effected a sale.

In any event, I am of opinion that the sale was a complete transaction in itself and that any subsequent agreement (though entered into immediately after the execution of the sale deed) cannot be read into the conveyance so as to vary its terms and in fact conditions or obligations which would be binding on the pre-emptor. In this view I am supported to some extent by the decision of a Division Bench of this Court reported in *Muhammad Mir* v. *Faizul Hassan* (1), as also by *Gurunath Balaji Mutalik* v. *Yamanava Nalarao* (2). I consider the agreement in this case only created a covenant personal to the vendee, Allah Dad, and quite separate from the sale transaction itself, and was, therefore, not binding on Ghulam Muhammad. I accordingly dismiss this appeal, but as no one has appeared for the respondents, I make no order as to costs.

Appeal dismissed.

(1) (1818) 74 P.R. 1918=163 P.W.R. 1918=47 I.C. 418.

(2) (1911) 35 Bom, 258=13 Bom. L.R. 240=10 I.C. 514.

1924 Lahore 222.

CAMPBELL, J.

Firm Gobind Sahai-Rup Lal—Petitioner.

v.

Gurdas Mal and others—Respondents.

Civ. Rev. No. 438 of 1922, decided on 24th January, 1923, from an order of Senior Sub-Judge, Gujrat, dated 8th May, 1922.

Civ. Pro. Code, S. 148—Order setting aside ex-parte decree on condition of paying damages by certain time—Court can extend time.

When an application to set aside a decree *ex parte* has been allowed conditionally on the applicant paying a certain sum by a certain date to the plaintiff as damages and payment is not made by due date, the Court has jurisdiction under S. 148 to extend the time fixed. (36 All. 77, *Foll.*)

Ram Chand Manchanda—for Petitioner.

Anant Ram—for Respondents.

Judgment:—The only authority on the point at issue which is cited before me is against the petitioners. This is *Jagarnath Sahi* v. *Kamta Prashad* (1) in which a Division Bench ruled that when an application to set aside a decree *ex parte* has been allowed conditionally on the applicant paying a certain sum by a certain date to the plaintiff as damages and payment is not made by due date, the Court has jurisdiction, under section 148, Code of Civil Procedure, to extend the time fixed.

I agree with this interpretation of the law and reject the petition with costs.

Petition rejected.

(1) (1914) 36 All. 77=12 A.L.J. 38=23 I.C. 138.

1924 Lahore 223 (1).

BRASHER, J.

Nauranga—Petitioner.

v.

Emperor—Respondent.

Cr. Rev. No. 447 of 1922, decided on 2nd June, 1922, from the order of Sessions Judge, Montgomery at Lahore, dated 19th December, 1921.

Penal Code, Ss. 379, 511 and 447—Accused caught in the vicinity of cattle on another's land—No offence is committed under S. 511.

Where accused was caught at night time in the vicinity of some cattle which had been tethered on the complainant's square and near which complainant and his brother were sleeping. *Held* he cannot properly be held guilty of an attempt to commit theft but no doubt that he committed the offence of criminal trespass.

Amar Nath Chona—for Petitioner.

Zafarullah Khan—for Respondent.

Judgment:—The petitioner in this case has been convicted under sections 379-511, Indian Penal Code, the finding being that he was caught at night time in the vicinity of some cattle which had been tethered on the complainant's square and near which complainant and his brother were sleeping. It may reasonably be inferred that the petitioner intended to commit theft and there can be no doubt that he committed the offence of criminal trespass but I do not think he can properly be held guilty of an attempt to commit theft. The case is analogous to *Walidad* v. *King-Emperor* (1), where it was held that a person who went at night on the roof of the house of another person with a stick and an instrument for house breaking was guilty of house trespass and not of an attempt to commit housebreaking by night. In the present case the petitioner had not gone beyond the stage of preparation for the theft.

I accordingly alter the conviction from sections 379-511, Indian Penal Code, to section 447, Indian Penal Code. The petitioner, who is on bail, has already undergone more than the maximum period of imprisonment which can be awarded for the latter offence, and no further order is necessary.

Conviction altered.

(1) (1907) 15 P.R. 1907 (Cr.)=14 P.W.R. 1907 (Cr.)=56 P.L.R. 1908=6 Cr. L.J. 444.

1924 Lahore 223 (2).

BROADWAY, J.

Kirpa and others—Defendants-Appellants.

v.

Gulba and others—Respondents.

S. A. No. 456 of 1922, decided on 23rd April, 1923, from the decree of District Judge, Hoshiarpur, dated 10th Nov. 1922.

Custom (Punjab)—Grazing rights reserved for Labanas as a whole, cannot be alienated by one of the class, not even his own right.

Where a tract of shamilat land belonging to a village was reserved for the grazing of cattle and cutting grass and wood and had been allotted for the purpose aforesaid, to certain specified families of Labanas. *Held* that this right cannot be alienated by one of the owners of the right, for by doing so he introduces a foreign element in the class of persons to whom the right was specifically restricted and that such transfer even to a proprietor was void. [P. 224, C. 1]

Fakir Chand—for Appellants.

Jagan Nath—for Respondents.

Broadway, J.:—It appears that a tract of shamilat land 1039 *kanals* in area belonging to village Barnoh has been reserved for the grazing of cattle and cutting grass and wood. The Wajibularz of the village shows that this particular area has been allotted for the purposes aforesaid, to certain specified families of Labanas. One of these Labanas a man named Bhana sold his grazing and other rights to 4 of the proprietors in the village by a registered deed of sale dated the 12th March, 1920.

The remaining Labanas instituted a suit against the said vendees and Bhana asking for an injunction declaring that the vendees had acquired no rights under the sale and restraining them from in any way obstructing or interfering with the plaintiffs in the exercise of their rights.

The trial Court dismissed the suit but the learned District Judge decreed it on the ground that the transfer of such grazing rights was void in law. He held that rights such as these were what are described in the Transfer of Property Act as profits a prendre and were appurtenant to the land and therefore inalienable apart from the land.

The vendees-defendants have come up to this Court in second appeal through Mr. Fakir Chand who has contended that the view taken by the lower appellate Court was bad in law.

He urged that grazing rights belonged to all residents in a village quite apart from any tenancy *Sundar* v. *Wazera* (1). Reliance was also placed on *Hans Raj* v. *Narain Chand* (2), but it seems to me that this is scarcely an authority for the proposition advanced. It was held by Rattigan, J., that grazing rights are confined to cattle used for agricultural or domestic purposes alone. It was also contended on the authority of *Nihal Singh* v. *Khazan Singh* (3), that the plaintiffs have no *locus standi* to challenge the alienation in question as they were not shown to be Bhana's reversioners.

It seems to me that this question must depend on what the right is and how it was created. According to the Wajibularz this area in question was specially set aside for the sole use of the Labanas, it being clearly laid down that they and they alone could exercise these rights. The proprietors even appear to have been excluded from using this land for grazing purposes. It amounts to an easement and speaking broadly, easements are generally inalienable apart from the property to which they are appurtenant. As the right to graze, etc., in these lands was specifically given to a definite set of persons I am of opinion that every member of that set has a right to defend his rights against any infringements of them. That the plaintiffs are vitally interested in maintaining the exclusive right of Labanas to exercise these rights seems to me clear and they have therefore a *locus standi*.

While admitting that an easement is inalienable Mr. Faqir Chand contended that section 38 of the Easement Act allowed the surrender of easement to the owner of the dominant tenement.

The present right however is not attached to any particular land. It is a right given to the Labanas to take certain profits from the area in question and was, it seems to me, granted to them not merely as tenants or non-proprietors but as Labanas.

If my reading of the Wajibularz is correct then it seems to me that a sale of his right to use the land for grazing purposes cannot be alienated by one of the owners of the right, for by doing so he introduces as in the present case a foreign element in the class of persons to whom the right was specifically restricted.

I, therefore, agree with the learned District Judge in thinking that the sale by Bhana was void in law and dismiss this appeal with costs.

Appeal dismissed.

(1) (1907) 144 P R. 1907.
(2) (1911) 86 P.R. 1911.
(3) (1902) 24 P.R. 1902 (F.B.).

1924 Lahore 224.

* * ABDUL RAOOF, J.

Firm Seth Khuda Bakshi and Sons—Appellants.

v.

Firm Sh. Ghulam Qadir and Sons—Respondents.

F. A. No. 486 of 1922, Civ. Mis. No. 167 of 1922, decided on 12th June, 1922, from an order of Sub-Judge, Sialkot, dated 19th January, 1922.

(a) *Civ. Pro. Code, O. 9, r. 13—Date fixed for arguments—Defendants absent*—ex parte *decree cannot be passed.*

Where a date is fixed for arguments on a preliminary issue but the defendant is absent on such date *ex parte* decree cannot be passed against him inasmuch as the date is not fixed for the decision of the case.

(b) *Civ Pro. Code, O. 43, r. 1 (d)—Appeal from* ex parte *decree is no bar.*

An appeal from the *ex parte* decree does not affect the appeal from an order rejecting an application for setting aside the *ex parte* decree.

C. H. Carden Noad—for Appellants.

G. C. Narang—for Respondents.

Judgment:—This is an appeal from an order refusing to set aside an *ex parte* decree and arises under the following circumstances:—

Ghulam Qadir and Sons sued the firm Seth Khuda Baksh and Sons for the recovery of Rs. 5,234-5-0 being the price of goods which had been supplied by the defendants to the plaintiffs and were found to be defective in certain respects. The suit was instituted on the 13th July, 1921. On the 17th August, 1921 written pleas were filed by the defendants and one of the questions raised was that the Court at Sialkot had no jurisdiction to hear the suit. The Court thereupon framed the following issue relating to the question of jurisdiction:—

"Has this Court no jurisdiction to try the suit?"

The Court described this issue to be a preliminary issue. After having framed the issue the Court fixed the 4th November, 1921, for evidence. Clearly, the Court fixed this date for evidence on this particular issue. On this date the defendants did not appear and the hearing was adjourned to the 24th November, 1921, and the defendants were ordered to pay Rs. 40 as damages to the opposite side. On the 24th November, 1921, the adjourned date, both parties gave evidence on the preliminary issue.

The 10th of December, 1921, was fixed for arguments. The defendants, however, did not appear on this date. The decision on the preliminary issue, therefore, might have been given *ex parte* against the defendants. But, curiously enough, the learned Judge allowed the plaintiff to go into the witness-box and give evidence in his favour supporting the claim put forward in the plaint. After recording the evidence the Court forthwith proceeded to decide the suit without framing any further issues and without giving parties an opportunity to produce evidence. It, however, decided the question of jurisdiction in favour of the plaintiffs and held that the suit was cognizable by a Court at Sialkot. On the merits the Court held in favour of the plaintiff and granted him a decree. The defendants applied, on the 4th December 1921, under Order 9, rule 13, Civil Procedure Code, for the setting aside of this decree on the ground that Muhammad Sharif, the managing member of the firm, was ill and could not attend on the date of hearing. This application for the setting aside of the *ex parte* decree has been rejected by the Court below by an order, dated the 19th January, 1922, and it is against this order that the present appeal has been preferred. Without going into the merits of the allegation as to whether the defendant Muhammad Shariff had actually fallen ill or not, I must hold that the *ex parte* decree ought not to have been passed under the circumstances disclosed by the record. The 10th of December, 1921, was not fixed for the decision of the case and, therefore, no *ex parte* decree could have been passed in favour of the plaintiffs against the defendants on the merits. Dr. Narang has argued that I should not interfere with the order of the Court below in this particular case, because the appellant, after filing this miscellaneous appeal, has filed a regular appeal against the *ex parte* decree also. The learned Counsel, however, has not shown me any authority on this point and I do not see how the fact of an appeal from a decree being filed can affect the present appeal. The appellant was entitled to apply for the setting aside of the decree and he had a right to appeal against the order rejecting his application.

A second point is urged by Dr. Narang that at least the decision on the question of jurisdiction must be considered to be final and that I should direct the Court below to treat this question as decided. But the question that I have to decide in the present appeal is whether this *ex parte* decree should be set aside or not, and I am concerned with this question alone. I have already held that, under the circumstances of this case, the Court was not justified in passing the *ex parte* decree.

I, therefore, accept the appeal and reversing the order of the Court below, pass an order setting aside the *ex parte* decree. I make no order as to cost, because the mistake was committed by the Court itself. The case will now go back to the Court below for decision on the merits.

Appeal accepted.

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* 1924 Lahore 225.

HARRISON AND ZAFAR ALI, JJ.

Neki and others—Plaintiffs-Petitioners.

v.

Chajju Ram and another—Defendants-Respondents.

Mis. Petition No. 522 of 1922 (Civ. App. No. 2789 of 1914), dated 1st June, 1923, from the judgment and decree of Leslie Jones, in C. A. No. 248 of 1918.

Decree—Construction—Review order challenged and set aside—Original order open to appeal.

On 3rd November, 1917, an appeal was accepted and the suit as instituted was dismissed by the order of a Division Bench. An application for leave to appeal to the Privy Council was duly presented within time and on the same day an application for review was made. This latter application was accepted and eventually the original order passed on the 3rd November, 1917, was reversed and the suit was decreed in full. From this order passed in review an appeal was presented to the Privy Council, who held that the review was not competent, and that the order of the 3rd November, 1917, be restored.

Held: that the application for leave to appeal to Privy Council by the applicant for review was still alive and had merely been in a state of

suspended animation during this long period and therefore leave would be granted to have the case heard on merits by Privy Council. [P. 226, Cs. 1 and 2.]

Sheo Narain and *Manohar Lal*—for Petitioners.

Tek Chand and *G. C. Narang*—for Respondents.

Order :—This is an application asking for orders to be passed on a petition for leave to appeal to the Privy Council from a decree, dated the 3rd of November, 1917.

"The facts are that on that date an appeal was accepted and the suit as instituted was dismissed by the order of a Division Bench. An application for leave to appeal to the Privy Council was duly presented within time and on the same day an application for review was made. This latter application was accepted and eventually the original order passed on the 3rd of November, 1917, was reversed and the suit was decreed in full, from this order passed in review an appeal was presented to the Privy Council urging that the review was not competent and further that on the merits the original order passed by the Division Bench on 3rd November, 1917, was correct. On the 27th February, 1922, their Lordships of the Privy Council held; that the review was not competent that rule 1 of Order 47 had been misunderstood and that, therefore, the judgments given by the two Division Benches were to be set aside and that of the Bench of the Chief Court which passed the order of the 3rd November, 1917, was to be restored so that the suit will stand dismissed."

Counsel for the respondents contends that this finding or rather the order in Council which followed upon it embodies the original decree passed on the 3rd of November, 1917, and, therefore, there can now be no question of appealing to the Privy Council. He also contends that in spite of the fact that their Lordships set aside the whole of the proceedings in review and thereby restored the original order passed by the first Bench, it would have been competent to the present appellants appearing as respondents to ask for an order on the merits reversing that decree and upholding the order passed on review, and this in spite of the fact that there was no appeal before their Lordships from this first decision.

With this view we cannot agree. The order of the Privy Council merely dealt with the competency of the review application and the legality of the orders passed. Once it had been held that the review proceedings were bad the clock was merely put back and the position as explained in their Lordships' order was that the original judgment was restored and the suit stood dismissed. From that judgment or rather from the decree which followed upon it the present petitioner wished to present an appeal. His application was presented within time. We do not agree with the contention that the order of the 22nd July, 1918, stating that "the application for review has been accepted, and there is no necessity to go on with the application" is tantamount to an order of dismissal, and we find that this application is still alive and has merely been in a state of suspended animation during this long period. It is not contended that the petitioners had not fulfilled the necessary conditions and were not entitled to the certificate which they sought.

We, therefore, accept the application and direct that the certificate be granted. The costs of the petitioner at this hearing will be paid by the respondents; Counsel's fee Rs. 120.

Application allowed.

1924 Lahore 226.

BROADWAY, J.

Nand Singh—Appellant.

v.

S. Lachhmi Narain Singh and others—Respondents.

Mis. F. A. No. 559 of 1922, decided on 24th November, 1922, from an order of District Judge, Ambala, dated 17th January, 1922.

Civ. Pro. Code, S. 60—"Panchotra" money is not covered by the section—Punjab Land Revenue Act (XVII of 1887), S. 70.

The income of the *Panchotra* is not covered by S. 60, Civ. Pro. Code, nor by S. 70 of Act XVII of 1887.

Kharak Singh—for Appellant.

Judgment :—Nand Singh, an undischarged bankrupt, a *Lambardar* and *Jagirdar* in the Ambala District, has preferred this appeal against the order of the District Judge, Ambala, dated the 17th January, 1922, directing the Receiver to sell

a house belonging to the insolvent and to arrange through the Collector, for the farming out of his land, some 100 *bighas* in area. The order also directs the insolvent to pay into Court all *panchotra* money in his hand. Mr. Kharak Singh has appeared for Nand Singh, and nobody has appeared on the other side.

So far as the house is concerned, inasmuch as the appellant is an agriculturist and as it is said that this is the only house he possesses, it appears to be not liable to be sold. The order relating to this house is, therefore, set aside.

In regard to the *panchotra* money Mr. Kharak Singh urged that it, too, was not liable to attachment under the provisions of section 60, Civil Procedure Code. He also referred to section 70 of the Punjab Land Revenue Act. I am unable to see that the income of the *panchotra* is covered by these sections. *Qua* this, the order will stand.

Next, it was urged that the Receiver only suggested in his report that three-fourths of the land should be farmed through the Collector, but the Court has directed that all the land should be so farmed. It has been pointed out in the grounds of appeal that two-fifths of the entire holding of the appellant is under mortgage, the mortgagees being in possession, and Mr. Kharak Singh urged that a provision should be made for the maintenance of the insolvent and his family suitable to his condition in life, not as an undischarged bankrupt, but as a *Lambardar* and a *Jagirdar*. The proposition appears to me somewhat novel. As, however, the Receiver has reported that three-fourths of the land belonging to the insolvent was sufficient and there is the order of the District Judge *qua* the whole land, I direct that only three-fourths of the appellant's land should be farmed through the Collector.

To this extent the appeal is accepted. No order as to costs.

Appeal accepted.

1924 Lahore 227.

SCOTT-SMITH, J.

Muhammad Akbar—Appellant.

v.

Emperor,

Cr. A. No. 573 of 1922, decided 5th October, 1922, from the order of Sessions Judge, Mianwali, dated 15th June, 1922.

Penal Code, S. 100—Accused striking deceased after latter struck former and accidentally causing death, is entitled to the benefit of the section.

The accused along with his father, uncle and cousin was proceeding to the threshing floor in order to get the half share of the produce claimed by them from the deceased. He had in his hand a *wahola* such as Zemindars usually carry. The other three had no weapon with them. On seeing them coming the deceased came out with a *dang*, and struck a blow on the head of the accused which fell on his shoulder. The accused retaliated by striking on the head of the deceased with the *wahola* which he was carrying. This blow fractured his skull and resulted in his death.

Held that the assault committed by deceased was such as might reasonably cause to accused the apprehension that death or grievous hurt would result to him if he did not strike, and therefore he is clearly entitled to the benefit of S. 100. [P. 227, C. 2 and P. 228, C. 1.]

Devi Dayal—for Appellant.

Public Prosecutor—for Respondent.

Judgment:—Muhammad Akbar has been convicted by the Sessions Judge of Mianwali of the culpable homicide not amounting to murder of Rohtas by striking him a single blow on the head with a *wahola*. Various discrepant accounts of what actually occurred have been given in the first information report and by the witnesses for the prosecution and these are set forth in detail by the learned Sessions Judge in his judgment. The Judge agreeing with the Assessors has accepted the version given by Nawaz Khan, P. W. No. 7. According to him there was a dispute between Muhammad Akbar and his relations on the one side and Rohtas and his relations on the other as to the produce of a certain piece of land, and it appears that on the day of the occurrence Muhammad Akbar along with his father, uncle and cousin, was proceeding to the threshing floor of Khalil Khan in order to get the half share of the produce claimed by them. Muhammad Akbar had in his hand a *wahola* such as *zemindars*, according to Nawaz Khan, usually carry with them when they are winnowing their crops. The other three men with him had no weapons. Rohtas was having a bath in a *khola* and seeing them, came out. He had only a loin cloth on him and told Muhammad Akbar to stop. He then went back to his house and Nawaz Khan, fearing that there would be a fight, told his mother to shut him inside the house. This she did, but in spite of it he came out with a *dang* and when Nawaz Khan tried to stop him he got past him and

struck a blow on the head of Muhammad Akbar with the *dang*. Muhammad Akbar had a *chadar* tied on his head as protection against the sun and the blow glanced off his head and fell on his shoulder. That he did receive a blow of this sort is supported by the Medical evidence. Muhammad Akbar retaliated by striking Rohtas on the head with the *wahola* which he was carrying. This blow fractured Rohtas' skull and resulted in his death.

The Sessions Judge is of opinion that the appellant could not plead that he was acting in the exercise of his right of private defence because he, accompanied by his relations, had gone to the threshing floor with the intention of enforcing his right to a share in the produce. At the same time, the Judge admits that nothing would have happened had not Rohtas been so excited and rushed out of his house and attacked Muhammad Akbar. Now, according to Nawaz Khan, the appellant and his relations were proceeding to the threshing floor when the witness told them not to do so and they stopped. It does not appear that their attitude was in any way aggressive when Rohtas rushed out and without being attacked or threatened in any way struck a blow on Muhammad Akbar's head with a *dang*. Rohtas was evidently in a violent rage at the time, and I cannot agree with the learned Sessions Judge that Muhammad Akbar was not entitled to defend himself against such an attack, simply because he and his companions had gone to get the share of the produce to which they thought they were entitled. The case would have been different had Muhammad Akbar's companions also been armed and had their attitude shown that they intended to take the share of produce by force, if necessary. According to section 100, Indian Penal Code, the right of private defence of the body extends under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault. Now, having regard to the evidence of Nawaz Khan, I have no doubt at all that the assault committed by Rohtas was such as might reasonably cause to Muhammad Akbar the apprehension that death or grievous hurt would result to him if he did not strike Rohtas. He used the weapon which he had in his hand at the time and I see no reason to suppose that he took the *wahola* with him in order to use it as a weapon of offence. He only struck one blow which unfortunately resulted in the death of Rohtas. In my opinion he is clearly entitled to the benefit of section 100 and I, therefore, accept the appeal, set aside the conviction and sentence and acquit him and order that he be released from custody.

Appeal accepted.

1924 Lahore 228.

SCOTT-SMITH, J.

Narain Singh—Appellant.

v.

Emperor.

Cr. A. No. 575 of 1922, decided on 12th October, 1922, from an order of First Class Magistrate, Gurdaspur, dated 13th June, 1922.

Criminal trial—Procedure — Separate trials—Common witness not examined in each case but their evidence read over—No prejudice caused—Trial is not invalidated.

Several cases were tried separately but the evidence of such witnesses as were common to all the cases was not recorded separately in all the cases. It was only read out to them and admitted by them to be correct. This procedure was followed with the consent of the counsel for the accused. It was however, clear that no prejudice was caused for the accused. *Held* that the procedure adopted was irregular, but it did not affect the validity of the trial as no prejudice was caused. (10 Cal. 405; 8 P.R. 1915 Cr., *Ref.*; 9 P.R. 1912 Cr., *Dist.*)

Kunwar Narain for *D. N. Mehra*—for Appellant.

Des Raj Sawhny for *Govt. Advocate*—for the Crown.

Judgment:—Criminal Appeals Nos. 575, 576 and 596 are by three persons who have been convicted by a Magistrate with section 30 powers of illegal possession of *chhavis* and have been sentenced under section 20 of the Arms Act to 4½ years' rigorous imprisonment each.

The appellants were tried separately, but as a great deal of the evidence is the same in all the cases, the appeals may conveniently be disposed of by one judgment.

The appellants, who all got out of the same train at the Dhariwal Railway Station, were searched as suspicious

characters by the Police in the presence of reliable witnesses. They were carrying *dangs*, and *chhavi* blades were found in the waistcoat pocket of one and in the loin cloths of the other two.

The first point raised in appeal is, that the appellants were not really tried separately at all, but that there was a joint trial, and that this was illegal being opposed to the procedure laid down in the Criminal Procedure Code. After an examination of the records of the three cases, it is clear to me that the trials were separate and not joint. The case of Thakar Singh was taken up first and at the conclusion of the statement of Sardar Saut Singh, Sub-Inspector, the Magistrate recorded the following note:—

"All three of the accused have been present during the course of the examination of this witness. Counsel for the three accused agree that the statement of the witness be read over in the connected cases as well. They agree that their clients will not be in any way prejudiced in this way and it will be a great saving of time."

The rest of the witnesses in Thakar Singh's case were then examined, and the cases against Makhan Singh and Narain Singh were subsequently taken up. The witnesses were again put into the witness-box and the statements made by them in Thakar Singh's case were read over to them. They admitted them to be correct and said that they had nothing to add. In Makhan Singh's case P.W. No. 5, Hafizulla Beg, was the Constable who had himself arrested him and conducted his search. He was not a witness in the case of Thakar Singh at all. Similarly, in the case of Narain Singh, Din Mohammad Constable, P.W. No. 5, was the witness who conducted the search of Narain Singh's person and was not a witness in the other two cases at all. It is, therefore, clear that the trials were separate. There is no doubt that the procedure adopted of reading out the statements of witnesses recorded in the first case was irregular, but it is quite clear that no prejudice has been caused to any of the appellants by this course which, according to the learned Sessions Judge, was suggested by appellants' Counsel. The only authority cited which has any bearing on the present case is that reported in *Nathu Sheikh* v. *Queen-Empress* (1). In that case four persons were accused of having given false evidence in the same proceeding and the Sessions Judge, while professing to try each case separately, heard the evidence of the witnesses only once. The High Court held that this was an error in the proceedings which would probably have proved fatal to the convictions, but these were set aside on the merits and the point was not, therefore, decided. Moreover, it is not clear from the judgment whether the facts were on all fours with the present case or not. I do not think that this is a case to which the well-known ruling of their Lordships of the Privy Council reported as *Subrahmania Ayyar* v. *King-Emperor* (2) is applicable.

On the merits, I am of opinion that the case against each of the appellants is clearly established. The evidence as to the search of their persons is quite conclusive and is very reliable. The petty discripancies pointed out by Counsel are quite immaterial, and do not at all shake the credibility of the witnesses. The convictions are, I consider, fully justified by the evidence. The learned Magistrate has given good reasons for awarding heavy sentences, and, having regard to the local circumstances of the District at the time, I do not consider the sentence to be too heavy. The question whether any particular case of illegal possession of arms comes under section 19 (*f*) or section 20 of the Arms Act must be decided on its own facts as was laid down in *Khem Singh* v. *Emperor* (3). I am not prepared to agree with all the remarks of the learned Judge who decided the case reported as *Ibrahim* v. *Emperor* (4), and the facts of that case are not on all fours with the present one. Here the appellants had removed the *chhavi* blades from their shafts and had concealed them about their persons with the obvious intention referred to in section 20 of the Act. The appeals are accordingly dismissed.

Appeals dismissed.

(1) (1884) 10 Cal. 405=8 Ind. Jur. 508.

(2) (1902) 25 Mad. 61=29 I.A. 257=11 M.L.J. 233=3 Bom. L.R. 540=5 C.W.N. 866.

(3) (1915) 8 P.R. 1915 Cr.=16 Cr. L.J. 412=76 P.L.R. 1915=28 I.C. 796.

(4) (1913) 9 P.R. 1913 Cr.=128 P.L.R. 1913=44 P.W.R. 1913 Cr.=14 Cr. L.J. 41=18 I.C. 965.

1924 Lahore 230.

BROADWAY, J.

Niaz Ali Khan and others—Defendants-Appellants.

v.

Md. Afzal Khan, minor through Mt. Gauhar Begam and others—Respondents.

S. A. No. 775 of 1922, decided on 27th November, 1922, from an order of District Judge, Jhelum, dated 25th January, 1922.

Limitation Act, S. 22—Suit for pre-emption—Joinder of one of the defendants after limitation due to minor plaintiff's next friend's mistake was not condoned.

Where in a pre-emption suit one of the vendees was not included as defendant till after the expiration of the limitation, due to the mistake of the minor plaintiff's next friend. *Held*, that though the plaintiff was a minor the suit should be dismissed.

Anant Ram—for the Appellants.

B. D. Kureshi—for the Respondents.

Judgment:—On the 11th November, 1919, one Hashmat Khan sold 53 *kanals*, 19 *marlas* including his share in the *shamilat* and his rights in a further 1 *kanal*, 18 *marlas* of *shamilat* to Niaz Ali Khan and five others, including a minor named Riasat Khan, son of Faiz Talib Khan. The deed was duly registered. On the 27th August, 1920, a minor named Muhammad Fazil, nephew of Hashmat Khan, vendor, acting through his mother, Musammat Gauhar Begam, instituted a suit claiming possession of the land sold by Hashmat Khan by pre-emption. The first hearing of the case took place on the 6th November, 1920, when it was found that the defendants had not been served. The plaintiff was told to furnish the necessary addresses and on the same date filed an application giving particulars. In this application the name of Riasat Khan, son of Faiz Talib Khan, was mentioned. On the 10th December, 1920, the defendants appeared and pointed out that Riasat Khan was one of the vendees but had not been impleaded in the plaint. In spite of this omission having been brought to the notice of the plaintiff, no steps were taken to bring Riasat Khan on to the record until the 24th January, 1921, when the Court returned the plaint for amendment owing to the omission of Riasat Khan's name, directing the plaintiff to cause the necessary amendment to be made. Riasat Khan's name was entered in the plaint on the same day.

It should be noted that in the original plaint amongst the defendants' names was that of Feroz Khan, son of Imam Ali Khan a person who was not a vendee and had nothing whatever to do with the case. On the 14th January, 1921, an application was made on behalf of the plaintiff asking that his name be struck off, yet no steps were taken in regard to Riasat Khan. The defendants pleaded that, inasmuch as Riasat Khan had been impleaded after the expiry of one year from the date of sale, the suit was barred by limitation. The trial Court held that the omission of Riasat Khan's name was due to a mistake but that this did not excuse the plaintiff, and the suit was accordingly dismissed. The plaintiff preferred an appeal to the District Court and the learned District Judge, while recognizing the extreme carelessness of the plaintiff's next friend, considered that the mistake made should be condoned. He, therefore, accepted the appeal and remanded the case for trial on the merits. Against this order of remand this second appeal has been preferred on behalf of the vendees-defendants through Mr. Anant Ram and I have heard Mr. Kureshi on behalf of the plaintiff.

It has been contended by Mr. Kureshi that, as a matter of fact, Riasat Khan's name should be regarded as having been entered in the plaint from the outset, inasmuch as instead of his name, that of Feroz Khan was inadvertently entered. Seeing that the fathers of these two persons are different and that Feroz Khan was a major while Riasat Khan was a minor this contention, has, in my opinion, no force.

It was next contended that it was not necessary under the present Code to enter the names of all persons against whom a relief is claimed in a plaint. Here, again, I am unable to agree.

Next, it was urged that Riasat Khan had been added by order of the Court and that, therefore, on the authority of *Fakira Pashan* v. *Bibi Azimunnissa* (1), no question of limitation arose. I am unable to agree that the name of Riasat Khan was added at the instance of the Court. It seems to me that the circumstances disclose extreme carelessness on the part of the plaintiff's next friend and advisers.

(1) (1900) 27 Cal. 540=4 C.W.N. 459.

The deed was a registered one and the suit was not filed for some nine months after its execution. It may be considered a little hard to penalise a minor plaintiff for the gross neglect of his guardian. At the same time, it has to be borne in mind that Riasat Khan, one of the vendees, is also a minor and that his interests have also to be considered. By the negligence disclosed in this case this minor, Riasat Khan, has secured a valuable right, and I am unable to see any justification to deprive him of that right for the simple reason that the plaintiff in the case is also a minor. It has not been contended that article 10 of the Limitation Act did not apply.

I accordingly accept this appeal and, setting aside the order of remand, restore the decree of the trial Court dismissing the plaintiff's suit with costs throughout.

Appeal dismissed.

1924 Lahore 231.

HARRISON, J.

Ghulam Mustafa—Appellant.

v.

Ghulam Sadiq and others—Respondents.

Mis. F. A. No. 811 of 1922, decided on 30th November, 1922, from the decree of Senior Sub-Judge, Amritsar, dated 7th February, 1922.

Civ. Pro. Code, S. 104 (f) and Sch. II, Para 21 (2)—Order filing an award—Appeal lies.

'Order filing the award' does not mean the order by which the arbitrators are directed to send their award or bring their award to Court before the objections have been lodged or disposed of; but an order filing an award is passed after the objections have been disposed of and an appeal does lie from an order filing an award even if in consequence the decree has to be set aside. In this connection the provisions of S. 104 (f) should be observed and paragraph 21 (2) Sch. II of the Code should be treated as a dead letter. [P. 231, C. 2.]

Abdul Aziz and *Badaruddin Kureshi*—for Appellant.

Niaz Ali—for Respondents.

Judgment:—The plaintiffs applied under article 20 of the second schedule of the Civil Procedure Code to have an award given by arbitrators filed. The defendants raised various objections. These were gone into by the Senior Subordinate Judge and disposed of in his order, dated the 7th February, 1922, which concluded as follows:—

"I accordingly grant a decree in terms of the award and order defendant to pay to plaintiff a sum of Rs. 32 as costs of these proceedings."

From this order the defendant Ghulam Mustafa has lodged this appeal under section 104 (*f*). Mr. Niaz Ali raises a preliminary objection that the appeal does not lie and that if it does, it is barred by time. He points out that there is no appeal from the decree which was eventually drawn up. He contends first that the order filing the award must mean the order by which the arbitrators were directed to send their award or bring their award to Court before the objections had been lodged or disposed of. In the second place, he objects that there is no order in so many words filing the award.

The first point is disposed of by the wording of paragraph 21 of schedule II, which makes it quite clear that the order filing an award is passed after the objections have been disposed of. His second objection is technically correct and it would obviously have been better if the Senior Subordinate Judge has consulted the Code and passed an order in the correct terms. There can, however, be no doubt that his order is tantamount to an order filing the award and that this is what he meant by saying, "I grant a decree in terms of the award."

Mr. Niaz Ali further contends that under paragraph 21 (2), as no appeal lies from a decree there can be no appeal from the order. This question has been exhaustively gone into in *Ram Ditti* v. *Amar Singh* (1), and it has been decided that an appeal does lie from an order filing an award even if in consequence the decree has to be set aside. The judgment of Rattigan, J., explains the difficulty which arises from there being apparently two contradictory provisions in the Code, and as one must be ignored he explains that the provisions of section 104 (*f*) should be observed and paragraph 21 (2) of the Code should be treated as a dead letter.

In arguing on the merits of his appeal Mr. Abdul Aziz has confined himself to three points and has dropped the remaining grounds of appeal. The first is, that the terms of the reference were clear and directed the arbitrators to give an award

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(1) (1911) 103 P.W.R. 1911=172 P.L.R. 1911=123 P.R. 1912=10 I.C. 512.

regarding the property, moveable and immoveable, left by the two brothers, Abdul Rahman and Muhammad Ali, whose descendants are now disputing over the partition. They came to a finding that Abdul Rahman in his lifetime had sold his one-half share to his son and nephew and Counsel urges that this was beyond the scope of the reference inasmuch as they were not empowered to hold that before his death Abdul Rahman had parted with his property. There is, in my opinion, no force whatever in this contention. They had to deal with the property which had belonged to the two brothers and they were quite right in coming to the decision, if satisfied with the correctness of the same, that one of the brothers had parted with the whole or a part of his share during his lifetime.

The second point was that, although there were seven parties to the reference the shares of two only have been defined. The remaining five are the younger brothers and sisters of Ghulam Ali, all of whom are represented by Mr. Niaz Ali. They are quite satisfied that their shares should be left joint, and, therefore, the present appellant has no grievance and the matter is no concern of his.

The third point pressed is that the award did not go far enough and did not deal with certain shares in a shop held by the descendants of the two brothers. It does consider this shop inasmuch as it explains that this is *naya harobar* and was not included in the property held by the two brothers. It was, therefore, outside the scope of the reference and the arbitrators were quite right in leaving it alone.

The other grounds of appeal, including the alleged misconduct of the arbitrators have been definitely given up.

Finding that there is no force whatever in the appeal, I dismiss it with costs.

Appeal dismissed.

1924 Lahore 232.

HARRISON, J.

Kadir Bakhsh—Appellant.

v.

Allah Ditta—Respondent.

S. A. No. 826 of 1922, decided on 30th November, 1922, from the decree of District Judge, Multan, dated 1st December, 1921.

Custom (Punjab)—Sister's son excludes collaterals.

A sister or sister's son excludes collaterals in the third degree among Lak Jats of the Muzaffargarh District.

B. A. Cooper—for Appellant.

Rama Nand—for Respondent.

Judgment:—Plaintiff in this case, who is the collateral in the third degree of one Piara, a childless proprietor, who died in 1918, brings this suit against his sister's son in whose name mutation has been effected, and contends that by custom he has a better right to succeed. The suit has been dismissed by both the lower Courts, and he now comes up on second appeal with a certificate; and the only point to be decided is whether, amongst Lak Jats of the Mazaffargarh District, collaterals in the third degree exclude sister's sons.

The plaintiff relies on one published decision of this Court, a decision, of the District Judge of Muzaffargarh and one of the Munsif of Muzaffargarh. These refer to particular cases in which it was decided that, among Minwal Jats, Gorab Jats and Gurab Jats, collaterals exclude sisters. He also relies on the reply to question No. 10 in the *Riwaj-i-am* which shows that in some cases sisters have been excluded and in other cases collaterals have been excluded by them.

As against this evidence there is the customary Law of the Muzaffargarh District, question No. 21, in which it is clearly laid down that sisters or their descendants succeed in preference to the grandfather or his descendants. In two reported decisions of the Chief Court, *Alam* v. *Nur* (1) and *Sawan* v. *Sahib Khatun* (2), which related to Mithu Jats and Panwar Jats of the Muzaffargarh District, it was held that sisters succeed as against collaterals. Similarly, in Exhibit D-1 sisters and their sons have been preferred and in Ex. D-11, a judgment of Wilberforce, J., (No. 151 of 1912) it was held that among Mouda Jats sisters excluded collaterals in the third degree. The position of the females generally, as has been clearly established in many rulings, is very much stronger in the western Punjab than elsewhere.

I find that it is fully established by the evidence on the record that a sister or

(1) (1905) 62 P.R. 1905=145 P.L.R. 1905.
(2) (1909) 44 P.R. 449=69 P.W.R. 1909=76 P.L.R. 1909=2 I.C. 71.

sister's son excludes collaterals in the third degree among Lak Jats of the Muzaffargarh District, I, therefore, dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 233 (1).

SCOTT-SMITH, J.

Kishen Singh and another—Petitioners.

v.

Emperor.

Cr. Rev. No. 865 of 1922, decided on 5th October, 1922, from the order of Sessions Judge, Gujranwala, dated 22nd March, 1922.

Punjab Excise Act (I of 1914), S. 61 (1) (a) and (2) (a)—Owner of the house where liquor is brought does not become a joint possessor.

Bringing of liquor by *A* to *B*'s house does not make *B* a joint possessor nor can the latter be said to have joined in the sale if he asks *A* to bring the bottles and hands them or the money to him.

Anant Ram—for Petitioners.

Judgment:—The evidence for the prosecution has been believed by the two lower Courts and I see no sufficient reason for rejecting it in revision. At the same time, I do not think the difference between the cases of Kishen Singh and his son Khushal Singh has been sufficiently considered.

Khushal Singh was a licensee for sale of liquor at Gakhar and it was he according to Attar Singh, witness, who brought the 8 bottles of liquor to Gujranawala. The possession, therefore, was his exclusively and the mere fact that he brought the liquor to Kishen Singh's house does not make the possession joint of himself and Kishen Singh. Further, I do not think it can be held that the latter joined in the sale merely because he called to his son to bring 2 bottles and because the money was handed to him. I, therefore, accept the petition so far as Kishen Singh is concerned, and setting aside his conviction and sentence acquit him. Fine if paid to be refunded. As far as Khushal Singh is concerned the petition is rejected.

Petition partly accepted.

1924 Lahore 233 (2).

SCOTT-SMITH, J.

Nihala and others—Petitioners.

v.

Kazan Singh—Respondent.

Civ. Rev. Pet. No. 905 of 1922, decided on 27th March, 1923, from the decree of Munsif, Small Cause Court, Hoshiarpur, dated 7th January, 1922.

Civ. Pro. Code, O. 9, r. 13—Where defendant proves absence of service, plaintiff must prove that defendant knew of the decree within thirty days of defendant's application to set it aside—Limitation Act, Art. 164.

Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be used. Where the defendant proved that a summons was never sent to be served on him and there was no rebuttal, and his application to set aside *ex parte* decree was made on the 37th day after the decree was passed. *Held*, under the circumstances, the onus was upon plaintiff to show that defendant had knowledge of the decree more than 30 days before date of his application. [P. 233, C. 2.]

Sagar Chand—for Petitioners.

Cooper—for Respondent.

Judgment:—In my opinion the summons was not duly served upon the defendant. Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be used and it cannot be said that this was done in the present case. The defendant led evidence to show that a summons was never sent to be served on him and there is no rebuttal. He made his application on the 37th day after the *ex parte* decree was passed, and, under the circumstances, I consider the *onus* was upon plaintiff to show that defendant had knowledge of the decree more than 30 days before date of his application.

I allow the revision and, setting aside the *ex parte* decree, remand the case for re-trial on merits.

Costs in this Court to follow the event.

Revision allowed,
Decree set aside.

1924 Lahore 234.

SCOTT-SMITH AND MOTI SAGAR, JJ.

Allah Din—Appellant.

v.

Emperor—Respondent.

Cr. App. No. 945 of 1922, decided on 18th January, 1923, from an order of Sessions Judge, Jhelum, dated 5th October, 1922.

Penal Code, S. 300, Excep. (1), and S. 326—Attack and hurt with a pen knife after provocation—Offence of grievous hurt committed.

The accused had been married to a girl and the ceremony of *tabdil parchat* was to take place on the day of the occurrence. On that day accused found the deceased taking the girl away from the village where the ceremony was to take place and when he remonstrated with her she told him that the girl would not be married to him that day and abused him. The accused thereupon attacked both the girl and the deceased with pen-knife and inflicted one injury on each in the abdomen. The girl however survived. *Held*, that the accused acted without premediation, used only a pen-knife and gave each woman only one injury and therefore there is a very strong presumption that he neither intended to cause death nor such bodily injury as he knew to be likely to cause death and that the provocation given to him by the deceased was sufficiently grave and sudden to bring him within the first exception in section 300. *Held*, further that when the accused wounded the women in the abdomen with a pen-knife he certainly intended to cause them grievous hurt. [P. 234, C. 2.]

Judgment:—Allah Din has been convicted by the Sessions Judge of Jhelum of the murder of Mt. Nek Bakht and of the attempted murder of Mt. Imam Bibi and has been sentenced for the former offence to transportation for life and for the latter to ten years' transportation, the sentences to run concurrently. Appeals were presented to this Court by Counsel who, however, has not attended to argue. We have perused the record. The facts are fully and clearly stated in the judgment of the learned Sessions Judge and need not be repeated.

In our opinion the questions which arise are the following:—

(1) Whether Allah Din, appellant, intended to cause the death of Mt. Nek Bakht or, as found by the Sessions Judge, intended to cause such injury as he knew to be likely to cause death.

(2) Whether he received such grave and sudden provocation as would reduce the offence from one of murder to one of culpable homicide not amounting to murder.

(3) Wnether he attempted to murder Mt. Imam Bibi.

(4) Having regard to the facts that Allah Din acted without premeditation, used only a pen-knife and gave each woman only one injury, we think there is a very strong presumption that he neither intended to cause death nor such bodily injury as he knew to be likely to cause death. Upon the second question the learned Sessions Judge admits that there was an altercation between the appellant and the women that abuse was exchanged, and that provocation was certainly given but holds that the provocation was not so grave and sudden as to bring the appellant within the first exception in section 300, Indian Penal Code. Now Allah Din had been married to Mt. Imam Bibi and it has been found by the Court below that the ceremony of *tabdil parchat* was to have taken place on the day of the occurrence in Chakwal. The appellant found Mt. Nek Bakht taking the girl away from Chakwal and when he remonstrated with her, she told him that the girl would not be married to him that day and abused him. Even if she did not say to him that if he wanted to marry anybody he could go and marry his mother, we still think that, under all the circumstances, the provocation given to him was sufficiently grave and sudden to bring him within the first exception in section 300 of the Indian Penal Code. These being our findings, it is clear that the conviction for murder cannot be maintained, nor can the conviction for the attempted murder of Mt. Imam Bibi be maintained. At the same time, we have no difficulty in holding that when Allah Din wounded the women in the abdomen with a pen-knife he certainly intended to cause them grievous hurt, and we, therefore, accept the appeals and, setting aside the convictions and sentences, convict him instead of two offences of voluntarily causing grievous hurt under section 326, Indian Penal Code. Though he had undoubtedly grave provocation, it was a very serious offence for him to stab helpless women in the abdomen with a knife. We consider it necessary to impose a severe sentence, and we sentence him to seven years' rigorous imprisonment including three months' solitary confinement for each offence, and direct that the sentences shall run concurrently.

Sentences altered.

1924 Lahore 235.

CAMPBELL, J.

Chhaprolia—Appellant.

v.

Emperor—Respondent.

Cr. A. No. 959 of 1922, decided on 24th January, 1924, from the order of Special Magistrate, Delhi, dated 31st July, 1922.

Evidence Act, S. 133—Evidence of accomplice against whom case is withdrawn under S. 494, Crim. Pro. Code—Less reliable than one to whom pardon is tendered under S. 337, Crim. Pro. Code.

An accomplice witness against whom the case has been withdrawn under section 494 is less reliable than one to whom a pardon has been tendered under S. 337. The latter is pardoned conditionally and has before him, as an inducement to stick to the truth, the constant apprehension that his statement may be used against him in a trial hereafter if he is proved to have given false evidence on any point. On the other hand the accomplice witness who has not received a conditional pardon is a freer man in the witness-box since he is not pinned down to a previous statement which may be based on tutored material by the fear of prosecution for prejury if his deposition in Court does not correspond exactly with that previous statement. [P. 235, C. 2.]

Ram Lal—for Respondent.

Judgment:—This judgment will dispose of the separate appeals of 13 persons out of 17 convicted by Lala Gopal Das, Special Magistrate, with section 30 powers, Delhi, of an offence under section 400. Of these persons Gopal Chamer, Shola Khatik, Badam Khatik, Babbam Khatik, Babu Khatik, and Sirya Jaga have appealed through Counsel Mr. Rustomji. The other appellants, Hansa, Chhaprolia, Zahria, Belia, Rai Singh *alias* Ashrafi Lal, Ajab Singh and Ram Chand have appealed through Jail. Of this second group, the last named is also a Khatik, and the others are members of criminal tribes being described as Bhatu Sansis with the exception of Chhaprolia who is described as a Kanjar Sansi. Of three persons who have not appealed Harnam is Kanjar Sansi and Ram Dial and Kala are Bhatu Sansis.

The principal prosecution witnesses are three approvers Jahangir, Bhatu Sansi, Ram Lal, Kanjar Sansi, and Bannun, Kanjar Sansi.

These three approvers, were not given conditional pardons but the cases against them were withdrawn by the Public Prosecutor with the leave of the Court under section 494, Criminal Procedure Code, and they were then tendered as witnesses. Mr. Rustomji has raised the objection, that they were not competent witnesses, but authority is against him on this point and all that he can point to is the opinion of the minority Judge in the Full Bench decision *Queen-Empress* v. *Hussein Haji*(1).

It can, of course, be argued with reason that an accomplice witness, against whom the case has been withdrawn under section 494, is less reliable than one to whom a pardon has been tendered under section 337. The latter is pardoned conditionally and has before him, as an inducement to stick to the truth, the constant apprehension that his statement may be used against him in a trial hereafter if he is proved to have given false evidence on any point. Moreover, there is at least one previous statement by which his veracity can be tested. On the other hand, it might be claimed that the accomplice witness who has not received a conditional pardon is a freer man in the witness-box since he is not pinned down to a previous statement which may be based on tutored material, by the fear of prosecution for perjury if his deposition in Court does not correspond exacty with that previous statement.

In any case, however, an accomplice's evidence must be regarded as tainted, particularly in such a case as is now before me, and it must be corroborated in material particulars before it can be acted upon. In regard to the extent of corroboration necessary it must be remembered, as the learned Counsel for the Crown has pointed out, that when persons are charged with belonging to a gang, associated for purposes of habitually committing offences, the only direct evidence that can be tendered is that of accomplices. Other witnesses can testify to association on certain isolated occasions, but the man who gives evidence of habitual association for a particular purpose must almost inevitably be an accomplice. [His Lordship then discussed the evidence as to corroboration and then proceeded to discuss the case of each accused separately.]

Shola.—This man is Khatik, and Mr. Rustomji, who appears for him, concedes that the case against him is very strong. He is said to have been, what the learned Counsel for the Crown has described as the head of the disposals branch of the

gang. A quantity of stolen property was found in his house which has been proved satisfactorily to represent four offences by evidence to rebut which no attempt has been made. There is also a good deal of evidence of association with the approvers and other appellants against whom I find the charge to be established and there are no reasons for interfering either with the conviction of this man or with the sentence imposed upon him of five years' rigorous imprisonment. His appeal is dismissed.

Badam and *Babbam.*—These are two Khatik brothers who are found by the Magistrate to be step-brothers of Shola. They were not arrested in company of any of the other appellants, and the only evidence of how they were arrested is a statement that they were arrested by the Meerut Police. They are said by Muhammad Din to have been seen by him in the Meerut garden with the other accused, but Muhammad Din is only a boy of 14 and his identification is not to be relied upon implicitly without the support of other independent evidence. Another witness Hira (P. W. No 72), who has been produced to speak also of association in the Meerut garden does not mention these persons. Two witnesses, Budha and Astam Khan, mention their being seen at Shola's shop in Meerut with the other accused. But if they were relatives of Shola, it is quite possible for them to have been there for innocent purposes, and the mere fact of their relationship cannot create a presumption that they were associated with Shola in crime. The corroborative evidence against these persons in my opinion is insufficient. I accept their appeals, set aside their convictions and sentences and order that they be released.

Babu.—This man also is a Khatik and was arrested at Shola's shop with Shola and Ram Chand, appellants. The evidence of Muhammad Din that he was seen at the Meerut garden with the other appellants is corroborated by Hira whom there is no reason to disbelieve. It has already been remarked that this Meerut garden is proved to have been the head-quarters of the gang by reason of the discovery in it of the proceeds of several robberies. Another witness, Budha, deposes to having seen the appellant on more than one occasion at Shola's shop with other accused persons. He is corroborated by Astam Khan (P. W. No. 91). It is true, as argued by Mr. Rustomji that the ear-ring found in Babu's possession is not proved to have been stolen property by evidence other than that of the approvers, but there is, in my opinion, sufficient corroboration of the approvers' statement that he was a member of the gang. I dismiss his appeal.

Ram Chand.—This is another Khatik and his case is similar to that of Babu. He was arrested with Shola and Babu at Shola's house. It is true, that Budha (P. W. No. 92) says that he was not one of the persons whom he saw frequenting Shola's shop, but Hira and Muhammad Din depose to his having been on various occasions in the Meerut garden, and there is no explanation of why he, a Khatik should go there and consort with Sansis. The evidence of the witnesses who prove him to be of good character does not rebut the prosecution case and I dismiss his appeal.

Gopal.—He is a Chamar who is alleged by the approvers to have participated in one substantive offence only. He is stated by Astam Khan (P.W. No. 91) to have been seen at Shola's shop, but this witness is not clear that he was in the company of other accused. Muhammad Din, the boy, says that he used to come to the Meerut garden; but may have been mistaken. The defence is, that Gopal was arrested by mistake for another man named Gopal, and it is conceded by the learned Counsel for the Crown that the corroborative evidence against this man is very slight. I accept this appeal, set aside the conviction and sentence and order that he be released.

Sirya.—He is described as a Jaga and there is direct evidence of his being concerned in a substantive offence under section 395 for which he is under trial in the Sessions Court at Meerut. His defence was mainly directed to proving an *alibi* in regard to that offence, but, as the learned Magistrate has held, there is no apparent reason for disbelieving the evidence of Mt. Rammo, Achpal and Mt. Mathri, who are his own relatives that he was one of the offenders. There is also evidence that he consorted with the approvers and the others accused at Shola's shop and in the garden. There are no grounds for interference with his conviction, but I do not see why he should have been given a more severe sentence

than Shola. He is alleged by the approvers to have been a prominent member of the gang, but there is no corroboration of special prominence and he is not a previous convict. I accept his appeal to the extent of reducing the sentence to one of five years' rigorous imprisonment with three months' solitary confinement.

Belia.—According to the approvers this man participated in a large number of offences. He was arrested in the Meerut garden. He is proved to have absconded on the 3rd of August, 1920, from a Settlement of Criminal Tribes. There is evidence of association on other occasions and he makes no allegations against the approvers. He has been once on security under section 110 but he is not a previous convict. At the same time, the fact that he absconded from the Settlement corroborates the other evidence that he deliberately devoted himself to a career of crime. There is no reason to interfere with this man's conviction. As regards the sentence, he has been classified with other appellants who are previous convicts and I do not appreciate the necessity of giving him a more severe sentence than Shola and Sirya. I accept his appeal to the extent of reducing the sentence to one of five years' rigorous imprisonment with three months' solitary confinement.

Zahria alias *Balwanta.*—This man also absconded from a Criminal Tribes Settlement and he also was arrested in the garden. There is corroborative evidence of association on other occasions. He has two previous convictions, one under section 379 and the other under section 392, Indian Penal Code. In his petition of appeal he alleges, that he is old and feeble; but he was medically examined in the Court below and found sound and healthy for his age. There are no grounds for interference with his conviction or with his sentence, and I dismiss his appeal.

Rai Singh alias *Ashrafi Lal.*—This man, as already stated, was arrested red-handed and his statement to the contrary is not supported by any evidence. He escaped from a Criminal Tribes Settlement with Hansa, appellant, on the 18th May, 1921, and the date of his arrest is 1st June. It might be questioned whether in this short time, he could be held to have become a regular member of the gang. On this point there is evidence that Hansa, who was arrested on the 14th June in the garden, stuck to the gang up to the end, and it is a reasonable explanation of the escape of the two men from the Settlement, that they intended to embark upon a systematic career of crime. There is evidence that he was associated with the other accused for a day or two before his capture, and the connection between the approvers and certain articles left behind by the offenders at the time when Rai Singh was captured is established. These circumstances corroborate the approvers' evidence of his membership of the gang, and the fact of his two previous convictions under section 379, Indian Penal Code, is also to be borne in mind. There are no grounds for interference in this case and I dismiss the appeal. His plea of blindness raised in his petition of appeal was dealt with in the lower Court by medical examination. He was found to be developing senile cataract, but at the time of the examination he could see quite well enough for all ordinary purposes.

Hansa.—As stated above, this man absconded from a Criminal Tribes Settlement with Rai Singh on the 18th May, 1921. He was arrested in the garden in the raid of the 14th June, 1921. There is other evidence of association, notably the statement of Chhajju (P. W. No. 104), who although an accomplice has been independently corroborated in most important details of his evidence. Hansa is a previous convict under section 380, and I consider the approver's evidence to be sufficiently corroborated. I dismiss his appeal.

Chhaprolia.—This appellant absconded from the Dhariwal Criminal Tribes Settlement from the 29th March, 1921, on which date he was given leave and did not return. He is a previous convict, having one conviction under section 380. He was arrested in the Meerut garden and there is a good deal of evidence of his association with the approvers and the other appellants on other occasions. The defence evidence produced by him supported the case for the prosecution in that it showed that he was not at the Dhariwal Settlement on the dates of the offences in which he was alleged by the approvers to have participated. He alleged enmity with Jahangir, approver, but failed to prove it. I dismiss his appeal.

Ajab Singh alias *Baldeva*—This man has three previous convictions, two under

section 379, and one under section 401, Indian Penal Code. When the garden was raided he was found to have hidden in a cook-house and was captured there. According to his own statement he absconded from a Criminal Tribes Settlement, but there is no other evidence to that effect. Several witnesses testify to his association with Jahangir, approver, and the others at the garden and at Shola's shop. He now alleges, that he was on bad terms with the approver Jahangir, but he did not state this in the Court below. The case against him is sufficiently corroborated and I dismiss his appeal.

Appeal dismissed.

1924 Lahore 238 (1).

SHADI LAL, C.J.

Matu Ram and others—Petitioners.

v.

Emperor.

Cr. Rev. No. 1045 of 1922, decided on 18th November, 1922, from Sessions Judge, Karnal, in No. 1326, dated 12th July, 1922.

Penal Code, S. 186—Obstruction to helpers of the public officer is not obstruction to public officer.

The Naib-Tahsildar of Income Tax visited the village of the accused where he was told by the Lambardars that the petitioners kept several shops and ought to be assessed. A dispute then took place between the Lambardars on the one side and the petitioners on the other and it was alleged that the Lambardars were in the course of the quarrel assaulted and beaten and thereupon they declined to render any help to the Naib Tahsildar. *Held*, that the mere fact that the Lambardars so refused to render help to the Naib Tahsildar, does not amount to obstruction to the Naib Tahsildar, within S. 186. [P. 238, Cs. 1 and 2.]

Balwant Rai—for the Petitioners.

Order:—The petitioners have been fined under section 186, Indian Penal Code, for voluntarily causing obstruction to a Naib-Tahsildar in the discharge of his public functions, the contention urged on their behalf is, that on the facts found by the learned District Magistrate the case does not fulfil the requirements of the aforesaid section.

It appears that the Naib-Tahsildar of Income Tax visited the village of the petitioners where he was told by the *Lambardars* that the petitioners kept several shops and ought to be assessed. A dispute then took place between the *Lambardars* on the one side and the petitioners on the other, and it is alleged that the *Lambardars* were, in the course of the quarrel, assaulted and beaten. They thereupon filed complaints under section 323, Indian Penal Code, but these cases have been compounded.

The case, out of which this application for revision arises, relates to the alleged obstruction offered to the Naib-Tahsildar. Now, the learned District Magistrate finds that the Naib-Tahsildar was obstructed because the *Lambardars*, "whom he called in, as he had a right to do, to aid him in his investigation were assaulted and beaten." I consider that this is a far-fetched view. The learned Magistrate does not find that the petitioners either assaulted the Naib-Tahsildar or made any gestures, and I am not prepared to hold that the mere fact that the *Lambardars* who were assaulted, declined to render any help to the Naib-Tahsildar in his investigation can be viewed as an obstruction caused by the petitioners.

Accordingly, I hold that the guilt of the applicants under section 186, Indian Penal Code, has not been made out and, setting aside their convictions, I direct that the fines be refunded to them.

Conviction set aside.

1924 Lahore 238 (2).

HARRISON, J.

Teja Singh and others—Appellants.

v.

Emperor.

Cr. App. No. 1084 of 1922, decided on 29th January, 1923, from the order of the First Class Magistrate at Jullunder, dated 31st October, 1922.

Crim. Pro. Code, S. 403—Penal Code, S. 411—Trial in Native State bars further trial for the same offence on the same facts in British India.

Where accused committed dacoity in British India but were caught with the stolen property in a Native State and were tried and convicted under S. 411 by the State Court and had undergone the period of imprisonment, *held* another trial for the same offence on the same facts in British India was barred.

Ram Lal—for Appellants.

M. Saleem—for Respondent.

Judgment:—A dacoity is said to have been committed in Mauza Kotla Heran,

in the Jullunder District, on the night between the 14th and 15th March, two head of cattle being removed. On the following day three men were captured in the adjoining state of Kapurthala and were sent up for trial in the Kapurthala State, on a charge under section 394, Indian Penal Code. The Sessions Judge of Kapurthala discharged them under section 394 but convicted them under section 411 and sentenced them to undergo two years' rigorous imprisonment. On appeal the High Court of Kapurthala reduced the sentence to one year, which they have undergone. On being released from jail they were once more sent up for trial in the Jullunder District on a charge under section 395, Indian Penal Code, and have been convicted and sentenced to undergo imprisonment for a further period of five years. They appeal, urging that section 403, Criminal Procedure Code, bars the present trial and I have heard arguments at length on the question of whether the Kapurthala Sessions Judge had jurisdiction to try the case for an offence alleged to have been committed in British India. It is by no means clear whether the accused are the subjects of His Highness the Maharaja of Kapurthala or of the King-Emperor, there being one passage in the Magistrate's judgment in which they are apparently considered to be State subjects while on the other hand they are described as residents of a village in the Amritsar District. It is, I find, unnecessary to go into this point as the evidence on which they have now been convicted as opposed to the evidence on which they were convicted of receiving stolen property is neither convincing nor sufficient. It consists of the statement of one witness, a youth of 17 named Banta Singh (P. W. No. 2) who says that the six men broke into the enclosure on a dark night and removed the cattle, that he followed and saw them, that they then came back and tied him up. After they had been arrested with the stolen property he is said to have identified them. Agreeing with the Sessions Judge of Kapurthala and being by no means satisfied with this evidence, I find that the only offence established against these men is under section 411, Indian Penal Code, of receiving stolen property. It is not contended that the Kapurthala Courts had not jurisdiction to try these men, whether they were British subjects or not for the offence committed in Kapurthala where they were caught with the stolen property. The only remaining point urged by Counsel for the Crown is that the Magistrate has rightly held that the Sessions Judge was not a competent Court inasmuch as there had been no committal proceedings and that this was a very serious irregularity. In the judgment of the High Court this point was noticed but it was held that it did not vitiate the proceedings. This being so, I think the Magistrate was going beyond his province in questioning the jurisdiction of the Sessions Judge.

The accused, therefore, having once been tried and convicted and having undergone a sentence for the offence, they could not be tried again. I, therefore, accept the appeal and acquit them.

Appeal accepted.

1924 Lahore 239.

MARTINEAU and MOTI SAGAR, JJ.

Gulab Rai-Sagar Mal—Defendants-Appellants.

v.

Nirble Ram-Nagar Mal—Plaintiffs-Respondents.

F. A. No. 1112 of 1922, decided on the 10th May, 1923, from the order of the Senior Sub-Judge, Delhi, dated 18th October, 1922.

Contract Act, S. 78—Property in goods passes on payment of price.

Where a Manchester firm sent goods to India for defendant firm at Delhi, and after shipment sent the drafts and shipping documents to the National Bank of Delhi with the directions for the delivery to the buyer on payment of the money to the Bank, *held*: that property in the goods did not pass to the buyer till the money was paid to the Bank. (3 Ex. D. 164, 1923 Bom. 125, *Foll.*)

Tek Chand—for Appellants.

Sardha Ram—for Respondents.

Judgment:—The plaintiffs in this case sue for the price of 15 bales of white shirting, sold by them to the defendants, of which the latter refused to take delivery. The goods had been imported by the firm of Mulchand-Ganga Bishen of Delhi from England under a contract made on the 19th November, 1919, with Haji Ali Akbar and Sons of Manchester. Mulchand-Ganga Bishen sold them to Chiman Ram-Badari Narain, who sold them to the plaintiffs, who on the 21st December, 1919

sold them to the defendants. The contract between Haji Ali Akbar and Sons and Mul-chand-Ganga Bishen was a D. P. Contract, that is to say, the documents were to be delivered against payment, and the drafts and shipping documents were sent by Haji Ali Akbar and Sons to the National Bank of India at Delhi. The amount due was paid to the Bank by Chiman Ram-Badri Narain on the 25th January, 1921. The main questions in the case are :—

(1) Whether the property in the goods passed to the defendants,

(2) Whether the goods offered to the defendants were in accordance with the contract, and

(3) Whether the defendants waived their right to object to them.

The lower Court has found on all these points in favour of the plaintiffs and has passed a decree for Rs. 31,050-12 with interest thereon at the rate of 10 annas per mensem from the date of suit till realisation. The defendants appeal.

The bill of lading has not been produced and there is nothing to show in whose name it was made out, and as the contract between the shippers and importers was a C.I.F. contract it is contended for the respondents, and it has been held by the lower Court, that the property in the goods passed to Mul Chand-Ganga Bishen on shipment. On the other hand the contention for the appellants is that as the goods were not to be delivered to Mul Chand-Ganga Bishen until they were paid for the property in the goods, which were not ascertained at the time of the contract, did not pass till payment was made to the Bank by Chiman Ram-Badri Narain on the 25th January, 1921. We think this contention is correct. It was held by *Cotton, L.J. in 3 Ex. D. 164* (referred to on page 377 of Benjamin's "Sale of Personal Property," fifth edition) that when the seller deals with, or claims to retain, the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the buyer. The same rule is given on page 206 of Remfrey's "Sale of goods in British India, and in a recent judgment of the *Bombay High Court* [*Ford Automobiles, Ltd.* v. *Delhi Motor and Engineering Co.* (1)] it is mentioned as a well established rule.

But even though the property in the goods did not pass to Mul Chand-Ganga Bishen or their indentors till January 1921, this fact does not relieve the defendants from liability. The appropriation of the goods to the contract, which was at first conditional, became final when payment was made, and if it was assented to by the defendants the sale to them became complete and the property in the goods passed. In that case the suit for the price of the goods is maintainable and we cannot accede to Mr. Tek Chand's contention that because the plaintiffs had not become the owners of the goods at the time when they made their contract with the defendants their only remedy is to sue for damages for breach of contract.

Now the invoices and the shipment patterns were sent by Mul Chand-Ganga Bishen to Chiman Ram-Badri Narain, who forwarded them to the plaintiffs, who in turn forwarded them to the defendants. The plaintiffs wrote to the defendants on the 30th September, 1920, asking them to pay for the goods, and the defendants on the 8th October sent the following reply (page 2) :—

"In reply to yours dated 30-9-1920 we "are sorry that as the exchange rate in "these days is in great disorder we can't "pay and take delivery of the above goods. "If you will pay on our behalf we shall not "be liable for that. We will pay at once "as soon as the exchange will be in order."

The plaintiffs wrote again to the defendants on the 16th November asking them to take up the goods, but apparently received no reply. They wrote again on the 15th January, 1921, informing them that if they did not retire the drafts by the 17th the drafts would be retired on the defendant's account and risk. The drafts were retired by Chiman Ram-Badri Narain on the 25th January, 1921, as already stated, and on the 29th January a Notary Public named Sham Bihari Lal (P.W. 3.) went on behalf of the plaintiffs to the defendant's shop and tendered delivery orders for the goods.

(1) 1923 Bom. 125=25 Bom. L.R. 1140=70 Ind. Cas. 138.

Ganeshi Lal, a member of the defendant's firm, who was at the shop, would not take the delivery orders, but said a reply would be sent in two or three days after he had consulted his father. No reply, however, was sent and it was not till the plaintiff's *Vakil* wrote a letter on the 2nd February calling upon the defendants to pay for the goods that the defendant's *Vakil* wrote a week later repudiating all liability. We think it is clear that the defendants signified their assent to the appropriation of the goods to the contract, first by their letter of the 8th October, 1920, in which they pleaded only the unfavourable exchange as a reason for not taking up the goods, again by their silence on the receipt of the plaintiff's letters of the 16th November, 1920, and the 15th January, 1921, and lastly by not having signified their dissent within a reasonable time after the delivery orders had been tendered to them on the 29th January, 1921.

It is next contended that the goods offered are not according to the contract. The goods ordered were of qualities Nos. 432, 436 and 440. It does not appear that the goods supplied were not of the qualities ordered, but by an arrangement between the shippers and the importers the goods, instead of being stamped with the Nos. 432, 436 and 440 as stipulated in the importer's confirmatory indents of the 3rd December, 1919, were stamped with the Nos. 1432, 1440 and 1436 respectively. The defendants contend that on account of this variation they were entitled to reject the goods. The contention is supported by (1921) 2 K.B. 519, and if the defendants when asked to take up the goods had refused on the ground of variation from the terms of the indent, they would have had a good case. But although the Nos. 1432, 1440, and 1436 were mentioned in the invoices sent to the defendants the latter never took any objection to the goods, and from their letter P. 2 to which we have referred above, as well as from the fact of their not replying to the plaintiff's subsequent letters asking them to take up the goods, it is only reasonable to conclude that they waived any objections which they might have taken. The suit is not barred by the Specific Relief Act as is contended in the 9th ground of appeal, and we would hold therefore that the defendants are liable for the price of the goods.

The only other matter for consideration is the rate at which interest should be charged. The decretal amount includes interest at 8 per cent. per annum, and it is contended that the interest should not exceed 6 per cent. which is the rate mentioned in the third clause of the importer's indent. That clause, however, relates only to what would be payable on account of loss incurred on resale. 8 per cent. per annum is the rate of interest charged by the Bank, and we see no reason why the defendants should not be required to pay interest at that rate. 10 annas per cent. per mensem is also not excessive rate to allow for interest on the decretal amount.

We would therefore dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 241.

SCOTT-SMITH AND MOTI SAGAR, JJ.

Indar Singh—Appellant.

v.

Emperor.

Cr. App. No. 1165 of 1922, decided on 23rd January, 1923, from an order of Sessions Judge, Gujranwala, dated 21st November, 1922.

Criminal trial—Evidence— Non-production of some of the prosecution witnesses—Credibility of other prosecution witnesses is not affected.

The mere fact of the non-production by prosecution of some of their witnesses cannot in any way affect the credibility of the witnesses that have been produced. [P. 243, C. 1.]

Morton—for Appellant.

Zafrulla Khan—for Respondent.

Judgment:—On the 27th July, 1922, one Kharak Singh, a Hindu *Jat* of the village Shahpur, in the Gujranwala District, is alleged to have been murdered by Indar Singh, appellant. The crime is said to have been committed early in the morning shortly after sunrise, and to have been witnessed by one Partap Singh (P. W. No. 2) who was planting paddy in a field close by and by certain other persons who have also been produced as witnesses on behalf of the prosecution in this case. The exact reason of the quarrel which led to this unfortunate incident is not known, but it is clear from the evidence of Radha Kishen, Patwari (P. W. No. 10), and Sant Singh, Zaildar (P. W. No. 7), that Indar Singh, appellant, and his father Rup Singh were not on good

terms with Kharak Singh, deceased, owing to a dispute with regard to field No. 780 which was in the possession of the deceased and his uncle for a large number of years, though recorded in the Revenue papers as the property of Rup Singh, father of the appellant. It is also in evidence that, shortly before the murder was committed, a *panchayat* was held in the village to settle this dispute but that it did not lead to any successful results. An amicable settlement not having been arrived at, an application was made by Rup Singh to the Revenue Authorities on the 18th July, 1922, that the boundary lines of his fields should be demarcated. This application is on the record, and is marked as Ex. P. H. It appears that, before this application could be disposed of, the deceased Kharak Singh arranged to sow paddy in the field in dispute, and with this object in view engaged the services of one Ilahi Bakhsh, Changar (P. W. No. 4), so that even if Rup Singh succeeded in the application made by him to the Revenue Authorities, he might not be able to get immediate possession of the field in question. This conduct on the part of the deceased evidently appears to have been resented by Indar Singh and his father Rup Singh and it is alleged that on the morning of the 27th July, 1922, when Kharak Singh was taking paddy plants to his field, he was followed by Indar Singh and Rup Singh and when the former came near his field, he was struck several blows from behind by Indar Singh with a *Chhavi* which the latter had in this hands. Partap Singh (P. W. No. 2) saw this, and raised an alarm which brought Rukin Din (P. W No. 3), Sundar Singh (P. W. No. 5) and Ilabi Bakhsh (P.W. No. 4) towards the spot. None of these witnesses, however, went near the spot, nor did any one of them make any serious effort to arrest the accused, as it is alleged that the appellant threatened to inflict injuries upon them also if they dared to interfere. Kharak Singh was killed on the spot, and then the accused is alleged to have run away. After his departure the witnesses went up to the place where Kharak Singh was lying and found that he had already succumbed to his injuries.

Partap Singh then went to the *thana* and lodged the First Information Report in which he distinctly mentioned the name of Indar Singh as the perpetrator of the crime. Investigations were at once started but Indar Singh could not be found. On the 30th July, 1922, however, Indar Singh was arrested at the house of his sister at the village of Kullawala, and marks of certain injuries were found on his person. The medical evidence shows that these injuries had been inflicted by a blunt weapon, but there is no evidence to show as to how they were caused. It is possible that Kharak Singh had a *lathi* in his hand and that he struck Indar Singh with this *lathi* when he was attacked, but no evidence has been produced on this point and it is idle to speculate as to how these injuries were caused.

In the course of the investigation it was also found that the weapon with which the crime had been committed had been made over by the accused to one Mangal Singh. Mangal Singh has been produced as a witness, and has deposed to his having received the *kulhari* from Indar Singh on the day that the crime is alleged to have been committed.

On these facts Indar Singh was charged with the murder of Kharak Singh, and committed to the Sessions to take his trial under section 302, Indian Penal Code. The learned Sessions Judge has found him guilty of the offence of murder and has sentenced him to the penalty of death. The convict has appealed. His case is also before us under section 374 of the Criminal Procedure Code for confirmation of the sentence of death passed upon him by the Sessions Judge.

There is ample evidence on the record in support of the prosecution story as set out above. Partap Singh (P. W. No. 2), Rukin (P. W. No. 3), Ilahi Bakhsh (P. W. No. 4) and Sundar Singh (P. W. No. 5) all of whom are eye-witnesses of the crime, have appeared as witnesses in the case, and have stated that they saw the injuries being inflicted, and that it was Indar Singh who inflicted these injuries on the deceased. We see no reason to doubt the testimony of these witnesses, and the learned Counsel for the appellant has not been able to give any satisfactory reason why their evidence should be rejected.

It is contended by Mr. Morton that it was stated in the First Information Report that one, Labh Singh, *Lambardar*, and three other *Changars* had also reached the spot where the murder had been committed but that they have not been produced in evidence and that this fact detracts very

greatly from the value of the evidence which has been produced on behalf of the prosecution. In our opinion this contention has no force. Ilahi Bakhsh, one of the *Changars*, has been produced as a witness, and has deposed to his having seen the injuries being inflicted on the deceased. Labh Singh and the other two *Changars* have, of course, not been produced, but it is quite possible that they may have reached the spot after the attack was over and that they may not have been the actual eye-witnesses of the crime. In these circumstances, the prosecution may well have thought, that it was entirely unnecessary to produce these persons as witnesses in the case or there may be some other good reason for their non-production which is not clear from the record; but in any case it is clear that the mere fact of their non-production cannot in any way affect the credibility of the witnesses that have been produced.

The accused denied his presence on the spot and set up an *alibi*. He further stated that Partap Singh (P. W. No. 2) had more motive to murder Kharak Singh, inasmuch as the former was carrying on an illicit intimacy with Mt. Atri, aunt of the deceased, which was resented by the latter. The evidence as to *alibi* is most unconvincing, and we have no hesitation in holding that no reliance can be placed upon it. As to Partap Singh's intimacy with Mt. Atri, we do not find any evidence on the record in support of this plea, and we are clearly of opinion that the learned Sessions Judge was right in holding that the plea was palpably false and that it should be rejected.

The murder was a most brutal one, and the medical evidence shows that the deceased received as many as seven injuries on his head and other parts of his person, causing extensive fracture of the skull and resulting in his voice-box and his wind-pipe being cut. From the nature of the injuries inflicted and from the nature of the weapon used in inflicting them it is clear that the accused must have intended to cause death and that he was guilty of murder.

After a careful consideration of the entire evidence on the record, we hold that the offence has been fully established and that the appellant has been rightly convicted of murder. We uphold the conviction and, confirming the sentence of death, we dismiss the appeal.

Appeal dismissed.

1924 Lahore 243.

BROADWAY, J.

Pars Ram and others — Defendants-Appellants.

v.

Hukman Singh and another—Plaintiffs-Respondents.

S. A. No. 1192 of 1922, decided on 21st December, 1922, from the decree of District Judge, Hoshiarpur, dated 7th February, 1922.

Custom—Hindu Law—Custom should not be extended by logical process—Marriage between Khatri male and Brahmani woman is not valid.

It would be dangerous to extend custom by such logical processes as analogy. The final presumption in the case of high caste Hindus is in favour of such Hindus following their personal law, and the onus of proving any special or general agricultural custom lies on the person asserting its existence. It cannot be held that by custom general or special a marriage between a Khatri male and a Brahmani woman is valid. (50 P. R. 1900, *Dist.*) [P. 244, C. 1.]

Bishan Narain—for Appellants.

M. L. Puri and *Fakir Chand*—for Respondents.

Judgment:—Mahesha, a Khatri, holding land as an occupancy tenant, died leaving him surviving Mt. Gurjo and five sons by her. Hukman Singh and Harnam Singh, proprietors in the village, instituted a suit for a declaration that Mahesha had died without lawful issue and that they (the plaintiffs) were entitled to resume the occupancy tenancy. The defence set up was that Mt. Gurjo had been married to Mahesha and that this marriage was valid according to custom (in spite of the fact that she was a Brahmani woman) and that, therefore, the issue of the marriage was legitimate. The trial Court found that Mahesha, a Khatri, had gone through some sort of ceremony with Mt. Gurjo, a Brahmani, and had lived with her as man and wife ever since, but that such a marriage was illegal under Hindu Law and no custom had been proved which would render it legitimate. The plaintiffs were accordingly granted a decree as prayed.

Pars Ram and the other sons of Mahesha appealed to the District Judge, who after discussing the points raised, came to the conclusion that the *factum* of marriage itself was doubtful, but that whether an actual marriage had taken place or not it was invalid according to Hindu Law and there was not sufficient proof of any custom validating such a connection.

Pars Ram and his brothers have come up to this Court in second appeal having obtained a certificate under section 41 (3) of the Punjab Courts Act, III of 1914. I have heard Mr. Bishen Narain on their behalf. The certificate granted relates to a question regarding the validity of a custom, *viz.*, whether a union between a Khatri and a Brahmani woman does or does not constitute a valid marriage. Mr. Bishan Narain quite frankly and properly admitted that such a marriage was not sanctioned by Hindu Law. He also frankly admitted that the evidence on the record did not establish the custom set up. He contended, however, that inasmuch as it has been held that a Hindu Jat may by custom marry a Brahmani woman, a presumption should be raised in favour of a Khatri being able to do the same. He drew my attention to *Sahib Ditta* v. *Bela* (1) which relates to Hindu Jats alone. As pointed out in *Bhambul Devi* v. *Narain Singh* (2) it would be dangerous to seek to extend custom by such logical processes as analogy. According to Ellis' Notes on Punjab Custom, pages 17—19, the initial presumption in the case of high caste Hindus is in favour of such Hindus following their personal law, and the onus of proving any special or general agricultural custom lies on the person asserting the existence of such. In these circumstances, I am unable to hold that the appellants have made out any case on which it can be held that by custom, general or special, a marriage between a Khatri male and a Brahmani woman is valid.

I accordingly dismiss this appeal but, in the circumstances of the case, allow the parties to bear their own costs.

Appeal dismissed.

(1) (1900) 50 P. R. 1900.
(2) (1915) 8 P.L.R. 1916=39 P.R. 1915=103 P.W.R. 1915=29 I.C. 572.

1924 Lahore 244.

ABDUL RAOOF, J.

Mt. Amir Bibi—Appellant.

v.

Nur Muhammad—Respondent.

Mis. S. A. No. 1363 of 1922, decided on 16th January, 1923, from an order of District Judge, Jullundur, dated 4th March, 1922.

Civ. Pro. Code, O. 21, r. 33—Decree for restitution of conjugal rights against wife—Circumstances entitling use of discretion—Disobedience of decree—Effect.

Where in a case in which decree had been passed against the wife for restitution of conjugal rights, it was found that there was enmity between the parties, that for 18 or 19 years, the husband had been neglecting the wife and had not maintained her, and that the feelings were so bitter that the appellant preferred to go to jail rather than go to live with her husband, *held* that though under ordinary circumstances, the High Court would refuse to listen to the objections raised by wives married according to law, having regard to the special circumstances of this particular case and the fact that the tendency of modern legislation is against sending women to jail in civil matters, the Court would exercise the discretion vested in it under O. 21, r. 33. Where a decree for restitution of conjugal rights was disobeyed by the wife; *Held*, she should loss her right to maintenance as a punishment. [P. 245, C. 1.]

Shujauddin—for Appellant.

Judgment:—These two second appeals have arisen out of proceedings in execution of a decree for the restitution of conjugal rights. The following facts will disclose the nature of the suit and of the question arising for consideration in these appeals:—

Musammat Amir Bibi and Musammat Aziz Bibi are two sisters. They were married to two brothers Nur Muhammad and Ghulam Muhammad, respectively, about 18 or 19 years ago when they were minors. It appears that on their attaining puberty their parents refused to send them to their husbands and they themselves refused to live as the wives of their husbands. Two suits were, therefore, instituted for the restitution of conjugal rights against the two ladies and for an injunction against their father. The suit was resisted on the ground that the plaintiffs had neglected their duties as husbands, that they had not supported their wives, and that bitter enmity existed between the parties. The suits were, however, decreed and the decision was upheld by the appellate Court on the 6th November, 1920.

The successful plaintiffs put their decrees into execution. The judgment debtors filed objections to the effect that the decree-holders were in debt, that they were too poor to maintain their wives and that enmity existed between the parties. The Execution Court overruled the objections and made an order directing the judgment-debtors to comply with the decrees within two months. Appeals were preferred to the first appellate Court and to the High Court; but they were dismissed. The

judgment-debtors still persisted in disobeying the decrees passed against them and preferred to go to jail rather than to go to their husbands. The Munsif accordingly ordered that both Musammat Amir Bibi and Musammat Aziz Bibi be sent to jail for a period of six months and directed the decree-holders to pay Rs. 15 monthly on account of diet money for each of them. The judgment-debtors appealed. Their appeals have been dismissed. They have consequently come up to this Court in second appeal and Mr. Shuja-ud-din on their behalf has put forward the following facts for the consideration of the Court and has requested that this Court should exercise the power given under Order 21, rule 33, Civil Procedure Code, and should order the release of the appellants:—

(1) that the appellants were married while they were minors and had not the marriage been brought about by their father they would have had the right of repudiation on attaining puberty;

(2) that undoubtedly there is enmity between the parties;

(3) that for 18 or 19 years the husbands have been neglecting their wives and have not maintained them;

(4) that the feelings were so bitter that the appellants preferred to go to jail rather than consent to live with their husbands, and

(5) that they have already been in jail and this circumstance must have added to the already existing bitterness existing between the parties.

Under ordinary circumstances, this Court would refuse to listen to the objections raised by wives married according to law; but, having regard to the special circumstances of this particular case and the fact that the tendency of modern legislation is against sending women to jail in civil matters, I am prepared to exercise the discretion vested in the Court under Order 21, rule 33, Civil Procedure Code. Having disobeyed the decree the appellants shall have to maintain themselves and shall not be entitled to make claim against the husbands for maintenance. This, as observed in the case of *Bai Parwati* v. *Mansukh Jetha* (1) will be sufficient punishment. Though I am not prepared to go to the length to which the learned Judges who decided the above cited case went, I must hold that according to the tendency of the present times the power of sending women to jail should be sparingly exercised.

I accordingly accept the appeal and setting aside the decrees of the Court below disallow the prayer of the decree-holders to send the appellants to jail. I understand that the appellants have already been released from jail. It is not, therefore, necessary to make any further order in this respect. Having regard to the particular circumstances of this case I direct that the parties should bear their own costs.

Appeal accepted.

(1) (1920) 44 Bom. 972=22 Bom. L.R. 1097=59 I.C. 861.

1924 Lahore 245.

MARTINEAU, J.

Mahomed Shah and others—Appellants,

v.

Talabhussain Shah and another—Respondents.

Mis. S.A. No. 1609 of 1922, decided on 29th January, 1923, from the order of District Judge, Multan, dated 6th April, 1922.

Civ. Pro. Code, O. 41, r. 23 and S. 151—Remand to try case after amendment is not under r. 23.

O. 41, r. 23 applies only where the case has been decided by the First Court on a preliminary point. Appellate Court has power to make an order of remand under S. 151 only when O. 41, r. 23 does not apply. An order of remand to try the case after amending the plaint is not one under O. 41, r. 23. (44 Cal. 929, *Ref.*) [P. 246, C. 1.]

G. R. Khanna—for Appellant.

M. Sleem—for Respondents.

Judgment:—The plaintiffs were given a decree by the First Court for possession of three out of four *khasra* numbers which they claimed. Both parties appealed to the District Judge, who was of opinion that it would be difficult to fix the actual boundaries of the land in suit by reference to the field numbers given in the plaint to which no plan was attached and that any decree that might be passed in favour of the plaintiffs would be practically incapable of execution owing to vagueness. He held, therefore, that there was no proper plaint before the Court and, setting aside the decree, he remanded the case for a fresh decision to be given after the plaint had

been properly amended and a proper plan of the property placed on the file. From that order the defendants have appealed to this Court.

A preliminary objection is taken on behalf of the respondents that no appeal lies as the order of the lower appellate Court is one passed under section 151 of the Civil Procedure Code and not under Order 41, rule 23. This objection must prevail. Order 41, rule 23 applies only where the case has been decided by the First Court on a preliminary point, whereas it is clear that the First Court's decision in the present case has been given on the merits and not no a preliminary point. There is no doubt that an appellate Court has power to make an order of remand under section 151 where Order 41, rule 23 does not apply [see *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Limited* (1)] and it must be held that the order passed by the lower appellate Court in the present case was one under that section and is not appealable.

Counsel for the appellants urges that the appeal should be treated as a revision, but it does not appear to me that there is a sufficient reason for so treating it.

The appeal is dismissed, but as there would have been a good deal to say in the appellant's favour if the appeal had been heard on its merits, I direct that the parties shall bear their own costs in this Court.

Appeal dismissed.

(1) (1917) 44 Cal. 929=26 C.L.J. 49=21 C.W.N. 877=41 I.C. 598 (F.B.).

1924 Lahore 246.

CAMPBELL, J.

Mahomed Din—Appellant.

v.

Labh Singh and others—Respondents.

S. A. No. 1712 of 1922, decided on 7th February, 1923, from the decree of Senior Sub-Judge, Lahore, dated 18th March, 1922.

(a) *Custom (Punjab) — Alienation—Non-proprietor cannot transfer his right of residence.*

A non-proprietor in the village, Raja Jang cannot transfer his right of residence in the village without the consent of the proprietor.

(b) *Custom (Punjab) — Alienation — Proof — Previous sales not a sufficient proof.*

Several previous sales, even where the acquiescence by the proprietors is proved, do not necessarily imply a renunciation by the proprietors of their discretionary right to object to subsequent sales or establish a custom recognising such sales as authorised by the proprietors. [P. 247, C. 1.]

Tirath Ram—for Appellant.

Kishen Chand—for Respondent.

Judgment:—The suit was by certain proprietors in the village of Raja Jang for possession of a site sold by Faqiria, a sweeper by caste and a non-proprietor, to another non-proprietor Mubammad Din *tarkhan*. The plaintiffs based their suit on the allegation that such a sale by non-proprietor was not sanctioned by custom. The defendant pleaded that Raja Jang is a town and not a village, that non-proprietors have the right to transfer their sites and that Faqiria was full owner.

The trial Court decreed the suit and the decree was upheld on appeal by the Senior Subordinate Judge who granted a certificate for second appeal under section 41 (3) of the Punjab Courts Act stating the question regarding the existence of custom to be whether a non-proprietor in Raja Jang can transfer his right of residence in the village without the consent of the proprietor or has the right to remove *malbae*. The first contention is that the finding of the Courts below that Raja Jang is a village is erroneous. I find no evidence on the record of the population of this place except an obviously exaggerated statement by a defence witness named Hazara Singh that there are 5,000 or 7,000 houses. There is no evidence that any trade is carried on. According to other evidence produced by the defendants, there is no Municipal Committee and no Bazars. There are two primary schools and most of the houses are *Kachcha*. On the other hand, it is proved that the organization of Raja Jang is that of an ordinary prosperous village in the Punjab, and no grounds have been established on which it can be held to be a town.

The second contention is that the evidence on the record establishes the right of a non-proprietor resident to transfer his right of residence and the materials of his house without the consent of the proprietor of the site. The defendants produced in all three witnesses. The first, Sundar Singh, states that he being a *Zargar* purchased

sites from Nabi Bakhsh, weaver, and Faiz *Khoja*. He did not say whether the proprietors consented to the sale. He was unable to produce any sale-deed by Nabi Bakhsh but he exhibited the sale-deed of the purchase from Faiz *Khoja*. The second witness, Hazera Singh *Mirasi*, stated that he had purchased land from two Christian sweepers, Chandu and Roshan, and he produced the sale-deeds. He stated that no one objected and that he did not obtain permission to make the purchase from anybody. The third witness, Roshan, says that twelve or fourteen years ago he purchased four *marlas* from the defendants, that a sale-deed was executed, but that he had not brought it to Court.

This was all the evidence and it is manifestly quite insufficient. It has often been ruled by this Court, *e.g.*, in *Kharak Singh* v. *Alladitta* (1), *Maya Das* v. *Jan Muhammad* (2), *Buta Mal* v. *Ruldu* (3), *Khudayar* v. *Kapur Singh* (4) and *Harsahai* v. *Ganga Ram* (5) that several previous sales, even where the aquiescence by the proprietors is proved, do not necessarily imply a renunciation, by the proprietors of their discretionary right to object to subsequent sales or establish a custom recognising such sales as authorised by the proprietors. A number of deeds was presented to the trial Court after the hearing of the case had been concluded, but no proof was offered of their genuineness and they cannot be accepted as evidence that the transaction which they profess to record, in fact took place.

The appellant has failed to establish his case and the appeal is dismissed with costs.

Appeal dismissed.

(1) (1882) 85 P.R 1882.
(2) (1889) 13 P.R 1889.
(3) (1889) 40 P.R 1889.
(4) (1889) 60 P.R. 1889.
(5) (1900) 7 P.R 1900.

1924 Lahore 247.

ZAFAR ALI, J.

Raja Ram—Petitioner.

v.

Emperor—Respondent.

Cr. Rev. No. 1568 of 1922, decided on 15th January, 1923, from an order of Sessions Judge, Ludhiana, dated 28th August, 1922.

(a) *Public Gambling Act, Ss. 3 and 4—Warrant not containing description of gaming house is illegal.*

Where at the time when the Magistrate signed the place used as public gaming house is not stated at all in the body of the warrant, the warrant is not for the search of any particular place and therefore is illegal. (35 All. 1 and 11 P.R. 1895 Cr., *Ref.*) [P. 247, C. 2 and P. 248, C. 1.]

(b) *Public Gambling Act—Crim. Pro. Code, S. 556—Magistrate issuing warrant may not try when required to give evidence in the case.*

An accused under the Act has the right to examine the Magistrate issuing the warrant as a witness to enquire from him what was the information received by him and how the warrant was filled up and therefore he is materially prejudiced by the trial of the case by the very Magistrate who issued the warrant. [P. 248, C. 1.]

(c) *Evidence Act, S. 132—Section affords sufficient protection to a co-accused.*

The section affords sufficient protection to a co-accused to give evidence against his co-accused if compelled to do so and there is no ground why his evidence should be refused.

Nanwa Mal—for Petitioner.

Judgment:—Petition in Revisions Nos. 1568, 1627 and 1628 of 1922 arise out of two connected cases, one under section 4 and the other under section 3 of the Gambling Act (III of 1867), and will, therefore, be disposed of together.

The grounds for revision pressed before me are:—

(1) that the warrant authorising search of the house was illegal;

(2) that the Magistrate who issued the warrant should not have tried the case himself because the petitioners wanted to examine him as a witness in respect of the circumstances under which he issued the warrant, and

(3) that Mukandi Lal, petitioner, was prejudiced in his defence in the case under section 3, because the Magistrate refused to call and examine as a defence witness one Gora, who was a co-accused with him in the other case under section 4.

It is in evidence that Syed Ali Shah, Sub-Inspector of Police, gave information to the Magistrate on which the latter signed the printed form of the warrant and that Syed Ali Shah himself subsequently noted down at the bottom of it the boundaries of the house to be searched. It is, therefore, contended that it was not a legal warrant inasmuch as the house to be searched was not specified therein when the Magistrate signed it. I am of opinion that this contention must prevail. In the body of the warrant the place used as

public gaming house was not stated at all and, therefore, the warrant when signed by the Magistrate was not for the search of any particular place and was illegal. See on this point *Hargobind* v. *Emperor* (1), *Benwari* v. *Queen-Empress* (2).

As regards the second point the accused had the right to examine the Magistrate issuing the warrant as a witness to enquire from him what was the information received by him and how the warrant was filled up by the Sub-Inspector. Therefore, he was materially prejudiced by the trial of the case by the very Magistrate who had issued the warrant.

As regards the third point, the Magistrate's reasons for refusing to call Gora as a defence witness in Mukandi Lal's case are quite unsatisfactory. According to section 132 of the Evidence Act (I of 1872), "a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any..... criminal proceedings upon the ground that the answers to such questions will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind provided that no such answer, which a witness shall be compelled to give shall be proved against him in any criminal proceedings." This section provides sufficient protection for a witness compelled to give evidence in a case like the present and he could not, therefore, be excused as laid down in the section from appearing in the witness-box.

The irregularities stated above vitiated the trials and, therefore, I accept the revision and set aside the convictions and acquit the petitioners. The fines, if already received, will be refunded.

Revision accepted.

(1) (1913) 35 All. 1=10 A.L.J. 355=13 Cr. L.J. 892=17 I. C. 576.
(2) (1895) 11 P.R. 1895 Cr.

1924 Lahore 248.

MARTINEAU, J.

Shanti Sarup, minor, through Kharak Singh—Appellant.

v.

Firm Jahangir Mal-Bansi Mal—Respondents.

Mis. F. A. No. 1875 of 1922, decided on 10th February, 1923, from the order of Sub-Judge, Ludhiana, dated 7th June, 1922.

Civ. Pro. Code. O. 23. r. 3 and O. 43, r. 1—Order finding that there was no compromise is not appealable.

O. 23, r. 3 applies, as its very wording shows, only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise or satisfaction. Consequently an order finding that there has been no compromise is not an order under r. 3 of O. 23 and it is not appealable under r. 1 (*m*) of O. 43 as that rule presupposes the existence of an agreement, compromise or satisfaction. (42 I.C. 192, *Dist.*) [P. 249, C. 1.]

Dev Raj Sawhny—for Appellant.

Balwant Rai and *Badri Das*—for Respondents.

Judgment:—In this case the plaintiff's next friend alleged, and the defendants denied, that the dispute had been compromised. The lower Court has found on inquiry that there was no compromise. The plaintiff appeals, contending that he has a right of appeal under Order 43, rule 1 (*m*), Civil Procedure Code, whilst it is contended for the respondents that the right of appeal given by that rule from an order refusing to record a compromise applies only where a compromise has been found to have been made and the Court has for some reason refused to record it, and does not apply to a case in which it has been found that no compromise took place.

No authority on the point has been cited. Counsel for the appellant has referred to *Mahammad Idris Meah* v. *Mahammad Esahak* (1), but it does not appear that in that case the existence of the compromise was disputed.

It appears to me that the contention of the respondent's Counsel is correct. In the first place, I think that the words used in Order 43, rule 1 (*m*) "an order under rule 3

(1) (1917) 42 I.C. 192.

of Order 23, recording or refusing to record an agreement, compromise or satisfaction" pre-suppose the existence of an agreement, compromise, or satisfaction. In the second place rule 3 of Order 23 applies, as its very wording shows, only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise, or satisfaction. Consequently, the order passed by the lower Court in the present case finding that there has been no compromise is not an order under rule 3 of Order 23 and is not appealable.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

1924 Lahore 249 (1).

SHADI LAL, C.J., and MARTINEAU, J.

Tirkha and another—Appellants.

v.

Solhu and others—Respondents.

L. P. A. No. 11 of 1923, decided on 9th May, 1923, from the order of Harrison, J., dated 30th November, 1922, in C. S. No. 853 of 1922.

Registration Act, S. 17—Mortgage deed not signed by parties—Registration is not necessary.

A document of mortgage which is not signed by either of the parties to it, is clearly not an instrument creating any right and S. 17 has no application. [P. 249, C. 2.]

Amar Nath Chona—for Appellants.

Shamair Chand—for Respondents.

Judgment:—This is an appeal under the Letters Patent from an order of a Single Judge, remanding the case to the lower appellate Court for decision on the merits. The suit is for redemption of a mortgage which plaintiffs allege to have been effected by their predecessors for Rs. 137. They obtained a decree in the first Court, but on appeal the District Judge dismissed the suit on the ground that the entry in their account-book which was the basis of the suit was inadmissible in evidence for want of registration. On second appeal the learned Judge in Chambers held that the document in question did not require registration as it had not been executed by any one. We agree with this view. The document is not signed by either of the parties to the alleged mortgage, so that it is clearly not an instrument creating any right, and section 17 of the Registration Act has no application.

It is argued for the appellants that the respondents have changed their cause of action, inasmuch as in their plaint they were suing on the basis of the entry in the account-book, whereas later on their Counsel stated that the mortgage was oral and that the entry in the book was only a memorandum of the transaction. The respondents did not, however, in their plaint describe the entry in the book as a mortgage-deed or say that they were suing on its basis. What they said was, that the house had been mortgaged *barucz bahi*. These words are not very precise and are not necessarily inconsistent with the definite position subsequently taken up that the mortgage on which the suit was based was an oral one and that the entry in the book was merely a memorandum. There is, therefore, in our opinion, no force in the argument as to the cause of action having been changed, and we dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 249 (2).

SHADI LAL, C.J.

Roop Chand and others—Petitioners.

v.

Gokul Chand and others—Respondents.

Civ. Mis. No. 28 of 1923, decided on 10th February, 1923, from the Court of Senior Sub-Judge, Ambala.

Civ. Pro. Code, Ss 22 and 23—Transfer of case—Courts have got unfettered discretion in the matter but it should be exercised very cautiously.

In the matter of transfers the Legislature has left it to the unfettered discretion of the Court to determine upon the circumstances of each case whether or not the venue should be changed from the place where the plaintiff has laid it. But though there is no statutory provision governing the jurisdiction of the Court in a matter of this kind there are certain principles which are recognised by the English Courts as well as the Indian

Courts. The cardinal principle, the soundness of which is beyond dispute is that the plaintiff as the *arbiter litis* has a right to choose his forum and that the Court is exceedingly reluctant to interfere with this right. The jurisdiction conferred upon the Court is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. The mere circumstances that the defendant's convenience would be promoted by the transfer should not be regarded as an adequate ground for depriving the plaintiff of his right to file his suit in any Court allowed by law but if the defendant establishes a manifest preponderance of convenience in his favour the Court would be justified in granting his prayer. [P. 250, Cs. 1 and 2.]

Sheo Narain—for Petitioner.

Manohar Lal—for Respondents.

Order :—On the 26th June, 1913, the parties entered into a contract at Jagadhari in the Ambala District, for the purpose of carrying on timber business in partnership. It is common ground that the plaintiffs, who reside at Jagadhari, were to finance the business, and that it was to be managed by the defendants, who belong to Kankhal in the Saharanpur District. The defendants also undertook to keep the accounts of the partnership and to submit a weekly statement thereof to the plaintiffs at Jagadhari.

It appears that for nearly nine years the parties worked together amicably, but they have now fallen out. The plaintiffs have consequently brought an action in the Court of the Subordinate Judge at Ambala for the dissolution of the partnership and the rendition of accounts; but the defendants, while admitting the jurisdiction of the Ambala Court to try the action, contend that the balance of convenience is in favour of the venue being changed to Saharanpur. They have accordingly made the present application under section 22, read with section 23 (3) of the Civil Procedure Code, asking this Court to determine that the suit shall proceed, not in the Ambala Court, but in a Court of competent jurisdiction at Saharanpur.

Now, a comparison of section 22 of the present Civil Procedure Code with section 20 of the Code of 1882 makes it clear that, while the latter required that the Court must be satisfied that justice was more likely to be done by the suit being instituted in some other Court before it interfered with the right of the plaintiff to choose his *forum*, no such provision is to be found in the present Code. The Legislature has left it to the unfettered discretion of the Court to determine upon the circumstances of each case whether or not the venue should be changed from the place where the plaintiff has laid it and it has wisely refrained from attempting to crystallise this discretion into definite formula. Though there is no statutory provision governing the jurisdiction of the Court in a matter of this kind, there are certain principles which are recognized by the English Courts as well as the Indian Courts. Now, the cardinal principle, the soundness of which is beyond dispute, is that the plaintiff as the *arbiter litis* has a right to choose his *forum*, and that the Court is exceedingly reluctant to interfere with this right. The jurisdiction conferred upon the Court is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. I am not prepared to accede to the proposition that the mere circumstance that the defendant's convenience would be promoted by the transfer should be regarded as an adequate ground for depriving the plaintiff of his right to file his suit in any Court allowed by law; but I recognize that if the defendant establishes a manifest preponderance of convenience in his favour, the Court would be justified in granting his prayer.

Coming now to the substance of this case, I find that there is no question here of the plaintiffs abusing the process of the Court or harassing the defendants. The application rests, as stated above, solely upon the ground of convenience, and I do not think that the applicants have succeeded in making out a clear case of preponderance of convenience such as would justify an exercise of my discretionary jurisdiction. It would, no doubt, be more convenient for the defendants to have the action tried at Saharanpur. They reside in that district and probably a large number of their witnesses belong to various places in that district and in the neighbouring districts where the major portion of the business was transacted. The plaintiffs, on the other hand, reside in the Ambala District and a large portion, if not the whole, of their evidence is only obtainable there. But the determining factor, in my opinion, is that the contract of partnership was admittedly entered into at the plaintiffs' place of residence, and it was there that the defendants were required to submit an account of the business carried on by them. It is to be observed that the action brought by the plaintiffs requires

the defendants merely to discharge, in the presence of the Court, the duty which they had undertaken to perform outside the Court.

The nature of the action, moreover, shows that the determination of the issues arising between the parties will depend mainly upon documentary evidence, and that oral evidence will play only a subsidiary part. The defendants will probably be required to produce the books of the partnership, but it would not add materially to their inconvenience if they take them to Ambala instead of Saharanpur.

I have bestowed my careful consideration upon the case, but I am not prepared to hold that the defendants have shown any sufficient cause for depriving the plaintiffs of the right which the law undoubtedly confers upon them. I must, therefore, dismiss the application with costs.

Application dismissed.

1924 Lahore 251.

SHADI LAL, C.J., and MARTINEAU, J.

Ram Singh—Decree-holder-Appellant.

v.

Waryam Singh—Judgment-debtor-Respondent.

L. P. A. No. 55 of 1923, decided on the 21st May, 1923, from the order of Campbell, J., in Civ. App. No. 1170 of 1922, dated 11th February, 1923.

Civ. Pro. Code, S. 2 (11)—Suit against Mahant not in representative capacity—Succeeding Mahant is not a representative of first.

One *R* filed a suit against one *G* whom he had appointad to manage a property attached to that shrine on the ground that he had been guilty of mismanagement; and he accordingly got a decree for the removal of the defendant from the management of the shrine and for possession of the property attached to it. *G*, having died, the decree was sought to be executed against one *W*, who was in *de facto* possession of the shrine and the property appertaining thereto, but he claimed to be appointed Mahant of the shrine by the *Bhek*. *Held*: that whether this claim was well founded or not, there can be no doubt that he has not intermeddled with the estate of *G*. Whatever interest *G*, possessed in the shrine and the property attached to it came to an end on his death, and the shrine with its property cannot by any stretch of argument be deemed to be the estate of *G*, and therefore *W* cannot be treated as the legal representative of the deceased.

Bakshi Tek Chand and *Manohar Lal*, *Kanshi Ram* and *Kahan Singh*—for Appellant.

Nand Lal—for Respondent.

Shadi Lal, C. J.:—On the 20th November, 1916, the appellant, Ram Singh, brought an action against one Gurmukh Singh, on the allegation that the said Gurmukh Singh whom he had appointed to manage the shrine called Hareke Kalan Dera and the property attached to that shrine, had been guilty of mismanagement; and he accordingly asked for a decree for the removal of the defendant from the management of the shrine and for possession of the property attached to it. On the 24th of December, 1919, the Subordinate Judge granted a decree in accordance with the prayer contained in the plaint; but it appears that Gurmukh Singh had died about six months before the date of that decree. In view, however, of rule 6 of Order 22 of the Civil Procedure Code, the Court considered it unnecessary to bring his legal representative on the record before pronouncing the judgment.

The decree-holder now seeks to execute the decree against one Waryam Singh on the ground that the latter is the legal representative of the deceased judgment-debtor. Now, the expression legal representative, as defined in section 2 (11) of the Civil Procedure Code means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. It is conceded that Waryam Singh does not in law represent the estate of the deceased Gurmukh Singh, but it is contended that he must be deemed to be the legal representative of the deceased.

(1) because he has intermeddled with the estate of the deceased, and

(2) because Gurmukh Singh was sued in a representative capacity and his estate has devolved on Waryam Singh.

Now, it is true that Waryam Singh is in *de facto* possession of the shrine and the property appertaining thereto, but he claims that he has been appointed *Mahant* of the shrine by the *Bhek*. Whether this claim is well founded or not, there can be no doubt that he has not intermeddled with

the estate of Gurmukh Singh whatever interest Gurmukh Singh possessed in the shrine and the property attached to it came to an end on his death, and the shrine with its property cannot by any stretch of argument be deemed to be the estate of Gurmukh Singh. Waryam Singh may be a trespasser, but he has not intermeddled with any state belonging to the deceased.

Nor are we prepared to hold that Gurmukh Singh was sued in a representative character. A perusal of the plaint makes it perfectly clear that Gurmukh Singh was described therein as the manager of the Dera and its property, and that the acts complained of were done by him in his personal capacity and not as the representative of the congregation. As defendant to such a suit Gurmukh Singh represented no one but himself.

On neither of the grounds urged by the learned Counsel for the appellant can Waryam Singh be treated as the legal representative of the deceased Gurmukh Singh. It is, however, contended that as the decree directed, *inter alia*, the delivery of certain boxes containing documents belonging to the appellant, the defendant Waryam Singh must be regarded as an intermeddler with the estate of the deceased in so far as these boxes are concerned. This point was not raised before the single Judge, and cannot, therefore, be agitated in an appeal under the Letters Patent.

For the aforesaid reasons we concur in the conclusion of Mr. Justice Campbell and dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 252.

MOTI SAGAR, J.

Bishen Singh—Petitioner.

v.

Emperor.

Cr. Rev. No. 73 of 1923, decided on 23rd February, 1923, from an order of Additional, District Munsif, Lyallpur, dated 28th November, 1922.

Penal Code, S. 447—Beating complainant in a field belonging to a third person does not constitute Criminal trespass.

One *B* trespassed into the fields of the accused. The accused remonstrated upon which *B* ran into an adjoining field belonging to one *S*. The accused went in pursuit, overtook him there and gave him a slight beating. *Held*, that no case under S. 447 has been established. First because the field into which the petitioner is alleged to have trespassed did not belong to the complainant *B*. And secondly there is no evidence of any interest on the part of the accused to commit an offence or to intimidate, insult or annoy any person. [P. 252, C. 2.]

Ram Chand Manchanda—for Petitioner.

Sagar Chand—for Respondent.

Judgment:—The facts are fully stated in the judgment of the learned District Magistrate and need not be recapitulated. One Boga trespassed into the fields of the accused. The accused remonstrated upon which Boga ran into an adjoining field belonging to one Sadra Din. The accused went in pursuit, overtook him there and gave him a slight beating. The accused was thereupon challaned by the Police under section 447 of the Indian Penal Code and on conviction sentenced to pay a fine of Rs. 100. On appeal his conviction and the sentence were maintained by the learned Additional District Magistrate. The accused has now come up in revision to this Court.

After hearing Counsel I am clearly of opinion that no case under section 447, Indian Penal Code, has been established against the petitioner. In the first place, the field into which the petitioner is alleged to have trespassed did not belong to the complainant Boga, and was not in his possession and it is very doubtful if section 447 could be held applicable to such a case. In the second place there is no evidence of any intent to commit an offence or to intimidate, insult, or annoy, any person which it is necessary to prove before a conviction under this section could be sustained. In my opinion, the case reported as *Chandi Pershad* v. *Evans* (1) was fully applicable and, following the rule laid down in that case, I hold that no case under section 447, Indian Penal Code, has been made out and that the petitioner is entitled to an acquittal. I accept the revision and setting aside the order of the Court below direct that the fine if paid should be refunded.

Appeal allowed.

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(1) (1895) 22 Cal. 123.

* * 1924 Lahore 253.

BROADWAY and FFORDE, JJ.

Autar Singh—Appellant.

v.

The Crown—Respondent.

Cr. App. No. 419 of 1923, decided on the 13th June, 1923, from the order of the Sessions Judge, Ferozepore, dated 15th February, 1923.

Evidence Act, S. 32 (1)—Statement must relate to the injuries by which death was caused.

Where the statements deposed to by a witness, and sought to be admitted under S. 32 (1) are said to have been made by the deceased 8 or 9 months before her death, and those narrated by another witness are alleged to have been made by the deceased about 10 days before the date when she is said to have been murdered, and the prosecution story is that she was accidentally shot by her husband, *held*: that the evidence is not admissible under S. 32 (1).

The sub-section applies to the class of statements made by a dying person as to the injuries which have brought him or her to that condition, or her circumstances under which those injuries came to be inflicted. The rule as to the admissibility of evidence under S. 32 (1) has worked ill in India. [P. 256, C. 1.]

C. Bevan Petman and *Manohar Lal*—for Appellant.

Jailal—for Respondent.

Fforde, J.:—The appellant Autar Singh has been convicted by the Sessions Judge of Ferozepore, under section 302, Indian Penal Code, of the murder of his wife Mt. Balwant Kaur and sentenced to death; and the appellants Harnam Singh and Kirpal Singh, the father and brother, respectively, of the first appellant, have been convicted under section 201, Indian Penal Code, of having caused the disappearance of evidence of the crime, and have been sentenced to five years' and three years' rigorous imprisonment, respectively. To sustain the conviction in any one of the three cases it must first of all be satisfactorily proved that Mt. Balwant Kaur was in fact murdered.

The story for the prosecution is that on the night of the 1st or early morning of the 2nd October, 1922, Autar Singh shot his wife dead with a revolver; that he with the help of his father and brother then removed the body in a bullock cart in the early hours of the morning to the cremation ground, which is a short distance from the scene of the crime, and there burnt it.

The story of the appellants on the other hand is that the deceased died suddenly in the course of the night of a somewhat rare form of cholera known as *gum haiza* and that the body was removed and cremated without unnecessary delay to avoid risks of contagion. They deny that funeral ceremony was carried out at the early hours alleged by the prosecution, but claim that it in fact took place between 8 and 9 on the morning of the 2nd, before a large crowd of villagers who assisted in the funeral ceremonies such as they were.

A great deal of evidence was produced to show on the one hand that the mode of disposing of the body at the cremation ground was in violation of the proper and customary procedure prescribed by the Hindu religion, while on the other hand it was sought to be proved that the procedure adopted was in accordance with the notions of advanced Sikhs.

I do not consider it necessary for the purposes of my judgment to deal with this class of evidence, nor do I consider it necessary to refer to the mass of testimony put forward by the prosecution to show the existence of grounds for enmity on the part of individual witnesses towards one another, or towards the accused on the one hand or the complainant and his family on the other.

The case for the Crown on the charge of murder depends, as the learned Government Advocate candidly admits, on the testimony of four persons, namely, Gabla, Rukna, Sayan, and Bahna. But the true vital witnesses are Gabla and Rukna. If we believe the story told by Gabla at the trial before the Sessions Judge, the fact that Mt. Balwant Kaur was shot dead with a pistol fired by the appellant Autar Singh is established beyond all question. And if Rukna's and Bahna's stories are also believed, there can be no reasonable doubt that the other two appellants are guilty of the offence of causing evidence of the crime to disappear. It is necessary therefore to scrutinize the testimony of the first two witnesses with the greatest care.

The account given by Gabla before the Sessions Judge is as follows:—

He had been employed by the appellant Autar Singh as his servant towards the end

of September, 1922, and was accustomed to stop at the appellant's house. On the night of the murder, *viz.*, the 1st of October, he was asleep in the courtyard of the house where the deceased and her husband were also sleeping some 7 or 8 paces distant, when he was awakened by the sound of a shot. He got up to find the deceased lying dead and her husband standing by her side with a pistol in his hand. Early in the morning of the 2nd, he went to his own house where he found his mother and his uncle Sayan. He told the latter that the appellant had shot the deceased with a pistol but he made no mention of the matter to his mother. A little later he returned to the house of the appellant and remained there three days and saw no one there during that time. He then went to the house of the appellant Kirpal Singh, which is in the same courtyard, and there stayed for a further 2 or 3 days, after which Kirpal Singh shut him up in a room for 3 days. After this he was taken by the three appellants to Jhindwali and sent back from there in charge of a *Teli* boy. Next he was taken to Indar Singh's threshing floor by Kirpal Singh and from there "a heavy man" took him to a hut where the *Thanedar* was. The *Thanedar* took down a statement from him and he was then taken to another village where a *Sahib* took down his statement. He adds that he was 2 or 3 days at Indar Singh's before he was removed from there. Indar Singh, I may mention, is a *lambardar* of Sherewala. He was called as a witness for the prosecution but although he gave some evidence, most of which was purely hearsay and should never have been admitted, he does not mention Gahla's name except a couple of times casually in cross-examination when he says "I saw Gahla at Sherewala when he was produced before the *Thanedar*" and again "Gahla was perhaps being examined at the time" the time being the 27th October. Gahla under cross-examination varies his statement in some details. Amongst other things he says that he was awake before he heard the shot and had been half-awake for about an hour. He also says that neither the deceased nor Autar Singh spoke before the shot was fired, and that the latter said nothing after firing the shot. He adds further, that the appellant and the deceased used to quarrel daily but he did not know what they used to quarrel about.

Now if we turn to the statement of this witness made before the District Magistrate, Colonel Coldstream, on the 16th of October or about $2\frac{1}{2}$ months before the above evidence was given, we find he there says that he was awakened by the noise of a pistol shot and found that Autar Singh had killed his wife; that she was lying on her back and blood seemed to be coming from her body on to the bed clothes. Autar Singh asked him if he was cold and put a *razai* over him and told him to go to sleep again, whereupon this remarkable boy promptly went to sleep. Next morning he went home, and in the morning his uncle Sayan came, and he told him what had happened.

It is at once seen that there are vital discrepancies between the two stories which I need not particularize as they speak for themselves.

The question as to the credibility of this supremely important witness Gahla does not depend only upon these two inconsistent narrations. This boy made a statement to the police on the 13th of October 1922, referred to in the judgment of the Court below. This statement, made 11 days after the morning of the alleged murder, is the first record of the matter taken by any person in authority and its material part is as follows:—

"On the night of the occurrence I slept in the house of Autar Singh. At night I heard the report of a firearm. I got up. Autar Singh at once put a *razai* on me saying that I was perhaps cold. I then fell asleep. In the morning I heard that the wife of Autar Singh had died that night."

This is the only version of the affair that the learned Sessions Judge thinks can be relied upon with any safety. In fact the learned Judge states that he will only rely upon the evidence of this witness to this extent: that he heard a shot and that Autar Singh covered him with a quilt. I entirely agree that this is the only part of this boy's evidence that can be said to be consistent, but at the same time I consider it highly dangerous to hold on such evidence that a murder has been committed and that Autar Singh is the murderer.

Before leaving this witness, I should point out that whereas in his cross-examination in the Sessions Court he alleges that "the accused and the deceased used to quarrel daily" in his evidence before the Committing Magistrate he states that he

not only heard of no quarrel between the accused and the deceased that night but that he had never heard of any quarrels between them.

It follows that if we cannot believe Gahla's story, the case for the prosecution is not improved by producing witnesses who say that they heard tales or remours to much the same effect as Gahla's finally edited version given at the trial. Most of such evidence is obviously inadmissible as offending against the most elementary principles of evidence, and should never have been allowed to have been given.

As to Sayan, his evidence is that Gahla told him much the same story that he told Colonel Coldstream. But, as I have already observed, if I cannot believe this version of Gahla's how does the production of a witness to say that Gahla told him the same tale help matters? If *A* tells me what I have reason to believe is a lie, the fact that *B* swears that *A* told him the same lie does not turn the lie into a truth. The learned Sessions Judge, however, attaches weight to Sayan's evidence as to what Gahla told him, though he does not believe the same story when Gahla swears to it in the witness box.

The witness next in importance to Gahla is Rukna. He purports to have heard a shot fired and to have seen shortly afterwards a human body removed in a bullock cart. According to this witness, when the body had been placed in the cart Harnam Singh came to the spot and asked whether there was any breath in the body and told the others to look carefully, whereupon the two persons in charge of the cart said; "*Bapu* there is no breath left, she was killed at once." This story is highly suspicious. The witness states that he was sleeping in the compound in question by permission of Harnam Singh himself, who gave him leave in person. Harnam Singh therefore knew he was there, and knowing that, and having just assisted in or come to know of the murder of his daughter-in-law, he deliberately supplies evidence of the crime to the strangers sleeping within his gate, and to make this evidence more definite and conclusive holds an incriminating conversation within ear shot of these strangers.

Moreover the rest of this witness's story is highly improbable and I am unable to believe that he and his friend Khaira were in that *haveli* at all on the night in question. The witness admits that he had never been to Sherewala in his life before or since this alleged occurrence. He was travelling with a couple of bullocks which he wished to sell. He says he sold one at Sammewali, but he does not suggest that he even attempted to sell the bullocks at Sherewala. It was not in his direct route and no satisfactory reason is given why he should have gone out of his way to visit that village on that particular night.

Khaira's evidence is even more fantastic and is utterly unworthy of credence.

The only remaining witness whose evidence is other than hearsay is Balena. This person claims to have seen the three appellants on one occasion at an early hour in the morning standing in the cremation ground of Sherewala throwing fuel on a fire. He explains his presence there by saying that he came to discuss some criminal case with his brother. Both he and his brother live at Chibranwali, but the brother cultivates land at Sherewala and goes there on occasions for 4 or 5 days at a time. The witness selected one of these inconvenient occasions to seek his brother. The story has all the appearance of a clumsy fabrication.

In addition to these four witnesses the prosecution have put forward two persons, Balwant Singh and his father Gurmukh Singh, who have given evidence of certain statements alleged to have been made by the deceased sometime prior to the date of her death. The statements deposed to by Balwant Singh are said to have been made by the deceased 8 or 9 months before her death, and those narrated by Gurmukh Singh are alleged to have been made on the 21st September, 1922, that is about 10 days before the date when she is said to have been murdered.

Now apart from any other objections which might be taken to the subject-matter of these statements, it seems to me quite obvious that they could not be made evidence in this case, seeing that they are statements made by a person who is dead, and, therefore could only be admitted if they could be shown to come within the provisions of section 32 (1) of the Indian Evidence Act.

The learned Government Advocate argues that they do come within these provisions being statements made by the deceased as to the cause of her death or as to the circumstances of the transaction

which resulted in her death. I feel constrained to say that I find it hard to believe that such a contention can be put forward seriously. The sub-section relied upon by the Government Advocate only applies to the class of statements known as dying declarations, that is to say statements made by a dying person as to the injuries which have brought him or her to that condition, or the circumstances under which those injuries came to be inflicted. In the case before us, assuming that the statements in question were in fact made, they were made in the one case many months, and in the other many days, before the cause of death.

According to the prosecution the cause of death was a shot fired from a revolver. A statement made by the deceased as to the firing of that shot or the circumstances under which it came to be fired would, of course, be admissible in evidence. The statement must be made by the person when he is dying from the result of the injury which caused his death, otherwise it is obviously not a dying declaration. In England there is the additional requirement that the injured person must be aware that he is dying, and the rule only applies in criminal cases and to the case of homicide, but in India the Evidence Act has done away with these two qualifications. In Mr. Justice Stephen's History of the Criminal Law in England the following interesting commentary appears on this rule of evidence as applied to India :—

"The rule is in many ways remarkable. It has worked, I am informed, ill in India, into which country it has been introduced together with many other parts of the English law of evidence. I have heard that in the Punjab the effect of it is that a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving his wound, thus using his last opportunity to do them an injury. A remark made on the policy of the rule by a native of Madras shows how differently such matters are viewed in different parts of the world. 'Such evidences' he said ought never to be admitted in any case. What motive for telling the truth can any man possibly have when he is at the point of death ?"

I have dealt perhaps at too great length with this point of evidence but the earnestness with which it has been pressed by the prosecution has made me feel bound to deal with it more fully than I would otherwise have done.

The learned Government Advocate has also relied on sections 6 and 8 of the Evidence Act as authorising the admission of this evidence. These sections, however, have obviously nothing to say to the class of evidence under discussion. Section 6 merely enacts the principles laid down in articles 3 and 8 of Stephen's Digest of Evidence, which deals with that class of evidence which comes under the doctrine of *res gestæ* and has nothing to say to the admissibility of statements made by persons who are dead. Similarly, section 8 of the Evidence Act applies the principles explained by Mr. Justice Stephen in article 7 of his Digest, and has no bearing on the topic under discussion.

For the reasons I have given I am clearly of opinion that the statements of Mt. Balwant Kaur deposed to by the witnesses Balwant Singh and Gurmukh Singh, are inadmissible in evidence and must be ignored.

The result is that there is no evidence before us of motive for the crime, but even if a motive had been established that would not carry the Crown case any further, as we have come to the conclusion that the evidence does not satisfactorily establish that Mt. Balwant Kaur was in fact murdered, however suspicious may be the circumstances surrounding her death and the disposal of her body.

I accordingly hold that the appeals of all three appellants must be accepted and the convictions and sentences of the Court below set aside.

Broadway, J.:—I agree. The appeals are accepted.

Appeals accepted.

1924 Lahore 257 (1).

HARRISON, J.

Badan Singh—(Accused) Petitioner

v.

The Crown.

Mis. Cr. Pet. No. 104 of 1923, decided on 19th September, 1923.

Crim. Pro. Code, S. 526—The Magistrate's having already expressed opinion in the case is a good ground—Transfer applications should not be lightly dealt with.

A case having once been dismissed on the report of the police by a Magistrate was resurrected in the form of a complaint at the suggestion of the Revenue Assistant. The Magistrate subsequently noted that as he had expressed an opinion on the case, he thought it better he should not try it. *Held*, that this was a good ground for transfer. Applications for transfer giving good reasons, if the allegations be correct, why a case should be transferred, require to be seriously dealt with and should not be casually brushed aside as *fazul*. [P. 257, Cs. 1 and 2.]

Nand Lal—for Petitioner.

Nemo—for the Crown.

Order:—Badan Singh applies for transfer of a criminal case which is pending against him on a complaint in the Court of Khan Bahadur Ahmad Hassan Khan, Revenue Assistant. A report has been called for on the allegations contained in the application and this establishes that most of these are quite correct. The case in question having once been dismissed on the report of the police by the Magistrate Ilaqa, was resurrected in the form of a complaint at the suggestion of the Revenue Assistant, who subsequently noted quite correctly that as he had expressed an opinion on the case, he thought it better he should not try it. In spite of this the case was sent to him by the District Magistrate for trial. On the application being made for transfer to the District Magistrate containing not one but several allegations which, if correct, necessitated a transfer, a brief order was written in vernacular to the effect that the application was *fazul*. The District Magistrate had been informed by the Revenue Assistant at an early stage that he had expressed an opinion on the case, and this, I can only suppose, he forgot at the time the order was written and signed with an illegible initial. I wish to point out to the District Magistrate that applications of this nature giving good reasons, if the allegations be correct, why a case should be transferred, require to be seriously dealt with and should not be casually brushed aside as *fazul*. Here it is clear that if the matter had been considered the District Magistrate would have been reminded of the facts by the contents of application and on these facts he could not have failed to pass an order of transfer.

I transfer the case to any first class Magistrate to whom the District Magistrate may send it, pointing out that the Magistrate Ilaqa, Pir Ghias-ud din and Khan Bahadur Ahmed Hassan Khan have both expressed opinions.

Petition allowed.

1924 Lahore 257 (2).

SHADI LAL AND LUMSDEN, JJ.

Emperor—Appellant

v.

Khanun—(Convict) Respondent.

Criminal S A. No. 343 of 1923, dated 12th June, 1923, from the order of the Sessions Judge, Shahapur at Sargodha, dated 13th December, 1922

(a) *Penal Code, S 353—Police on guard is a public servant in the discharge of his duty*

A constable was on duty at the judicial lock-up and while he was patrolling, the accused came up and entered into a conversation with certain under-trial prisoners who were detained in the lock-up. The constable prevented the accused from talking with the prisoners. Thereupon the accused not only abused the constable but also threw his shoe at him.

Held that accused was guilty of an offence under S. 353, Indian Penal Code. [P. 257, C. 1, and P. 258, C. 2.]

(b) *Prisons Act, S. 3 (2—Under-trial prisoner is a prisoner—Judicial lock up is a prison.*

An under-trial prisoner is a prisoner. A person committed to custody in pursuance of a warrant or an order of a Court exercising criminal jurisdiction, though not convicted, is a criminal prisoner within sub-S. 2) of S. 3.

A judicial lock up is a prison within the meaning of that expression used in the Prisons Act. [P. 258, Cs. 1 and 2.]

Kanwar Dalipp—for the Appellant.

Nemo—for the Respondent.

Judgment:—The facts, which are relevant to the question of law involved in this appeal, lie within a narrow compass. On the 9th November, 1922, a constable named Lutaf was on duty at the judicial lock-up situated in Sargodha, and while he was patrolling, the respondent Khanun came up and entered into a conversation with certain under-trial prisoners who were detained in the lock-up. The con-

stable prevented the respondent from talking with the prisoners. Thereupon the respondent not only abused the constable but also throw his shoe at him. Upon these facts the Magistrate convicted Khanun of an offience under section 353, Indian Penal Code, but on appeal the Sessions Judge has acquitted him of that offence and has convicted him under section 352, Indian Penal Code, instead, holding that the constable was not at the time of the assault, acting in the discharge of his duty as a public servant

We find it difficult to follow the judgment of the learned Sessions Judge. He concedes that communication with under-trial prisoners while "confined in a prison or outside a prison when they are in control of an officer belonging to the "prison" is prohibited ; but he thinks that a judicial lock-up is not a prison, and that a constable, while he is on duty at the lock-up, cannot be deemed to be a public servant acting in the lawful discharge of his duty as such public servant. Now, the word "prison" as defined in section 3 (1) of the Prisons Act (IX of 1894) means any jail or "place used permanently or temporarily, under the general or special "orders of a Local Government, for the "detention of prisoners, and includes "all lands and buildings appurtenant "thereto, but does not include (*a*) any "place for the confinement of prisoners "who are exclusively in the custody of the police....." It is clear that an under-trial prisoner is not a prisoner who is exclusively in the custody of the police, and that a judicial lock-up used for the detention of under-trial prisoners cannot be excluded from the category of a prison if it otherwise fulfils the requirements of the definition.

The vital question is whether an under-trial prisoner is a 'prisoner' and that question must be answered in the affirmative. A perusal of sub-sections (2), (3) and (4) of section 3 makes it absolutely clear that prisoners are divided into two classes (*a*) civil prisoners ; and (*b*) criminal prisoners; and that the latter are again sub-divided into "convicted criminal prisoners" and "unconvicted criminal prisoners". Indeed Chap. VI of the Act refers to unconvicted criminal prisoners expressly, and there can, therefore, be no doubt that a criminal prisoner is not necessarily one who has been convicted by a Court of law. A person committed to custody in pursuance of a warrant or an order of a Court exercising criminal jurisdiction, though not convicted, is a criminal prisoner within the meaning of sub-section (2) of section 3 and a place used for the detention of such a prisoner is a prison. We must, therefore, hold that a judicial lock-up is a 'prison' within the meaning of that expression used in the Prisons Act.

Now, section 42 of the aforesaid Act provides that a person, who communicates or attempts to communicate with any prisoner commits an offence punishable with imprisonment or fine. The constable, who was employed to guard the lock-up, was authorised to prevent the commission of an offence under section 42, and he was consequently acting in the lawful discharge of his duty when he was assaulted by the accused.

The offence committed by the respondent fulfils all the requirements of section 353, Indian Penal Code, and we accordingly accept the appeal and setting aside the judgment of the Sessions Judge, convict the respondent of an offence under section 353, Indian Penal Code. We, however, maintain the sentence imposed by the learned Judge, because the learned Counsel for the Crown admits that the reason why the Local Government invoked the jurisdiction of this Court was to obtain an authoritative pronouncement on the question of law and not to seek an enhancement of the sentence.

Appeal allowed.

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* 1924 Lahore 258.

LUMSDEN, J.

Mehr Chiragh Din—Accused-Petitioner

v.

The Crown—Respondent.

Cr. Rev. No. 398 of 1923, decided on the 12th May, 1923, from the order of the Sessions Judge, Multan, dated 29th January, 1923.

(a) *Crim. Pro. Code, S. 200—Failure to examine complainant is mere irregularity.*

The use of the word "shall" in S. 200 does not render an omission to examine a complainant an illegality as distinguished from a mere irregularity. (30 Cal. 923 and 2 P.R. 1912, *Appr.*). [P. 295, C. 2.]

(b) *Crim. Pro. Code, S. 195—Absence of formal complaint does not vitiate conviction when police officer asks for prosecution and desposes in this case.*

When a police officer asks that a person should be prosecuted under S. 211 for information given

to him and gives evidence himself in support of that charge, no serious irregularity can arise in the conviction of the accused in proceedings initiated upon that report. A report by police officer in a non-cognizable case is a complaint within the definition. (30 Cal. 910, 32 P.R. 1910 and 30 Cal. 285, *Dist.*; 40 Cal. 300, 22 Bom. 550, *Foll.*) [P. 260, C. 1.

Abdul Rashid—for Petitioner.

The Government Advocate—for Respondent.

Judgment:—The facts leading up to the criminal revision are as follows: During the night of the 18th and 19th December, 1921, two mares were stolen from the house of the petitioner. The latter followed up the tracks which, according to him, led past the house of the local Sub-Inspector of Police. For reasons which need not be detailed, the petitioner came to the conclusion that the Sub-Inspector would not assist him in respect of the theft and telegraphed to the Superintendent of Police alleging that the Sub-Inspector of Police had not only refused to record the case but was engaged in friendly communication with the thieves. An enquiry was held on receipt of this telegram with the result that the Deputy Superintendent of Police reported that the allegations made by the petitioner were entirely without foundation. Thereafter the Superintendent of Police recorded an order to the effect that as there was in his opinion ample evidence that an offence had been committed under section 182, Indian Penal Code, he sanctioned the prosecution of the petitioner under section 195, Criminal Procedure Code, for this offence. It was further directed that the necessary action should be taken without delay. In accordance with the terms of the order Natha Singh, the Sub-Inspector concerned, received instructions to submit an application by way of complaint and to append a calendar of the witnesess. These documents were prepared and submitted and were eventually produced before the Magistrate who, after recording the evidence, found the petitioner guilty and sentenced him to two months' rigorous imprisonment plus a fine of Rs. 500. Petitioner preferred an appeal to the Sessions Judge in whose Court various legal objections to the procedure were urged. The Sessions Judge has repelled these objections but adjourned the hearing of the appeal on the merits to enable the petitioner to move this Court on the revision side.

The only two points urged before me are:—

(*a*) that as there was no complaint within the meaning of section 4 of the Criminal Procedure Code, the Magistrate had no jurisdiction to try the case, and

(*b*) that as the Magistrate failed to examine the complainant under section 200, Criminal Procedure Code, all the subsequent proceedings were vitiated.

The latter objection is not, in my opinion, tenable. It is based on the assumption that the use of the word, 'shall' in section 200, Criminal Procedure Code, renders an omission to examine a complainant an illegality as distinguished from a mere irregularity. No authority, however, has been quoted to support this view, on the other hand the very decisions on which petitioner relies, 30 Cal. 923 and 2 P. R. 1912, clearly imply that such omissions amount to irregularities to which the provisions of section 537, Criminal Procedure Code, apply. In both the cases referred to, the objector was the complainant and it is easy to understand that a complainant who is not afforded an opportunity of supporting his written complaint by an oral statement may be prejudiced. In the present case it is the accused who is setting up a grievance. This grievance was not mentioned until the time of arguments in the Trial Court and there is a presumption therefore that it had not made itself felt prior to this late stage in the case. A somewhat analogous case is reported in 11 P. R. 1911 and it was then laid down that as the failure to comply with the provisions of section 200, Criminal Procedure Code, had not occasioned a miscarriage of justice, the irregularity was cured by section 537 (*a*) of the Criminal Procedure Code. In the present case no attempt has been made to show that the accused was prejudiced in any way and I have no hesitation in holding that the omission is only an irregularity which is covered by the section mentioned.

Petitioner's main contention is, however, that there was no complaint and that consequently the Magistrate had no power to take cognisance of the case. In support of this argument reference has been made to 30 Cal. 910, 32 P. R. 1910 and 30 Cal. 285. The first two authorities are not, however, in point. They deal with the question of complaints with reference to section 199, Criminal Procedure Code. That section is of a special nature. It restricts the power of the Courts to take

cognisance of matrimonial offences and prescribes that before a Court interferes there shall be a definite request in the shape of a complaint on the part of the injured party. On the other hand section 195, Criminal Procedure Code, does not lay down that any particular person should submit the complaint; provided that sanction has been obtained, the personality of the complainant is immaterial. The third authority on which the petitioner relies is also distinguishable as in that case no previous sanction had been obtained, nor did the public servant concerned (a peon) do more than lodge a report at the *thana*. In the present case the sanction of the Superintendent of Police was duly obtained and that officer directed that the necessary action should be taken on this sanction. The public servant concerned then drew up what is virtually a complaint and sent it up along with a calendar of witnesses to his immediate superior who had the documents presented to the Magistrate by the Court Inspector. The only thing that can be urged on behalf of the petitioner is that this complaint was not addressed to a Magistrate. In 40 Cal. 360 it was held that a recommendation for prosecution by a public officer under section 211 of the Indian Penal Code comes within the meaning of the word complaint as used in section 195, Criminal Procedure Code, as that section clearly contemplates prosecution at the instance of police officers. In the body of that judgment the Bench made the following further remarks: In

> any case when a police officer asks that a person should be prosecuted under section 211 for information given to him and gives evidence himself in support of that charge we cannot see that any serious irregularity can arise in the conviction of the accused in proceedings initiated upon that report.

Mutatis mutandis these remarks apply with equal force to the present case. In the Full Bench ruling 26 Bom. 150 it was held

> that a report by a police officer in a non-cognizable case was a complaint within the definition.

I agree with the learned Sessions Judge that the document (Ex. P. F.) is to all intents and purposes a complaint and that the Magistrate had jurisdiction to act upon it. The slight irregularity in form has not in any way prejudiced the petitioner.

It follows that this petition must be dismissed. The records will be returned to the Sessions Judge to enable him to dispose of the appeal on the merits.

1924 Lahore 260.

MARTINEAU, J.

Kapur Chand--Plaintiff-Appellant

v.

Chet Ram—Defendant-Respondent.

S. A. No. 664 of 1923, decided on 21st November, 1923, from the decree of the District Judge, Hoshiarpur, dated 4th January, 1923.

Civ. Pro. Code. S. 100—Question of construction of deed is one of fact.

Where admittedly the deed is on its face a lease and the question in dispute is merely whether the real contract between the parties was something different from the contract entered in the deed: *Held*, that the finding on this point is clearly a finding of fact. (37 I.C. 297, *Ref.*)

Badri Das—for Appellant.

Kanshi Ram—for Respondent.

Martineau, J.:—Ramditta, defendant 3, executed a lease by which he granted occupancy rights in 30 *Kanals* 7 *Marlas* of land to defendants 1 and 2 for a consideration of Rs. 2,100. The plaintiff sued for pre-emption, alleging that the land had really been sold, and the first Court decided in his favour, but the District Judge has held that the transaction was not a sale and has dismissed the suit. The plaintiff has preferred a second appeal.

It is contended that the lower appellate Court has overlooked important facts, but it does not appear to me that this is the case. The learned District Judge has mentioned in his judgment the various points on which the first Court had relied in support of its finding, with the exception only of the fact that the consideration for the grant of occupancy rights slightly exceeded the amount at which the local Commissioner has estimated the value of the land. Although that fact was not referred to in the learned District Judge's judgment, I see no reason to think that he overlooked it. It is probable that the Commissioner's estimate was not entitled to much weight in the face of the fact that rent was payable to the lessor. Counsel for the appellant points out that the rent (excluding revenue and cesses) was only 8/3/ *per annum* and not

Rs. 2, as stated in the lower appellate Court's judgment, but this is immaterial, for if the lessees were liable to pay rent the transaction was a lease, however small the rent may be. The learned District Judge attached great importance to the fact that mutation had been effected in accordance with the terms of the lease, Ramditta being still entered as the owner of the land, and that Ram Ditta had stated in Court that the transaction was a lease and that he retained the proprietary rights. These facts, together with the production of a receipt for rent, outweighed in the opinion of the learned Judge all other considerations, and he therefore decided that the land had not been sold. I hold that no evidence has been overlooked.

This being so the appeal must fail as the finding is one of fact. There is no question as to the construction of the deed, for admittedly the deed is on its face a lease and nothing more. The question in dispute is merely whether the real contract between the parties was something different from the contract entered in the deed, and the finding on this point is clearly a finding of fact. See *Ahmad Khan* v. *Alam Khan* (1).

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) (1916) 120 P.L.R. 1916=115 P.W.R. 1916=37 I.C. 297.

1924 Lahore 261.

MOTI SAGAR, J.

Abdul—Petitioner

v.

Ghulam Muhammad—Respondent.

Cr. Rev. No. 793 of 1923, from the order of Sessions Judge, Sialkot, dated 14th November, 1922.

Crim. Pro. Code, S. 517—Order must be passed at the close of trial and not subsequently.

Accused was charged with being in possession of a stolen bullock but acquitted, but no order was passed about the restoration of the bullock. After some days, the complainant applied to the Magistrate for restoration of the bullock and his application was allowed.

Held: the order was illegal. An order for the disposal of the property regarding which an offence has been committed can only be made upon the conclusion of the inquiry or a trial before any Criminal Court, and not on the application of a person subsequently made by him to the Court after the conclusion of the trial. [P. 261, C. 2, and P. 262, C. 1.]

Imam Din—for Petitioner.

Bihari Lal—for Respondent.

Moti Sagar, J.:—The orders of the Courts below in this case are clearly illegal and must be set aside. The facts are briefly these:—A bullock belonging to one Ghulam Muhammad went astray, and it was subsequently traced to the possession of the present petitioner Abdul. A report was made to the Police, and Abdul was consequently challaned under section 411 of the Indian Penal Code for receiving stolen property knowing it to be stolen property. Abdul's defence was that he had purchased the bullock in good faith from one Lal Din for Rs. 160 and that he did not know that it was stolen property. The Court found that this was so and acquitted Abdul of the offence with which he was charged. With regard to the ownership of the bullock, however, the Court did not pass any orders and held that as it had been recovered from the possession of the accused who had honestly acquired possession thereof, it should continue to remain in his possession. The accused was accordingly, called upon to furnish security in the sum of Rs. 400 in respect of the bullock, and he was ordered to keep possession thereof. Subsequently Lal Din from whom the bullock was alleged to have been purchased by Abdul was also challaned under section 414 of the Indian Penal Code, but acquitted. Then an application was made to Mr. Balwant Singh, Magistrate, who had tried the case of Lal Din that the bullock belonged to the complainant Ghulam Muhammad and that Abdul should be called upon to deliver possession of the same to him. The Magistrate held that the bullock belonged to the complainant, that it had been criminally misappropriated and then sold to Abdul by Lal Din or by some other person who was responsible for its criminal misappropriation. Possession of the bullock was accordingly ordered to be made over to Ghulam Muhammad, complainant. An application for revision of this order was filed in the Court of the Sessions Judge but dismissed.

It appears to me that the learned Sessions Judge has entirely overlooked the provisions of section 517 of the Code of Criminal Procedure under which an order for the disposal of the property regarding which an offence has been

committed can only be made upon the conclusion of an inquiry or a trial before any Criminal Court, and not on the application of a person subsequently made by him to the Court after the conclusion of the trial. In the present case no orders having been passed by the Court in respect of the disposal of the bullock on the conclusion of the trial of Abdul, the Court had no jurisdiction to pass orders at any subsequent time directing delivery of property to the complainant. The complainant certainly has his remedy by means of a civil suit, but till such suit is instituted and decided the bullock must remain in possession of the petitioner.

I accept the application for revision and set aside the orders of the Courts below directing delivery of the bullock to the complainant, Ghulam Muhammad.

Revision accepted.

1924 Lahore 262.

MOTI SAGAR, J.

The Crown—Petitioner

v.

Abdul Aziz and Nawab—Respondents.

Cr. Rev. No. 912 of 1923, decided on the 2nd July, 1923.

Crim. Pro. Code, S. 514—Conviction for causing hurt is sufficient to cause forfeiture of bond executed under S. 110, Crim. Pro. Code.

A bond to be of good behaviour can be forfeited on a conviction, of the person bound down, under S. 323 or 325, Penal Code. (6 P.R. 1915 (Cr.) and 10 P.R. (Cr.) 1915, *Foll.*)

But where two bonds have been executed one by the accused and the other by his surety, only one of the two can be forfeited and not both. (26 P.R. (Cr.) 1894, *Foll.*)

Moti Sagar, J.:—The facts are fully stated in the order of reference made by the learned Sessions Judge and it is not necessary to repeat them here at length.

On the 17th of June, 1922, the petitioner Abdul Aziz was ordered under section 110, Criminal Procedure Code, to execute a bond in the sum of Rs. 250 to be of good behaviour for a period of one year and to furnish a surety in the like amount. One Nawab stood surety for him and the usual bond for good behaviour was executed by both in Form XI of Sch. V of the Criminal Procedure Code. On the 26th of August, 1922, Abdul Aziz was convicted under section 323, Indian Penal Code, and sentenced to three months' rigorous imprisonment by Lala Chuni Lal, Sessions Judge of Rawalpindi. Shortly after, proceedings were started against the principal, Abdul Aziz and his surety, Nawab under section 514 of the Code of Criminal Procedure for the forfeiture of their bond. It was pleaded on their behalf that a conviction under section 323, Indian Penal Code, was not sufficient to justify a forfeiture of the bond to be of good behaviour. The learned Magistrate, however, did not give effect to this plea and ordered Abdul Aziz and his surety, Nawab each to pay a sum of Rs. 250 within a specified time. An appeal against this order was filed to the District Magistrate but dismissed. The learned Sessions Judge has now reported the case to this Court under section 438 of the Criminal Procedure Code.

In my opinion the learned Sessions Judge is right in holding that a bond to be of good behaviour can be forfeited on a conviction under section 323 or 325, Indian Penal Code. *Fatta* v. *Emperor* (1) and *Emperor* v. *Sher Singh* (2) are clear authorities in support of this view, and must be followed.

The next question for consideration is whether only one sum of Rs. 250 could be forfeited or whether both the petitioners could be called upon to pay a sum of Rs. 250 each. In my opinion only one sum of Rs. 250 could be forfeited and the order of the learned Magistrate calling upon the petitioners to pay an amount in excess of the amount secured by the bond is illegal. It has been held in *Kaku* v. *Queen-Empress* (3) that a bond contemplated by sections 112 and 118 of the Criminal Procedure Code is one bond for one amount and is discharged, on forfeiture, by the payment of the amount due by either the principal or the surety. The bond in the present case is clearly secured for the sum of Rs. 250 only and the amount secured in case of forfeiture could be recovered either from the principal or from the surety or from both, but in no case a sum exceeding Rs. 250 could be recovered under this bond. I order accordingly.

Revision accepted.

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(1) (1915) 6 P.R. (Cr.) 1915=16 Cr. L.J. 287=62 P.W.R. (Cr.) 1915=28 I.C. 335.

(2) (1915) 10 P.R. (Cr.) 1915=21 P.L.R 1916=16 Cr. L.J. 549=29 I.C. 821.

(3) (1894) 26 P.R. (Cr.) 1894.

1924 Lahore 263 (1).

ABDUL RAOOF, J.

Maula Dad and others—Defendants-Appellants

v.

Ali and Muttalli, minors, through Taja their uncle—Plaintiff.

Pira, son of Fazal—Defendant—Respondents.

Mis. S. A. No. 2023 of 1922, decided on the 1st May, 1923, from the order of the District Judge, Jhelum, dated 15th July, 1922.

(a) *Civ. Pro. Code, S. 100—Finding as to character of property is one of fact and as to eligibility of plaintiffs to sue is one on custom.*

Whether the property in dispute is ancestral is a finding of fact. Whether the plaintiffs as the collaterals in the sixth degree are entitled to sue is a finding on custom and cannot be questioned in second appeal without the production of the necessary certificate under the Punjab Courts Act. [P. 263, C. 1.]

(b) *Custom (Punjab)—Originally ancestral property in possession of a member is presumed to be ancestral.*

Where the property in suit originally belonged to the common ancestor of the parties, it will be deemed as ancestral when found in possession of a descendant, unless it could be shown that the land had at any time, gone out of the hands of the family and had been re-acquired by the descendant or some of his ancestors.

N. C. Chopra—for Appellant.

M. L. Puri—for Respondents.

Judgment:—The findings of the lower appellate Court are questioned on two points, namely, (1) whether the property in dispute is ancestral, and (2) whether the finding that the plaintiffs as the collaterals in the sixth degree are entitled to sue is a good finding according to custom.

As regards (1) it is enough to say that the finding recorded is a finding of fact which cannot be challenged in second appeal. Mr. Nanak Chand, the learned Counsel for the appellant has relied upon the decision of their Lordships of the Privy Council in the case of *Attar Singh* v. *Thakar Singh* (1) and has contended that as the finding in this case is based upon mere conjecture it cannot be treated as a valid finding of fact. The facts of the case decided by their Lordships of the Privy Council, however, were entirely different from those of the present case. Here in this case it has been clearly established by the production of the complete pedigree table in the appellate Court that Bhikhi, the common ancestor of the parties, had founded the village. The land in dispute was held at one time by Mubarik the grandfather, of Pira, the alienor. Unless it could be shown that the land had at any time, gone out of the hands of the family and had been re-acquired by Pira himself or some of his ancestors, they being admittedly Bhikhi's descendants, the presumption is irresistible that the property must have come to them as the descendants of Bhikhi, and, therefore, must be taken to be ancestral. This view is supported by the following rulings (1) 41 P.R. 1914 at page 195, (2) 90 P.R. 1914 at page 331 and (3) 1 L.L.J. 148.

As regards the second point the finding being one on custom it cannot be questioned in second appeal without the production of the necessary certificate required under the Punjab Courts Act.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1908) 35 Cal. 1039=35 I.A. 206=42 P.R. 1910=12 C.W.N. 1049=8 C.L.J. 359=18 M.L.J. 379=12 P.W.R. 1908=4 M.L.T. 207=10 Bom. L.R. 790=6 I.C. 721 (P.C.).

1924 Lahore 263 (2).

BROADWAY AND CAMPBELL, JJ.

Harkishen Singh and others—Applts.

v.

The Lahore Bank, Limited, of Amritsar in Liquidation—Respondent.

F. A. No. 500 of 1915 decided on 28th April, 1922, from the decree of Sub-Judge, F.C., Amritsar, dated 19th November, 1914.

* *Hindu Law—Debts—In absence of illegal or immoral debt—Decree on mortgage by father can be executed against entire co-parcenery property though sons are not personally liable or their share is not charged as such.*

It is only when a son seeks to avoid liability, that he has to prove that the debt incurred by his father was an immoral one. A money decree against a Hindu father when the debt was neither illegal nor immoral, whether it was incurred for family purposes or not, could be enforced in the lifetime of the father by sale in execution of the entire co-parcenary estate and is binding on the sons. Although the share of the minors in the mortgaged property cannot be considered as charged with the debt *qua* mortgage, nevertheless the entire co-parcenary estate can be brought to sale in execution of the money decree against the father whose share in the mortgaged property would remain charged in any event. However, although the shares of the sons in the mortgaged property are not liable to be proceeded against *qua*

mortgage, nevertheless in execution of the decree the entire co-parcenary estate including the property mortgaged can be brought to sale. [P. 264, C. 2 and P. 265, C. 1.]

Mehr Chand Mahajan and *L. C. Mehra* —for Appellant.

Moti Sagar—for Respondents.

Judgment:—The facts of this case are detailed in the judgment of a Division Bench of the Chief Court presided over by Sir Henry Rattigan, C J., and Scott Smith, J., dated the 8th November, 1918. By that order an issue was remanded to the trial Court under Order 41, rule 25, Civil Procedure Code. The issue was to the following effect :—"Was the promissory note, Ex. P. 4, executed by defendants Nos. 1 and 2 as agents or managers of the joint Hindu family and was the sum of Rs. 15,000 borrowed by them from the plaintiff Bank for necessary or family purposes or was it used for the benefit of the family ?" The onus of proving this issue was placed on the plaintiff, although it was directed that both parties should be called upon to produce all available evidence. The enquiry has been made and the Subordinate Judge has submitted his report, dated the 24th March 1919. According to this report, it has been found on the evidence that though it was established that the family was a joint Hindu family, yet it had not been proved that the consideration in this case was taken for the family purposes or was used for the benefit of the family.

The plaintiff filed objections to this report which, however, have not been seriously proved by Mr. Moti Sagar who appeared for the plaintiff Bank and who also frankly conceded that the evidence on the record could scarcely be regarded as proving the issue in favour of the plaintiff. It was contended, however, that the sons and their interest in the joint estate were liable under the mortgage on the ground that there was a pious obligation on them to pay the debts of their father unless and until they proved that the debts had been incurred for immoral purposes. In *Sahu Ram Chandra* v. *Bhup Singa* (1) their Lordships of the Privy Council have differentiated between suits brought by the sons to have it declared that they were not liable, and suits by creditors seeking to fix the liability on the sons, and it seems to us that it is only when a son seeks to avoid liability that he has to prove that the debt incurred by his father was an immoral one. Mr. Moti Sagar, however, admitted that the sons could not be held personally liable, but referred us to *Amar Nath* v. *Rustomji* (2) and *Bahadur Singh* v. *Desraj* (3) in support of the proposition that the entire co-parcenary estate could be proceeded against in execution of a decree against the father. In *Bahadur Singh* v. *Desraj* (3) a suit had been filed by a son for a declaration that a mortgage of ancestral property executed by his father for an advance which was made at the time of the mortgage and which was not for any family necessity should not affect his rights ; and it was held that as the mortgage was not for an antecedent debt, it was not binding on the son who was entitled to a decree that the mortgage *qua* mortgage should not affect his rights, but that such a decree would not bar the mortgagee from enforcing any decree which he might obtain against the father for the amount of loan against ancestral property including the property mortgaged. In *Amar Nath* v. *Rustomji* (2) it was held that a money decree against a Hindu father, when the debt was neither illegal, nor immoral, and whether it was incurred for family purposes or not could be enforced in the lifetime of the father by sale in execution of the entire co-parcenary estate and was binding on the sons. It seems to us that in view of these pronouncements, although the share of the minors in the mortgaged property cannot be considered as charged with the debt *qua* mortgage, nevertheless the entire co-parcenary estate, which is now represented in part by the sale proceeeds, can be brought to sale in execution of the money-decree against the father, whose share in the mortgaged property would remain charged in any event. We accordingly accept this appeal and modify the decree of the Court below to the extent that the shares of Harkishen Singh and his minor brothers in the mortgaged property shall not be liable so far as the mortgage is concerned and that they themselves shall not be personally liable for the amount decreed.

(1) (1917) 39 All. 437=44 I.A. 126=21 C.W.N. 698=1 P.L.W. 557=15 A.L.J. 437=19 Bom. L R. 498=26 C.L.J. 1=33 M.L.J. 14=1917 M.W.N. 439=22 M.L.T. 22=6 L.W, 213=39 I.C. 280 (P.C.).

(2) (1918) 15 P.R. 1918=24 P.W.R. 1918=112 P.L.R. 1918=43 I.C. 678.

(3) (1901) 53 P.R. 1901=62 P.L.R. 1901 (F.B.).

Mr. Lal Chand Mehra attempted to argue on behalf of Vir Singh and Sarmukh Singh, the two persons who signed the promissory-note, and wished to contend that consideration had not passed. These two defendants, however, have preferred no appeal and cannot, therefore, be heard on this point.

We would note, however, that although the shares of the minors and Harkishen Singh in the mortgaged property are not liable to be proceeded against *qua* mortgage, nevertheless as pointed out in *Amar Nath* v. *Rustomji* (2), in execution of the decree, the entire co-parcenary estate including the property mortgaged can be brought to sale. We leave the parties to bear their own costs in this Court.

Appeal accepted.

1924 Lahore 265.

ABDUL RAOOF AND ABDUL QADIR, JJ.

Mt. Channi Bibi—Appellant

v.

Ahmad Khan and others—Respondents.

F. A. No. 2741 of 1917, decided on 25th May, 1922, from the decree of Senior Sub-Judge, Attock at Campbellpur, dated 6th June, 1917.

(a) *Custom (Punjab)—Widow holding land in her name takes for maintenance only.*

Widow step mother holding portion of husband's land in her name during lifetime of her step son who holds the other portion should be considered as holding in lieu of maintenance. [P. 266, C. 2.]

* * (b) *Custom—Evidence—Overwhelming oral evidence as to existence dispenses with evidence of Specific instances.*

A rule of custom may be established and held to be of binding force even where no instance is forthcoming if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence, in its favour. The proof of custom should not be confined merely to judicial precedents and definite instances but might consist in the deliberate and well considered opinion of the people living under and governed by the custom. (117 P.L.R. 1903 (F.B.); 110 P.R. 1906; 24 P.R. 1914, *Foll.*) [P. 267, C. 2.]

* (c) *Evidence—Oral if convincing should be accepted even if no documentary evidence exists.*

Where the oral evidence produced is itself convincing the absence of documentary evidence in support of it should not be made much of. (3 Lah. 48 (P.C.), *Rel. on*). [P. 268, C. 2.]

(d) *Evidence—If admitted by trial Court should not be rejected by appellate Court.*

Evidence admitted by the trial Court without any objection at the time when it was offered should not be excluded from consideration by the appellate Court though it may not be legally admissible. (7 M.I.A. 128; 13 M.I.A. 519; 11 B. 320, *Foll.*) [P. 269, C. 1.]

(e) *Custom (Punjab)—Sister succeeds brother in Khattars of Attock.*

There is a custom among the Khattars of Attock District under which a sister can succeed to the property left by her brother in preference to the collaterals of her father. With regard to ancestral property the rights of a sister are not superior to those of the collaterals. [P. 269, Cs. 1 and 2]

Nanak Chand and *Muhammad Rafi*—for Appellant.

Sheo Narain and *M. S. Bhagat*—for Respondents.

Judgment:—The pedigree table of the parties is to be found at pages 410—413 of the printed record. The plaintiff, Mt. Channi, is the daughter of Muhammad Khan. He died in 1902 leaving behind him this daughter and two widows, Mt. Ilahi Khanam and Mt. Nur Jahan. Mt. Ilahi Khanam, shortly after her husband's death, gave birth to a son named Ali Waris Khan. The deceased had left considerable landed property in two villages 8,828 *kanals*, 9 *marlas* in Surg Salar, Tahsil Attock, and 3,321 *kanals*, 19 *marlas* in Kharala Kalan, Tahsil Fateh Jang in Attock District. Half of the land at Surg Salar was after his death mutated in favour of Mt. Nur Jahan, and the other half together with the whole of the land at Kharala Kalan was entered in the name of Ali Waris Khan. The latter died in 1904 and the whole of the estate of Muhammad Khan was then mutated in equal shares in the names of his two widows. In 1912 Mt. Nur Jahan also died with the result that the whole of the land in both the villages passed into the possession of Mt. Ilahi Khanam. She died in December 1915 and it is on her death that the present suit was brought by Mt. Channi on the 16th May 1916, for possession of the whole of the property above described on the ground that it was the self-acquired property of her father and was not ancestral *qua* his collaterals, who are the contesting defendants. She said that her claim was superior to that of the collaterals of her father both as the daughter of Muhammad Khan and as the sister of Ali Waris Khan, and added that, as she was married to Muhammad Aslam Khan, one of the collaterals of her father, she could also claim a preference on that account. In the alternative she prayed that she was

entitled at least to a $\frac{1}{4}$th share of the land in dispute according to the rule of *pagwand* which prevailed in the family, as she was the wife of Muhammad Aslam Khan, who was entitled to a $\frac{1}{4}$th share.

This suit was against two sets of defendants, defendants Nos. 1 to 7 being the descendants of Amir Khan, brother of Muhammad Khan deceased, and defendants Nos. 8 to 17 being the descendants or representatives of three step brothers of Muhammad Khan. It may be mentioned that Muhammad Aslam Khan, husband of Mt. Channi, was a grandson of one of the step brothers of Muhammad Khan. The defendants pleaded that the property was ancestral and that the plaintiff had no right to succeed to it in any case.

The following issues were framed in the case:—

(1) Is the property in suit ancestral *qua* the defendants.

(2) Whether the descendants of Muhammad Khan split up into two groups, and the plaintiff being a member of a different group is not entitled to the property in dispute?

(3) If the parties follow Muhammadan Law, is the suit within limitation?

(4) If so, to what share is the plaintiff entitled?

(5) Do the parties follow a special custom to be inferred by analogy to their personal law, by which a sister is entitled to succeed to the whole of the self-acquired property in preference to collaterals?

(6) In case the property is ancestral, has the sister a superior right?

(7) Does the fact of the plaintiff's marriage with Muhammad Aslam Khan give her any preferential right?

(8) Is the plaintiff not entitled to the relief claimed, because the rule of *pagwand* does not apply?

(9) To what relief is the plaintiff entitled?

The plaintiff has not pressed Issues Nos. 3 and 4 and the trial Court has left them alone as hopeless pleas in the case of a family of agriculturists. As to the nature of the property, the Court finds that the whole of the land in Surg Salar village is not ancestral *qua* the defendants and is the self-acquired property of Muhammad Khan. With regard to the land in Kharala Kalan the Court holds that the bulk of that land is ancestral with the exception of the share of the plaintiff's father purchased from Nadu Khan to which Ex. P-22 relates. It is stated before us that this area is about 416 *kanals* and, according to the above finding of the Subordinate Judge, First Class, the rest of the land in Kharala Kalan is ancestral. With regard to Issue No. 2 the Court below has given no definite finding whether the brothers of the whole blood and of the half blood in this family had respectively formed themselves into separate groups or not, as the Court considered it unnecessary to go into that matter. On the remaining issues the conclusions arrived at by the learned Subordinate Judge are against the plaintiff Mt. Channi and he has dismissed her suit with costs. She has appealed against this decision and we have heard Mr. Nanak Chand on her behalf and Mr. M. S. Bhagat and Mr. Sheo Narain for the respondents, the latter representing defendants Nos. 1 to 7.

The main question in this case is whether the plaintiff has succeeded in establishing the custom by which she is entitled to succeed to the property in dispute as the sister of the last male owner, Ali Waris Khan. It may be convenient to mention here that her learned Counsel explains that she is claiming not only as the sister of Ali Waris Khan deceased, but with regard to some portion of the property she is in a position to claim as the daughter of her father. He says that the half share of Surg Salar property which had been mutated in favour of Mt. Nur Jahan and which remained in possession of the latter, never came into the possession of Ali Waris Khan and that, therefore, nothing but the life-estate of a widow intervened between the plaintiff and her father, and, therefore, so far as that land is concerned the plaintiff's rights are those of a daughter of Muhammad Khan. We are not very much impressed by this argument and think that in spite of the fact that Mt. Nur Jahan got some land in the presence of Ali Waris Khan, she must be taken to have enjoyed its possession in lieu of maintenance and the fact that no mutation of this portion was effected in the name of Ali Waris Khan before he died would not make any material difference. We are, therefore, of opinion that the claim of the plaintiff must stand or fall regarding the whole of the property in accordance with the finding arrived at as to her rights as a sister of a childless male owner, among Khattars of Attock District, which is the tribe to which the parties belong.

The evidence that she has produced in support of Issue No. 5 may be divided under three heads :—

(1) Oral evidence of a large number of men belonging to her tribe who state that there is a custom among them under which sisters inherit the property of their childless brothers in preference to collaterals.

(2) A number of instances mentioned by various witnesses to show that sisters have succeeded their brothers in some cases under certain circumstances and have got shares along with them in other circumstances.

(3) Copies of statements made by some witnesses in a previous case, relating to this very tribe, which was not *inter partes*, but some portion of the evidence given in it has been admitted in the present case, under section 32, clause (4) of the Indian Evidence Act, because the witnesses, who made those statements are now dead.

We will take these items one by one. On point No. 1 the following observations, as made by the learned Subordinate Judge, require attention :—

"The second set of witnesses consists of Nos. 3, 4, 6, 19, 22, 23, 26, 27, 29, 30, 38, 40, 41, 42, 44, 45, 48—52 and 55 and they all give expression to a general opinion that a sister is entitled to succeed in preference to collaterals. The total number of witnesses produced by the plaintiff in this case is 55 and all the other witnesses except No. 32 who does not state anything useful, who are not enumerated above, state the same thing and the difference in the two sets is only this that the latter set reply upon instances to support their opinion while the former do not."

Mr. Nank Chand refers to *Ram Lal* v. *Gopi* (1) in which it was held that "a rule of custom may be established and held to be of binding force, even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it, and likely to know of its existence, in its favour." He urges that the *dictum* laid down in this ruling should be followed in the present case, and it must be held that the plaintiff has succeeded in proving the custom, relied upon by her, by producing such abundant testimony of disinterested men who are making statements which are against the interest of males and in favour of a female. This aspect of the case was placed before the trial Court as well, but, while recognising the force of this contention, it expressed an opinion that it was not satisfied that such a custom existed because there was not a sufficient number of good instances to prove it. The learned Subordinate Judge remarked that he agreed that the opinion of the representative men, particularly when they came forward in such large numbers as in this case, was entitled to considerable weight, but he was influenced in coming to a contrary decision by the defects he found in the instances cited. We have been favourably impressed, however, by the general evidence produced as to the existence of this custom and we think that if the observations made in *Ram Lal* v. *Gopi* (1) are sound then the case before us is one to which those remarks should apply with very great force. Many of the witnesses, who have come forward to support the case of the plaintiff, are men in whose families similar questions may possibly arise any day and they would not show such unanimity in recognising the rights of a sistor to succeed her brother in preference to collaterals if they did not believe that a custom of this kind existed in their tribe. Some remarks of Mr. Justice Chatterji made in *Jowala* v. *Hira Singh* (2) were quoted with approval by Mr. Justice Shah Din, who was responsible for the ruling in *Ram Lal* v. *Gopi* (1) and we think that they might with advantage be reproduced here. "A rule of custom may be established and held to be of binding force even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour."

Similar observations were made in *Daya Ram* v. *Sohel Singh* (3) as follows :—

"The proof of custom should not be confined merely to judicial precedents and definite instances, but might consist in the deliberate and well-considered opinion of the people living under, and governed by, the custom."

In the light of the above remarks of the learned Judges of the Chief Court, with which we entirely agree, we hold the custom alleged by Mt. Channi proved by the oral evidence in its favour. The case for

(1) (1914) 24 P.R. 1914=68 P.W.R. 1914=196 P.L.R. 1914=25 I.C. 710.

(2) (1908) 117 P.L.R. 1909=56 P.R. 1908 (F.B.).

(3) (1906) 110 P.R. 1906=31 P.L.R 1907=59 P.W.R. 1907 (F.B.).

the plaintiff is, moreover, made stronger by the fact that instances in support of the custom set up are not altogether wanting in the case before us. Nineteen different instances were cited by the witnesses produced by the plaintiff in this case. Counsel on both sides have taken us very minutely through those instances and we think, after considering the arguments addressed to us about their value, that some of them are helpful though a good many of them afford very little assistance. Instance No. 1 mentioned by Rustam Ali Khan (P. W. No. 1) gives the case of one Ghazi Khan, who died leaving a son, Hayat Khan, and a daughter, Mt. Sardaran. Hayat Khan succeeded him first and Mt. Sardaran succeeded Hayat Khan. Certain collaterals contested the sister's right but failed. Nawab Khan (P.W.No. 2) is one of the collaterals and he supports this instance. Shanishi Khan (P.W No.13) also corroborates them. Mr. Sheo Narain criticises this instance, saying that the case is of succession by a daughter and contends that this is probably the same instance as quoted in the *Riwaj-i-am* of Attock District at page 13 under a question relating to daughters. We think, however, that, in view of the fact that, according to the evidence before us, Mt. Sardaran succeeded on the death of her brother, this must be ragarded as an instance relating to a sister and it is doubtful whether the instance given at page 13 of the *Riwaj-i-am* is identical with this one, because there is great difference in the details as given there and as given by the witnesses on this record. Then follow some instances, which either relate to succession by daughters or to succession by unmarried sisters till marriage, which are not very helpful beyond showing that the position of daughters as well as sisters is more favoured in the tribe of Khattars than under the general Customary Law. There are, however, some undoubted instances of the succession of sisters. Instance No. 7 is given by Shanshi Khan witness No. 13. He states that his father's sister succeeded to a share and there was a dispute but without avail. Gannu Khan, witness No. 15, sites two instances in Fateh Jang, one of which is instance No. 8, where one Sharfu of that village died and his sister succeeded him. The only criticism that is levelled against these instances is that no mutation entries have been produced in support of them. This may detract to some extent from the value of the testimony but still the instances are entitled to some weight, and we see no reason why they should not be taken into consideration in this case.

It may be noted in this connection that where the oral evidence produced is itself convincing the absence of documentary evidence in support of it should not be made much of. It has been recently held by their Lordships of the Privy Council in Privy Council Appeal No. 140 of 1920 [*Sabz Ali Khan* v. *Khair Muhammad Khan* (4)] which was a case depending entirely on oral evidence that the said evidence satisfied the necessary test in that case, though it had been discarded by the Chief Court on the ground that the knowledge of details shown by the witnesses was unreliable and their testimony was not supported by any documentary evidence. In accordance with the observations of their Lordships, we consider the oral evidence as to these witnesses reliable, without any support from documentary evidence.

It seems to us that the trend of feeling among Khattars is in favour of daughters and sisters presumably owing to the influence of the neighbouring frontier tribes which follow Muhammadan Law. It is noteworthy that in the latest *Riwaj-i-am* of the district there is an indication of the trend above mentioned. The answer to question No. 27 says that though at the last Settlement it was stated that sisters can never inherit their brothers' estate and the same statement has been repeated again, yet the assertion is not corroborated by the few examples which have come to light. These instances are quoted under this paragraph at pages 28 and 29 of the *Riwaj-i-am*, one of them relating to Khattars and the two others to Awans. We think that the instances available, though few in number, are quite enough, when considered in the light of the general evidence given in this case, to establish the existence of a custom in favour of succession of sister to her brother.

The third item of evidence consists of the statements of Nawab Khan, Hayat Khan, Muhammad Khan and Sardar Muhammad Hayat Khan, C. S. I., in a case decided in 1894 [*Mahommad Khan* v.

(4) 1922 P.C. 139=49 I. A. 74=3 Lah. 48=20 A. L.J. 427=35 C L J. 514=43 M.L.J. 49=7 P.W.R. 1922=30 M.L.T. 237=67 I.C. 264 (P.C.).

Mussammat Sahib Jan.] Mr. Nanak Chand referred to this evidence, but objection was taken on behalf of the respondents to the admissibility of this evidence on the ground that section 32 (4) is not applicable for two reasons:—*firstly*, that there was no proof that these witnesses were dead, and, *secondly*, that these statements were not made before a controversy as to the existence of the custom to which they relate arose. There is something in this objection, but it is met by the other side by showing that the evidence having been admitted by the Court without any objection at the time when it was offered, it should not be excluded from consideration by the appellate Court. Reference is made in support of this last contention to *Unide Rajaha Raje Bommarouze Bahadur* v. *Pemmasamy Venkatadry Naidoo* (5) and *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh* (6) and *Chimnaji Govind Godbole* v. *Dinhar Dhondev Godbole* (7) and following these authorities we hold that this evidence cannot be excluded. There is no real dispute as to the fact that these witnesses are dead and at least with regard to one of them, the late Sardar Muhammad Hayat Khan, it is admitted before us that he was dead when his evidence in the previous case was placed on the present record. For our purposes it would be sufficient to refer to his statement alone, as by virtue of his position and experience as one of the leading members of the Khattar tribe, his opinion seems to be entitled to weight. The answers made by him to interrogatories are to be found at page 58 of the printed record. He says that according to custom daughters and sisters are entitled to the property left by their fathers and brothers in the presence of collaterals beyond the second degree. He then gives some instances which he can remember and among them he mentions a man named Hayat Khan in Garhi Sikhandar who died leaving a minor son. The minor son died some time after his father and the sister of the minor succeeded him. We think, therefore, on a consideration of the whole of the evidence in this case that there is a custom, among the Khattars of Attock District under which a sister can succeed to the property left by her brother in preference to the collaterals of her father.

Coming to Issue No. 6, our decision is the same as that of the trial Court. With regard to ancestral property the rights of a sister are not superior to those of the collaterals. This is the evidence given by the majority of the plaintiff's own witnesses and must be taken to be a correct exposition of the custom as prevailing in tribe of the parties. Issues Nos. 7 and 8 do not require going into because of the conclusion we have come to as to the existence of the custom. As a result of our finding the plaintiff is entitled in her own right to succeed to that part of the inheritance of her brother which represents the self-acquired property of her father. The question of her preference by marriage to Muhammad Aslam Khan, therefore, hardly arises, but we might add that though there is some evidence in support of her assertion in this respect, it is not sufficient to establish any such preferential right. Issue No. 8 has reference to her claim in the alternative, which was being resisted by the defendants on the ground that owing to the existence of the custom of *chundawand* among the family and the consequent grouping of the brother of the whole blood and half blood separately, Muhammad Aslam Khan had no right to any share. As remarked already, this question does not arise now, but so far as the evidence as to grouping is concerned, we might say that there is no satisfactory testimony to establish that any grouping had been done. We, therefore, grant her a decree for possession of the whole of the land in dispute in village Surg Salar and of 416 *kanals* of the land in Kharala Kalan, which have been found to be self-acquired property in the hands of her father. She is also granted her costs in the Court below and in this Court in proportion to the success of her claim.

Appeal allowed.

(5) (1857) 4 W.R. 121=7 M.I.A. 128 (P.C.).
(6) (1869) 15 W.R. 1=6 B.L.R. 509=13 M.I.A. 519=2 Sar. 607 (P.C.).
(7) (1887) 11 Bom. 320.

1924 Lahore 269.

ABDUL RAOOF AND ABDUL QADIR, JJ.

Piara Ram—Appellant

v.

Behari Ram and another—Respondents.

S. A. No. 1266 of 1919, decided on 1st June, 1922, from the decree of District Judge, Mianwali, dated the 17th March, 1919.

• • *Fatal Accidents Act (XIII of 1855), S. 1—Widow and son can recover—Deceased provoking quarrel does not deprive the right.*

The widow and son of the deceased can recover damages for the loss of the contribution made by the deceased towards the joint income of the family. Legal liability alone is not the test of injury in respect of which damages may be recovered under the Act, but the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account and damages given in respect of that expectation, if it be disappointed, and the probable pecuniary loss thereby occasioned. (112 P.R. 1913, *Ref.*) and the fact that the deceased provoked the quarrel in the course of which he was killed does not disentitle his relatives from recovering damages. [P. 270, C. 2 and P. 271, C. 1.]

Nanak Chand—for Appellant.

Jagan Nath—for Respondent.

Judgment:—This judgment will dispose of the second appeal filed by Piara Ram, defendant-appellant, as well as the cross-objections filed by the respondents. The suit, which has given rise to this appeal, was filed by Behari Ram and Mussammat Hondi Bai for recovery of Rs. 2,500 as damages for the loss caused to them by Piara Ram, who was convicted of culpable homicide not amounting to murder by having struck a blow to Mul Chand, (father of Behari Ram, and husband of Mussammat Hondi Bai) which led to the death of Mul Chand. This was a suit under the Fatal Accidents Act XIII of 1855. The trial Court held that it was proved that the death of Mul Chand had been caused by Piara Ram inflicting a blow on him with a trowel. It also held that loss has been caused to the plaintiffs by the defendant's act. The Court expressed an opinion that the amount claimed was not too heavy for the loss suffered and it decreed the claim in full, with costs. The defendant appealed against this decree and the learned District Judge, though agreeing on the whole with the view taken by the trial Court, reduced the sum awarded as damages to Rs. 1,000. The defendant has preferred this second appeal against the order of the District Judge, contending that no damages should have been allowed, while cross-objections have been filed, on behalf of the respondent, by Lala Jagan Nath, to the effect that the decree of the trial Court should have been maintained.

We have heard Counsel on both sides and are of opinion that both the appeal and the cross-objections must fail.

Though originally there was a dispute as to Piara Ram being responsible or not for the death of Mul Chand, this fact is not seriously questioned in the arguments before us. There is a clear finding of the Court of first instance on this point, based mainly on the dying declaration of the deceased, which has been held to give a true version of the facts. This finding has been confirmed by the lower appellate Court and must be treated as final. It is argued before us, however, that even taking this finding to be correct, it must be remembered that the assault was provoked by Mul Chand's own conduct, in going to the place where a wall was being built by the defendant and interfering with his masons, and it is urged that no man can be injured by what he suffers through his own fault. It is next argued that if it is held that the plaintiffs had a cause of action, they have not been able to give any proof of actual loss resulting to them from the death of Mul Chand. Mr. Nanak Chand goes on to say that the deceased was an old man, who would not have lived very much longer in any case, and was not doing anything useful. There was a petty shop, he goes on to say, which was being run jointly by the deceased and the plaintiff Behari Ram, which can now continue to bring the same income as before. It is also contended that the sum of Rs. 1,000 has been arbitrarily fixed by the lower appellate Court, without any reference to the evidence on the record and that the estimate is purely conjectural. Mr Nanak Chand relies on *Secretary of State* v. *Sardar Gopal Singh* (1) which is a case under Act XIII of 1855, in which a student was killed in a Railway accident and where the Railway was sued for damages due to its negligence. A Division Bench of the Punjab Chief Court dismissed that suit on the ground that no pecuniary loss to the father had been proved to have been caused by the death of the boy. Mr. Nanak Chand draws particular attention to the following passage in that judgment.

"The rule laid down and adopted by the English Courts is concisely stated in Mayne on Damages, 6th Edition, page 615. Under Lord Campbell's Act which is in *pari ratione* with Act XIII of 1855, with some minor differences, 'legal liability alone is not the test of injury in respect of which damages may be recovered under this Statute; but the reasonable

(1) (1913) 112 P.R. 1913=284 P.L.R 1913=188 P.W.R. 1913=20 I.C. 425.

expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a Jury and damages given in the respect of that expectation, if it be disappointed, and the probable pecuniary loss thereby occasioned. Thus a parent may recover for the loss of the probability that his son would have continued to contribute to his maintenance; and children may recover for the loss of the education, comforts, and position in society, which they would have enjoyed if their father had lived and retained the income which died with him, and they had continued to reside with him; and even the probability that the deceased, if he had lived, would have made provision for his children may be considered."

Mr. Nanak Chand urges that the passage abovequoted embodies the principles underlying the question of damages in cases of this nature, and one of the principles laid down is that in order to justify a party being compensated for loss caused by a relative being killed it must be shown that the income has died with him, which he contends is not the case here. His further contention is that there is nothing to show that there was a probability of the man continuing to live long and contributing to the earnings of the family.

The reply given, on behalf of the respondent, to the arguments summarized above, is that the alleged conduct of Mul Chand does not take away from him or from his relatives the right of claiming compensation for an injury. A reference is made to Ratan Lal's Law of Torts, page 64, 8th Edition, where it is stated: "A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained." This note in the commentary is based on an English case, *Barnes* v. *Ward* (2). With regard to the question that the death of Mul Chand has caused pecuniary loss to his son and widow, who have lost the benefit of his contribution to the family earnings, our attention is drawn to the findings of the Courts below. The trial Court observes: "The defence plea that the deceased was old and a burden to the family is not established by evidence. He had a shop and owned other property and added to the income of the family by his pursuits...He was about 50 and might have lived another 20 years." The lower appellate Court has not given a very definite finding, but the following remarks in its judgment show that it agrees with the trial Court in holding that loss has been caused but disagrees as to the estimate of that loss. It says: "It is not safe to conclude that the age of the deceased was about 50 but probably more than 50. He left an adult son who was joint with him, and the family business, a small shop, is still carried on. Under the circumstances, taking as the measure of damages, the pecuniary loss suffered by the plaintiffs as the result of Mula's death, to Rs. 2,500 is obviously much too high a figure, and I propose to reduce it to Rs. 1,000." It is argued by the Counsel for the respondent that even admitting that the earnings from the shop were about Re. 1 a day, which is the estimate which appears to have been accepted by the lower appellate Court, though there was evidence on the record of a higher rate of daily income, the deceased and his son would have earned Rs. 360 a year and, even if he had lived for ten years longer, the earnings would have come to Rs. 3,600. Deducting from this sum about half of this money as the share of the earnings from the shop due to the labour of the son of the deceased, the balance Rs. 1,800 would represent a reasonable estimate of the income which could have been derived from the shop alone in 10 years' time if the deceased had continued to live. A part from this there is some land held in the possession of the family and some cattle which would give a certain income and if the deceased could do anything to supervise the management of the land or the up-keep of the cattle he could be considered to be contributing a portion of that income also. It is argued, therefore, that the decree of the trial Court, which was based on a full consideration of the evidence on the record represented a fairer estimate of the loss than the sum allowed by the District Judge which, however, must in any case be allowed, though it falls short of the proper estimate. Reliance is placed on *Bishen Das* v. *Ram Labhaya* (3) in which substantial damages were allowed to the plaintiffs by the Punjab Chief Court in a case under the Act XIII of

(2) [18509] C.B. 392=19 L.J.C.P. 195=14 Jur. 384=2 Car. & Kir. 661.

(3) (1915) 106 P. R. 1915=187 P. W. R. 1915=32 I. C. 18.

1855, *Secretary of State for India* v. *Muhammad* (4) and *Sri Ram* v. *Delhi Electric Tramways and Lighting Coy.* (5) are also referred to with the same object.

We think that there is no doubt that the son and the widow of the deceased have suffered pecuniary loss by his death. However small his contributions to the family income may have been, they cannot, we think, be estimated at less than Rs. 100 a year, and taking the finding of fact as to the age of Mul Chand, we are of opinion that it can be safely held that he could have probably lived for about 10 years more and in that case the estimate of Rs. 1,000 roughly made by the learned District Judge, though somewhat conjectural, is not very far out of the mark. There is material on the record which can fully justify that estimate. We agree with it, therefore, as a fair estimate of the damages and dismiss this appeal, confirming the decree of the lower appellate Court.

In this view of the case there is no need to discuss any further the question raised by the cross-objections. There are some witnesses, no doubt, who put the earnings of the shop at Rs. 2 or Rs. 2-8-0 a day and according to whose estimate loss of Rs. 2,500 or more could be caused but the lower appellate Court has evidently considered that testimony to be exaggerated and we see no reason to take a different view of the matter. Therefore, the cross-objections are also dismissed.

In the circumstances of this case we allow the parties to bear their own costs in this Court.

Appeal and Cross objections dismissed.

(4) (1894) 85 P.R. 1894.
(5) (1919) 75 P.R. 1919=13 P.W.R. 1919=49 I.C. 435.

1924 Lahore 272.

SHADI LAL, C.J. AND BRASHER, J.

Lila Ram Ladha Ram and another—Appellants.

v.

Ramzan—Respondent.

S. A. No. 1402 of 1919, decided on 6th June, 1922, from the decree of District Judge, Multan, dated 19th March, 1919.

Civ. Pro. Code O. 17 r. 3—Process-server party responsible for non-attendance of witness—Rule 3 should not be applied against plaintiff.

Where an officer of the Court was negligent in the performance of his duty the plaintiff alone cannot be held responsible for failure to cause the attendance of his witnesses for not paying process-fee in time. To such a case the stringent provisions of O. 17, r. 3 should not be applied. [P. 272, C. 2.]

S. K. Mukerji—for Appellant.

Judgment:—On the 23rd of July, 1917, the plaintiff-appellant brought an action for the recovery of Rs. 1,621 on the basis of an account. It appears that the relatives of the defendant, who is a minor, showed no disposition to facilitate the disposal of the case, and the Court was accordingly obliged to grant several adjournments before framing the issues. The plaintiff was ultimately ordered to produce his evidence on the 10th June, 1918, but on that date he produced no evidence in support of his claim. He was thereupon directed to deposit the process-fee within three days, and the hearing was adjourned to the 24th June. He deposited the process-fee not within the period prescribed by the Court, but on the 17th June. Two days afterwards, that is on the 19th, the Nazir of the Court gave the summonses as well as the process-fee to a process-server who, however, reported on the 22nd that the time was too short for the service of summonses. Consequently, the plaintiff could not produce any evidence to prove his claim on the 24th June, and the trial Court, dismissed the suit under Order 17, rule 3, Civil Procedure Code.

Now, there can be no doubt that the plaintiff was to blame for not depositing the process-fee within three days as directed by the Court, but he explains, and produces an affidavit in support of his explanation, that the delay in complying with the order of the Court was due to the death of a member of his family. We are not in a position to pronounce any opinion on the truth or falsehood of this explanation, but we certainly think that the process-sever should have made an attempt to serve the the witness who, we are told, were residing at or near the town of Multan. It seems to us that if he had taken the summonses to the witnesses he would have succeeded in effecting service on some, if not all of them. Considering that an officer of the Court was negligent in the performance of his duty we are not prepared to hold that the plaintiff alone is responsible for the failure to cause the attendance of his witnesses. We do not think that this is a case to which the stringent provisions of Order 17, rule 3 should have been applied.

and we accordingly accept the appeal and setting aside the decrees of the Courts below remit the case to the Court of the first instance for trial on the merits. The Court-fees on the memorandum of appeal in this Court as well as on that filed in the Court of the District Judge shall be refunded, and other costs shall abide the event.

Case remitted.

1924 Lahore 273.

SCOTT-SMITH, J.

[on difference between MARTINEAU AND HARRISON, JJ.]

Jawala Singh – Appellant

v.

Teja Singh and others—Respondents.

S. A. No. 1593 of 1919, decided on 17th May, 1922, from the decree of District Judge, Rawalpindi, dated 6th January, 1919.

* (a) *Evidence Act, S. 65 Secondary evidence, production of—No objection by opposite party or Judge—Appellate Court cannot reject.*

When secondary evidence is produced in the first Court and no objection is taken either by the other side or by the Presiding Officer, it is not open to the Court of Appeal to reject that evidence. (6 Cal. 666, 31 Cal. 155 and 11 Bom. 320, *Foll.*)

(b) *Mortgage—Construction—Mortgage deed—Redemption without paying interest.*

In a mortgage deed the provision as to redemption ran as follows: "*Aur ikrar kiya mukarrar kiya ki mublagh mazkur (i.e. Rs. 180) andar arsa tin sal ke ada karke fakkul akn karlunga aur sud be hisab fi sadi ek rupiya chhe anna bila uzar ada kardunga aur haveli mazkura par qabza murtahin ka rahega aur marammat shikast etc., ta zimma murtahim hogi.*" There was nothing in the deed which made it obligatory on the mortgagor to pay interest as a condition precedent to redemption. *Held* that every case of this sort must be decided on its own merits. (45 P. R. 1913, *Rel.*)

Badruddin Kureshi for *Devi Dayal*—for Appellant.

Anant Ram for *Gobind Ram*—for Respondents.

Harrison, J:—The plaintiff in this case being the successor-in-interest of the mortgagor sued to redeem a house and claimed to be entitled to do so on payment of Rs. 180. The First Court gave him a decree conditional on payment of Rs. 450 which sum was reduced to Rs. 80 by the learned District Judge, that sum to be paid to one Sohan Singh, a subsequent mortgagee from Jawala Singh, the contesting defendant. Jawla Singh appeals and claims Rs. 2,240.

The facts are that in his plaint the plaintiff disclosed one mortgage only as against himself effected by Sukhu in the year 1870 in favour of Kalyan Singh, father of Jawala Singh, and he contended that he was entitled to redeem on payment of the principal sum secured by this mortgage without the payment of any interest. Jawala Singh contended that not only was he entitled to the principal but also to the interest on this mortgage of Rs. 180 and also stated that he had redeemed a previous mortgage of Rs. 50 in favour of one Jai Singh and that he was entitled both to the principal and the interest on this first mortgage also. The questions to be decided are whether he is entitled to any sum on this first mortgage and whether he is entitled to receive the interest as well as the principal on the second mortgage effected in favour of his father before the property can be redeemed. Plaintiff denies all knowledge of the first mortgage and in order to prove its existence and the allegation that it had been paid off by Jawala Singh's father a copy was produced in the first Court and some oral evidence was tendered as to the payment. The learned District Judge holding that although no objection had been taken to this copy the plaintiff should have fulfilled the necessary conditions laid down in the Evidence Act and should have secured the production of the original, disallowed the secondary evidence altogether and held that this first mortgage was wholly unproved. It has been laid down in *Akbar Ali* v. *Bhyea Lal Jha* (1), *Kishori Lal Goswami* v. *Rakhal Das Banerjee* (2) and *Chimnaji Govind* v. *Dinkar Dhondev* (3), that when secondary evidence is produced in the first Court and no objection is taken either by the other side or by the Presiding Officer it is not open to the Court of Appeal to reject that evidence. Following these decisions I find that the copy should not have been rejected by the District Judge. This merely shows that in the year 1870 before the execution on the mortgage in favour of Jawala Singh's father a previous mortgage for Rs. 50 had been effected in favour of Jai Singh. As to redemption from Jai Singh or, as Counsel wishes to put it, the purchase of the rights of Jai Singh by Kalyan Singh there is no evidence beyond the oral statement of

(1) (1881) 6 Cal. 666=7 C.L.R. 497.
(2) (1904) 31 Cal. 155.
(3) (1887) 11 Bom. 320.

one Lal Singh, son of Jai Singh, who says that he heard that before his birth his father had been paid Rs. 55 by the father of Jawala Singh. On this evidence Jawala Singh asks for a finding that because he is now in possession of a copy of that document he is entitled to payment of the principal and interest for 46 years. He has not gone into the witness-box himself to explain how he came by the copy nor has he attempted to tender the original mortgagor or rather his son to state what he knows about this ancient document. There is some Hindi writing on the back of the copy of which he has put in no transliteration and which he has not attempted to prove. It is, in my opinion, just as probable and in fact more probable that the original mortgagor paid off this mortgage if it has been paid off, than that Jawala Singh's father did so. The evidence of Lal Singh is, in my opinion, quite valueless and although it is doubtless difficult to produce evidence as to what happened or did not happen 40 years ago or more, this is not, in my opinion, any reason for allowing a man on the mere production of a copy of an ancient mortgage-deed to claim the whole amount which would be due on that deed, if it be still alive, and this more especially when he has not the original document in his possession. In his statement before the framing of issues Jawala Singh said vaguely that his father had redeemed this mortgage in the year 1881. The original, which bears no endorsement whatever, was obtained by the District Judge from the record-room, it being found on the record of an old objection in execution, which was made by Jai Singh and all that this shows is that the mortgage was alive in May 1870 or six months before the second mortgage was effected. In the absence of any evidence worth the name that this first mortgage still subsists and that Jawala Singh has acquired any sort of rights under it, I find that he is not entitled to any payment on its account.

The second point of whether interest is payable in addition to the principal as a condition of redemption depends on the interpretation placed upon the following words:—

"*Aur ikrar yeh mukarar kiya ki mublagh mazkur (i.e., Rs. 180) andar arsa tin sal ke ada karke fakh-ul-rahn karlunga aur sud be hisab fi sadi ek rupiya chhe anna bila uzar ada kar dunga aur haveli marhuna par qabza murtahin ka rahega aur marammat shikast, etc., ba zimmu martahin hogi.*"

Counsel has quoted many authorities such as *Mota Singh* v. *Bishen Singh* (4), which relate to the question of the *post diem* interest. This is not the question here and I am only concerned with the meaning of the plain words used, for the intention of the parties can only be discovered from the words which they themselves used. Now, although the mortgagor undoubtedly bound himself to pay interest, he did so in a clause subsequent to and, in my opinion, disconnected from the clause regarding redemption and the words in which the conditions of redemption are laid down are that on payment of *mubligh mazkur*, *i.e.*, Rs. 180, principal, the land can be redeemed. It appears to me to be useless to argue that business-men usually make the payment of interest a condition of redemption or that it is very foolish not to do so. The document clearly and in definite words says that on payment of Rs. 180 the house can be redeemed. It is unnecessary to discuss what further remedy the mortgagee has and how he is to set about realising the interest, if any, which may be due to him. The deed says that the house may be redeemed on payment of Rs. 180, and only one interpretation can be placed upon these words.

The amount payable has been altered by the addition of the cost of re-building and the deduction of the value of the old materials of the house and the decision on this point is a finding of fact.

I, therefore, find, agreeing with the learned District Judge, that the plaintiff is entitled to possession of the house on payment of Rs. 80 and that this sum will be paid to Sohan Singh, the puisne mortgagee of Jawala Singh, and would dismiss the appeal with costs.

Cross-objections were put in by Sohan Singh, but he did not appear himself at the hearing nor was he represented by Counsel. They are, therefore, dismissed.

Martineau, J.:—I agree with my learned brother that Jawala Singh has not proved that his father redeemed the property from Jai Singh or purchased Jai Singh's rights, and that he is not entitled to

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(4) (1916) 5 P.R. 1916=23 P.W.R. 1916=32 I.C. 821.

be paid anything on account of Jai Singh's mortgage of the 13th February 1870.

But I regret that I am unable to agree with my learned brother on the second point, namely, the question as to whether interest is payable in addition to the principal of the mortgage of the 20th December 1870 as a condition of redemption. In my opinion the sentence in which the mortgagor says that he will redeem in three years on payment of the amount previously mentioned, that is, the principal, should be read along with the sentence immediately following, in which he says he will pay interest at the rate of Re. 1-6 per cent., and the intention of the parties to the mortgage was that the mortgagor in order to redeem would have to pay interest as well as the principal, although the deed was carelessly drafted. The deed contains no clause regarding the right of the mortgagee to hold the mortgagor personally liable for the interest if it was not paid, and it seems to me improbable that such a stipulation would have been omitted if the intention had been that the property could be redeemed on payment of the principal only.

As the difference of opinion arises on a point of law, namely, as to the construction of the document of the 20th December 1870 by which the property that the plaintiff seeks to redeem was mortgaged, I propose that if my learned brother agrees, the question whether under the terms of that document interest is payable in addition to the principal as a condition of redemption be referred to a third Judge under the provisions of section 98 of the Civil Procedure Code.

Harrison, J.:—I agree.

Scott-Smith, J.:—After reading the mortgage-deed and hearing what Mr. Devi Dayal has to say on behalf of the appellant, I have no hesitation in agreeing with the opinion of Harrison, J., that under the terms of the mortgage-deed interest is not payable in addition to the principal as a condition of redemption. There are four conditions in the deed of mortgage, (1) that within three years the mortgage would be redeemed on payment of the mortgage-money, Rs. 180, (2) that the mortgagor would pay interest at the rate of Re. 1-6 per cent., (3) that the mortgagee would retain possession of the mortgaged *haveli* and (4) that the mortgagee would be responsible for repairs. All these conditions are, in my opinion, quite distinct. The condition as to redemption on payment of the mortgage-money is complete in itself. The condition as to payment of interest constitutes a separate covenant, and I can see nothing in the deed which makes it obligatory on the mortgagor to pay interest as a condition precedent to redemption. Every case of this sort must be decided on its own merits and the cases cited by Mr. Devi Dayal are not in point. *Aulia Khan* v. *Kanshi Ram* (5) was a case in which it was held that the covenant to pay interest was quite distinct and that redemption could be effected on payment of the principal mortgage-money only. In the present case also I am clearly of opinion that redemption can be effected on payment of the principal mortgage-money only. In accordance, therefore, with the provisions of section 98 of the Civil Procedure Code the point is decided according to the opinion of the majority of the Judges who heard the appeal, and the appeal is dismissed with costs. Counsel has not appeared before me on behalf of the plaintiff-respondent.

Appeal dismissed.

(5) (1913) 45 P.R. 1913=25 P.W.R. 1913=145 P.L.R. 1913=17 I.C. 677.

1924 Lahore 275.

BROADWAY AND ABDUL QADIR, JJ.

Sita Ram and others—Appellants

v.

Ghanno and others—Respondents.

S. A. No. 1604 of 1919, decided on 15th June, 1921.

(a) *Civ. Pro. Code, S. 11—Same person in two different capacities in the two suits—S. 11 does not bar the latter suit.*

Where a person claimed relief in the former suit in his individual capacity and in a subsequent suit he is proceeded against in his representative capacity in respect of the same subject-matter, the subsequent suit is not barred.

(b) *Easements Act, S. 15—Acquisition of easement by prescription is different from acquisition of customary easement—Easements Act, S. 18.*

Where the plaintiffs claimed to have acquired an easement by prescription the Court should not convert the claim into one of customary easement. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and *vice versa*. The two rights are different although the result may be the same. [P. 276, Cs. 1 and 2.]

Mehr Chand Mahajan—for Appellants.

Ghulam Mohyuddin—for Respondents.

Judgment:—The plaintiffs, who are 60 members of the Muhammadan community of Batala, instituted the suit giving rise to this appeal, asking for a declaration that they were entitled to use a certain plot of ground for purposes of prayer, funeral ceremonies, etc., and asking for an injunction to restrain the defendants from obstructing the plaintiffs in the use of the site in suit. The learned District Judge having granted the plaintiffs a decree, the defendants have come up to this Court in second appeal through Mr. Mehr Chand Mahajan and we have heard Mr. Ghulam Moby-ud-din for the respondents.

The first point taken by Mr. Mehr Chand was that the present suit was barred by the rule of *res judicata*, and a reference was made to Explanation VI of section 11, Civil Procedure Code. It appears that in 1914, Sita Ram and others, some of the defendants in this case, instituted a suit against some ten persons at Batala. They claimed to be entitled to possession of the site as owners. The defence there set up was that the then defendants were the owners of the site, and the issues settled in that case related purely to, which of the parties was the owner of the plot of land in suit. The present case is entirely different and we are unable to see that either Explanation VI or Explanation IV of section 11 has any bearing on the point. In our opinion, the learned District Judge is right in holding that in the former suit the defendants were not impleaded in their representative capacity but were proceeded against in their individual rights. We, therefore, hold that the present suit is not barred by the rule of *res judicata*.

There is, however, force in Mr. Mehr Chand's contention that the learned District Judge has decided the case erroneously. The plaint clearly shows that the plaintiffs claimed to have acquired, the right to use this site for certain definite purposes by long user; in other words, they claimed an easement by prescription. The learned District Judge has, however, come to the conclusion that the plaint discloses that they claimed a right "of the nature of a customary easement" to which they were entitled. Now, the plaintiffs never did claim customary easement and, therefore, it is evident that the learned District Judge has approached the evidence on the record from the wrong angle. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and *vice versa*. The two rights are different although the result may be the same. We think, therefore, that the parties should be given a further opportunity of arguing their respective cases before the lower appellate Court.

We, therefore, accept this appeal and set aside the order of the District Judge, maintaining only that portion of it which relates to the question of *res judicata*. The appeal will go back to the lower appellate Court which will decide all the other points that arise in it. Costs in this Court will follow the event.

Appeal accepted.

1924 Lahore 276.

CHEVIS, J.

Sampat Ram and others—Appellants

v.

Ganga Datt and others—Respondents.

S. A. No. 1769 of 1920, decided on 27th March, 1922, from the decree of District Judge, Hissar, dated 18th March, 1920.

Adverse possession—'Possession goes with title' applies where land actually vacant—Otherwise presumption exists in favour of person in actual possession—Limitation Act, Art. 142.

Where land is admittedly vacant there is no doubt that possession may be presumed to go with title but before possession can be presumed to go with title it must be clearly proved that the land has been lying vacant. Where it is not so proved the presumption is that possession has been with the person in actual possession although he may be holding under an invalid sale. [P. 277, C. 2.]

Dev Raj Sawhny for *Abdul Rashid*—for Appellants.

N. C. Pandit—for Respondents.

Judgment:—This case relates to the site of a *kacha* house in the *abadi* of Motta Kalan. The plaintiffs are some of the proprietors of the *abadi* in which the site is situated. The site was occupied by a non-proprietor called Nirbhe and on his death by his son Hukma. Hukma left the village some years ago. The plaintiffs sue for possession alleging that Hukma left the village 9 or 10 years ago and that they then

took possession as proprietors and that about a year prior to suit Gunga Dat, another non-proprietor, has taken possession of it. The lower Courts having dismissed the suit as barred by limitation, the plaintiffs have lodged a second appeal to this Court.

The findings are that Hukma sold the house to Ganga Dat for Rs. 98 in September 1899 and that Hukma then left the village and that the plaintiffs have failed to prove that they have since been in possession. On behalf of the plaintiffs it is urged that there is no proof that Ganga Dat ever held possession till recently and it is urged on the strength of *Madan Mohan Singh* v. *Brij Bihari Lal* (1), *Barkat Ali* v. *Hussian Khan* (2), and other authorities that in such a case the plaintiffs' suit cannot be held to be time barred, unless it is shown not only that the plaintiffs have not been in physical possession within 12 years of it but that some one else has been in possession. It has been urged that mere non-user cannot be regarded as equivalent to absence of possession and that possession goes with title. It is also pointed out that, according to the finding of the First Court, Ganga Dat bought the house secretly knowing that Hukma, a non-proprietor, had no right to sell it, and it is urged that Ganga Dat for many years did not dare to take possession knowing that if he did so the plaintiffs would become aware of the sale and would sue to eject him. Now, the plaintiffs have never alleged fraudulent concealment in their pleadings, and therefore, section 18 of the Limitation Act cannot be involved. As to possession there is a finding of the Trial Court that Mt. Phusan, a sister of Hukma, lived on in the house till her death in 1903 but that at least from the date of her death Ganga Dat must be regarded as in possession, the site being adjacent to his residential house. The learned District Judge has said nothing as regards Ganga Dat's possession but simply holds that under section 142 of the Schedule of the Limitation Act it is sufficient to find that plaintiffs have failed to prove their possession. On behalf of the plaintiffs it is urged that in such cases possession must be presumed to go with title.

Now, according to the plaint, plaintiffs only obtained possession when Hukma left the village which, according to the same plaint, was 9 or 10 years prior to the suit, whereas according to the findings of fact Hukma left the village about 20 years ago. Now, if plaintiffs never obtained possession till 9 or 10 years prior to suit, it cannot be said that they took possession when Hukma left the village about 20 years ago. But taking the plaint merely to allege that plaintiffs took possession when Hukma left the village, whenever that event occurred, still I think that in such a case as the present the plaintiffs must produce some proof of their having taken possession and cannot merely rely on the maxim that possession goes with title. None of the rulings cited by Counsel for the plaintiffs seem to refer to a case where a tenant or other person having a right of residence sold his right to another person. I do not suppose that Ganga Dat wasted Rs. 98 for nothing, and I think the presumption in such a case must be that Ganga Dat took possession when Hukma left the village or at least when Hukma's sister died and the house was lying vacant. If there had been no other claimant in the field then it might perhaps be presumed that the plaintiffs had taken possession of the abandoned site but here there was really no abandonment by Hukma, for Hukma when he left the village left behind him a person to whom he had sold the site. It is true that Ganga Dat only recently began to take steps towards constructing a building on the site and it is quite probable that the plaintiffs only then became aware of the sale to Ganga Dat, but this alone is not, in my opinion, any sufficient ground for holding that Ganga Dat only recently took possession. The plaintiffs are no doubt the proprietors and Hukma had no right to sell to Ganga Dat, but as he did sell I think the presumption must be that the vendee took possession and that possession did not go with title. Where land is admittedly vacant then no doubt possession may be presumed to go with title but before possession can be presumed to go with title, I think, it must be clearly proved that the land has been lying vacant. In the present case it is not so proved and I think the presumption is that possession has been with the vendee. I think, therefore, that the suit has rightly been dismissed as time-barred and I dismiss the appeal with costs.

Appeal dismissed.

(1) (1920) 1 Pat. L.T. 505=5 P.L.J. 592=57 I.C. 717.

(2) (1906) 6 P.R. 1906=61 P.L.R. 1906=33 P.W.R. 1906.

1924 Lahore 278 (1).

ABDUL RAOOF AND LUMSDEN, JJ.

Parmeshri Das and another—Appellants

v.

Paras Ram and others—Respondents.

S. A. No. 2007 of 1920, decided on 26th April, 1923, from the decree of District Judge, Karnal, dated 5th May, 1920.

Punjab Courts Act (VI of 1918), S. 41 (3)—Pre-emption suit—Certificate is not necessary where appeal Court does not go into question of custom.

Where a Court of first appeal fails to go into the question of custom and a second appeal is preferred with the object of having the question of custom tried, no certificate under S. 41 (3) is necessary.

Shamair Chand and *Badri Das*—for Appellants.

Manohar Lal—for Respondents.

Order:—This second appeal arises out of a suit for pre-emption. One of the issues raised was framed in the following words:—

"Does the custom of pre-emption of exist in Kalanaur?"

The trial Court decided this issue in the affirmative and granted a decree to the plaintiff. On appeal the question was again raised before the lower appellate Court. That Court recorded the following finding on that question:—

"The next point raised by the vendee-appellant is that there is no custom of pre-emption in Kalanaur. This contention is untenable as, by Notification No. 677 of 10th November 1908, the Punjab Government included Kalanaur as a town for the purposes of Pre-emption Act.

It is clear from the judgment of the lower appellate Court that the question as to the existence of custom was not decided on the merits. The decree of the trial Court having been upheld by the lower appellate Court the defendant preferred the present second appeal. A Division Bench of this Court, while admitting the appeal, made the following remarks:—

"The District Judge has not gone into the question of the existence of the custom of pre-emption in Kalanaur. The Notification does not conclude the question."

We have taken into consideration the provisions of the Act. All that the Notification could have declared was that Kalanaur was a town. It does not necessarily follow that the custom of pre-emption exists in a place which has been declared to be a town under the Notification. We are, therefore, constrained to remit the issue No. 2 for decision on the merits on the evidence on the record. On receipt of the finding ten days will be allowed to the parties to file objections.

We may mention that a preliminary objection was raised by Mr. Manohar Lal on behalf of the respondents to the hearing of the appeal on the ground that no certificate having been produced, as required by section 41 of the Punjab Courts Act, the appellants were not entitled to question the finding on custom. It is, however, clear from the judgment of the lower appellate Court that the Judge has not gone into the question of custom at all.

The object of the appeal is to have the question of custom tried. We accordingly overrule the preliminary objection and proceed to hear the appeal.

Suit remanded.

1924 Lahore 278 (2).

SCOTT-SMITH, J.

Ayub and others—Petitioners

v.

Kirpal Singh and others—Respondents.

Civil Rev. No. 483 of 1921, decided on 21st June, 1922, from the decree of Senior Sub-Judge, Shahpur, dated 25th April, 1921.

(a) *Punjab Courts Act, S. 70 (1) (a)—Question as to jurisdiction decided erroneously by lower appellate Court—No revision lies.*

An appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear a suit is not open to revision by the Chief Court under S. 70 (1) (a), the lower appellate Court having had jurisdiction to entertain and decide the appeal. (4 P.R. 411, *Foll.*) [P. 279, C. 1.]

(b) *Landlord and tenant—Adna Maliks are not liable to Ala Maliks for cutting trees on the land.*

Where the plaintiffs were originally *muafidars* of the land and at the time of suit they received a share of the produce from the proprietors in lieu of the land revenue which was previously paid to them, *Held* that this fact does not establish the relationship of landlord and tenant between the parties and therefore plaintiffs are not entitled to the price of trees cut by defendants on the land. *Held further* that the plaintiffs would be the *ala maliks* and the defendants would be the *adna maliks* and not *vice versa*. [P. 279, Cs. 1 and 2.]

Nanak Chand—for Petitioners.

Nand Lal—for Respondents.

Judgment:—This is an application for revision of the order of the lower Court decreeing the plaintiffs' claim for Rs. 30 on

account of price of trees cut by the defendants-petitioners from land of which they are themselves the proprietors. In the lower Courts the question was raised whether the suit was triable by a Civil or a Revenue Court. The Munsif held that the suit was triable by a Civil Court and on the merits he gave the plaintiffs a decree. The point was again raised before the Senior Subordinate Judge who heard the appeal. He agreed with the Munsif that the suit was triable by a Civil Court. He also held in accordance with a decision of the Financial Commissioner in 1894 that the plaintiffs were *adna maliks* of the land, and, therefore, were *prima facie* owners of the trees, and without going into the oral evidence on the record he upheld the decree of the Munsif.

In revision the point is again raised as to whether the lower Courts had jurisdiction. Now, in *Arur Singh* v. *Bua Ditta* (1) it was held that an appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the Chief Court under section 70 (1) (*a*) of the Punjab Courts' Act, the lower appellate Court having had jurisdiction to entertain and decide the appeal. The learned Judge followed a previous Division Bench ruling reported as *Dowlat Ram* v. *Asa Ram* (2), and therefore, I am not prepared to interfere in revision on a question of jurisdiction. The question is, moreover, a difficult one in the present case. It appears that the plaintiffs were originally *muafidars* of the land and that at the present time they receive a share of the produce from the proprietors (defendants-petitioners) in lieu of the land revenue which was previously paid to them. Whether this fact establishes the relationship of landlord and tenant between the parties is arguable. Having regard to the fact that the appellants are the proprietors of the land the presumption certainly appears to be that they are owners of the trees growing thereon. I have read the judgment of the Financial Commissioner of 1894 and I find that the question there was whether the new settlement should be made with the *muafidars* or with the owners of the land. It was decided that the settlement should be made with the *muafidars* and incidentally the Financial Commissioner remarked that they were *adna maliks* of the land, though this point was not clearly in issue at that time. Now, article 139 of Rattigan's Digest shows that the *ala maliks* usually levy a sort of customary rent from the *adna maliks*. If this is correct the plaintiffs, who receive half the produce from the defendants, would be the *ala maliks* and the defendants would be the *adna maliks*, and not *vice versa*. However this may be, I consider that the *onus* was heavily upon the plaintiffs to prove that they were entitled to the trees growing on the land. I do not think that it can be said that the plaintiffs have established that they are *adna maliks* of the land, and, therefore, the reasons given by the learned Subordinate Judge for decreeing their claim are not sound. I have had the oral evidence read to me and, in my opinion, it is quite insufficient to rebut the initial presumption.

I, therefore, allow the revision and setting aside the decree of the Courts below, dismiss the plaintiff's suit. Under all the circumstances of the case I direct the parties to bear their costs in all the Courts.

Revision allowed.

(1) (1911) 4 P.R. 1911=45 P.L.R. 1911=26 P.W.R. 1911=9 I.C. 674.
(2) (1886) 46 P.R. 1886.

1924 Lahore 279.

SCOTT-SMITH, J.

Ata Muhammad and others—Appellants

v.

Shankar Das and others—Respondents.

Mis. F.A. No. 621 of 1921, decided on 21st June, 1922, from the order of District Judge, Hoshiarpur, dated 24th January, 1921.

* *Civ. Pro. Code, O. 41, r. 17—Appeal—Date of hearing not fixed—Notice not given—Dismissal for default is improper—Limitation Act, Art. 168.*

Where no date is fixed for the hearing of an appeal and no notice is given to the parties of any date on which the hearing of the appeal would be taken up, an order dismissing the appeal for default is without jurisdiction. In such case the limitation of thirty days for setting aside the dismissal does not apply, especially when the record does not show that the appellants were informed of the dismissal. If the order of dismissal were made under circumstances which would render such action *ultra vires* of the Court, the 30 days' limitation under Art. 168 ought not to apply.

S. K. Nias Muhammad—for Appellants.

Nanak Chand Pandit—for Respondents.

Judgment :—This is a first appeal from the order of the District Judge of Hoshiarpur, rejecting an application for the re-admission of an appeal dismissed in default under Order 41, rule 17, Civil Procedure Code. The First Court passed a decree in favour of Thakar Das and two other plaintiffs. Thakar Das died while the suit was pending in the First Court and Shankar Das was impleaded as his legal representative. In the appeal filed before the District Judge Shankar Das was made a party but when the appeal was filed in this Court Thakar Das' name was shown instead of that of Shankar Das. It appears, however, that in the District Judge's order rejecting the application for re-admission of the appeal the name of Thakar Das appears, and not that of Shankar Das, and, therefore, there was certainly some excuse for the mistake made in the memorandum of appeal. When the appeal was first filed in this Court it was returned in order that a copy of the application for restoration of the appeal in the lower appellate Court and also a copy of the First Court's judgment should be filed. These were filed and they show the name of Shankar Das and not that of Thakar Das, and it is, therefore, contended by Counsel for the respondents that, if there had been due care and attention on behalf of the appellant and his Counsel the mistake would have been corrected when the appeal was re-filed. I admit there was some remissness on the part of Counsel, but having regard to the fact that the original mistake arose on account of the mistake in the copy of the order appealed against, I think it should be overlooked and this Court should exercise its power of adding Shankar Das as respondent under the provisions of Order 41, rule 20, Civil Procedure Code.

Another objection was raised to the effect that Hamun Khan, one of the defendants, had died and his legal representatives were not brought on the record within the statutory period. Hamun Khan was the lessee of the property claimed by the plaintiffs but he sold it to defendants Nos. 2 to 4. He was, therefore, only a *pro forma* party to the suit. Defendants Nos. 2 to 4 were substantial defendants in the case and they alone have appealed. They seek to have the plaintiffs' decree set aside and seek no relief against Hamun Khan. I, therefore, hold that he is not a necessary party to the appeal. Mr. Kennaway, District Judge, remanded the case to the Trial Court for further enquiry under Order 41, rule 25, Civil Procedure Code, on the 13th July, 1917. The case was postponed for some time owing to the war and the impossibility of getting the respondents served. The Trial Court reported that Badri Das respondent could not be served with notice and that the appellants also had not been appearing before it and asked the District Judge what course it should pursue. The District Judge on receipt of this report and without issuing notice to any party dismissed the appeal under Order 41, rule 17 on the 13th May, 1920. It is contended on behalf of the appellant that this order was passed without jurisdiction inasmuch as no date was fixed by the District Judge for hearing the appeal. It appears from the record that the 13th May, 1920, was not fixed for hearing the appeal and that no notice was given to any party that the case would be taken up in the District Judge's Court. I must, therefore, hold that the order was passed without jurisdiction and is not justified by the provisions of the law.

A further objection is raised on behalf of the respondents that the application to the District Judge which was not made till some 8 months afterwards was barred by time. As, however, the appellants had no notice of the date in the District Judge's Court and the record does not show that they were informed of the dismissal, it appears that the limitation laid down in article 168 of the 2nd Schedule of the Limitation Act should not apply. Mr. Rustomji in his Law of Limitation, Third Edition, at page 700 submits that if the order of dismissal were made under circumstances which would render such action *ultra vires* of the Court, the 30 days' limitation under article 168 ought not to apply. It appears that the appellants had only come to know of the order of dismissal after the 4th January 1921 when Kazi Mahbub Alam applied to the District Judge that the hearing of the appeal be proceeded with.

I, therefore, accept the appeal and, setting aside the orders of the District Judge, dated the 24th January, 1921, and of the 13th May, 1920, remand the case to his Court for disposal of the appeal in accordance with law. Costs of this Court will be costs in the cause.

Case remanded.

1924 Lahore 281 (1).

HARRISON, J.

Bahadur Singh—Petitioner

v.

Wasawa Singh and others—Respondents.

C. R. P. No. 660 of 1921, decided on 30th June, 1922, from the order of Addl. District Judge, Lahore, dated 7th April, 1921.

Civ. Pro. Code, O 9, r. 13—Application to set aside ex parte decree—Dismissal for failure to pay process-fee—Appeal lies.

An application to set aside an *ex parte* decree was consigned to the record room owing to the applicant's failure to pay the process-fee for service of notice : *Held* the order amounts to a dismissal of the application to set aside the *ex parte* decree under O. 9, r. 13 and an appeal lay. [P. 281, C. 2.]

Shaukat Rai—for Petitioner.

Kishen Chand—for Respondents.

Judgment:—The plaintiff in this case brought a suit for possession of certain land and was given a decree *ex parte* on 30th November 1920. On the following day, the 1st December 1920, the defendant applied to have the *ex parte* decree set aside. The 17th of December was fixed for the hearing of this application and an adjournment was given to the 5th of January, as notice had not been served for the 17th December. The applicant failed to pay the process-fee and consequently on the 5th of January the application was consigned to the record room. This I take to be tantamount to an order dismissing the application. An appeal was presented to the District Judge, who has held that it does not lie, inasmuch as the order must be treated as being under Order 9, rule 2 and not Order 9, rule 13 and that, therefore, the proper remedy for the appellant was an application under Order 9, rule 4 and not an appeal. From this order this revision has been presented and the first question to be decided is whether the appeal did or did not lie to the District Judge. Counsel for the petitioner relies on three rulings: *Kumud Kumar Bose* v. *Hari Mohan Samadar* (1), *Sacheeni* v. *Kanta Hazi* (2) and *Pakari Pramanik* v. *Sarat Sundari Debya* (3). In all these the application for setting aside the *ex parte* decree was dismissed in default and in all it was held that this order of dismissal in default was an order under Order 9, rule 13, and, therefore, an appeal lay. In both *Kumud Kumar Bose* v. *Hari Mohan Samadar* (1) and *Sacheeni* v. *Kanta Hazi* (2), Counsel for the petitioner applied for an adjournment, and, on this being refused, withdrew. In *Pakari Pramanik* v. *Sarat Sundari Debya* (3) there was no sort of appearance at all. On the reasoning adopted by the learned District Judge the orders should have been treated as being under Order 9, rule 3 from which there is no appeal and against which the aggrieved party must seek his remedy by an application under Order 9, rule 4. This view, however, was not taken, and the result rather than the intermediate stage being looked to, the final order was treated on all three occasions, in spite of having been passed in default and not on the merits, as being an order under Order 9, rule 13. Both views of the nature of the order are possible and I follow that taken three times by the learned Judges of the Calcutta High Court and hold that the result of the order being a dismissal of the application to set aside the *ex parte* decree, an appeal lay. I, therefore, accept the application for revision and direct that the appeal be decided on its merits. Under the circumstances of the case and as it is clear that the successful petitioner did not state his case fully or rather the law on the subject before the District Judge, I think the correct order is that the parties should pay their own costs in this application for revision.

Application allowed.

(1) (1915) 21 C.L.J. 628=30 I.C. 45.
(2) (1916) 36 I.C. 798.
(3) (1917) 37 I.C. 935.

1924 Lahore 281 (2).

BROADWAY, J.

Chiragh Din—Appellant

v.

Muhammad Usman Khan and others—Respondents.

S. A. No. 803 of 1921, decided on 16th May, 1922, from the decree of District Judge, Jullundar, dated 17th February, 1921.

*(a) *Transfer of Property Act, S. 111 (g)—Denial of landlord's title must be in clear terms—Lessor must do some act to show his intention of determining the lease.*

Repudiation of a landlord's title is a ground of forfeiture. In other words a tenant forfeits his holding if he denies his landlord's title in clear unmistakable terms, not only must there be a denial of title to bring about a forfeiture but the

lessor must do some act showing his intention to determine the lease. The mere assertion of a title as owner by a person having rights in land of a very substantial kind should not necessarily be treated as denial of the title of a landlord whose rights are of an attenuated character. The denial itself must be in clear unmistakable terms. (2 L.W. 941, *Ref.*) Denial of a landlord's title in the pleading of a suit may work forfeiture but the denial cannot be taken advantage of in the same suit. [P. 284, C. 1, and P. 283, C. 1.]

(b) *Transfer of Property Act—Principles apply to the Punjab.*

The Transfer of Property Act is not in force in the Punjab but the Courts in the Punjab will be guided by the principles therein enunciated. (42 Mad. 589 (P.C.) *Foll.*). [P. 283, C. 2.]

(c) *Evidence Act, S. 115—Lessor allowing a person to purchase at Court auction a lease-hold subject to a right of forfeiture—Lessor cannot exercise that right as against him.*

Where the lessor did not exercise his right to forfeit the tenancy for two years after his title was repudiated by the tenant and allowed a third party to purchase the leased property at a Court auction he was held as estopped as against the third party from setting up the forfeiture which was considered as waived.

Tirath Ram —for appellant.

Kanwar Dalip Singh—for respondents.

Judgment :—One Miran Bakhsh was indebted to Umar Draz Khan. Miran Bakhsh died and after his death Umar Draz Khan obtained a decree against Mt. Rabia, widow of Miran Bakhsh, for a sum of Rs. 1,140-0-0.

In execution of this decree a house was attached on the 14th October 1908. Thereupon one Elahi Bakhsh filed objections to the attachment alleging that he had purchased the said house from Mt. Rabia and that it was, therefore, not liable to attachment in execution of the decree in favour of Umar Draz Khan. This objection being allowed Umar Draz Khan instituted a suit asking for a declaration that the said house was liable to attachment in execution of his decree and obtained a decree in his favour on the 4th December 1915. Before the house was brought to sale, however, one Mohammad Usman Khan came forward on the 22nd November 1916 objecting to the sale of the site which he alleged belonged to him. His objection was dismissed on the ground that it had been made many years after the original attachment. He thereupon instituted a suit asking for a declaration that he was the owner of the site and that only the *malba* was liable to attachment. On the 27th July 1917 a decree was passed in his favour declaring that he was the owner of the site but at the same time declaring that the *malba* and the right of residence were liable to attachment and sale. This decree was confirmed on appeal by the District Judge on the 19th of November 1917.

On the 8th October 1919 the said house was sold by public auction exclusive of the site and was purchased by one Chiragh Din for Rs. 4,150-0-0. Chiragh Din obtained possession of the house.

On the 3rd December 1919 Mohammad Usman Khan instituted the suit out of which this appeal had arisen claiming to be entitled to eject the defendants, who were Piran Ditti, widow of Umar Draz Khan, and Mt. Rabia and the auction-purchaser, Chiragh Din. He based his right to eject on the allegation that in the declaratory suit which was decreed in 1917 Mt. Rabia had denied his (the plaintiff's) title in the site and set up her own proprietary right in it, thus forfeiting the lease and rendering herself liable to ejectment.

On behalf of the auction-purchaser, Chiragh Din, it was contended that in the declaratory suit of 1917 it had specifically been held that the right of residence and *malba* were liable to be sold and that he had purchased these at an auction-sale and was not, therefore, liable to ejectment. The trial Court dismissed the plaintiff's suit accepting Chiragh Din's contention. Against this dismissal Mohammad Usman Khan appealed to the learned District Judge who held that Mt. Rabia having denied the plaintiff's title and set up her own had lost her right to the tenancy and that, therefore, Chiragh Din was liable to ejectment as he could not purchase more than the rights Mt. Rabia had in the house. Mohammad Usman Khan's suit was accordingly decreed, Chiragh Din being given three months in which to remove the materials.

Against this decree the defendants have come up to this Court in second appeal through Mr. Tirath Ram and I have heard Mr. Dalip Singh on behalf of the plaintiff.

In the plaint it is averred that the forfeiture of the tenancy took place owing to the denial of the plaintiff's title by Mt. Rabia in the declaratory suit decided in 1917. A reference to that declaratory suit shows that in paragraph 2 of the plaint it was stated that the plaintiff

was the owner of the site and that Miran Bakhsh and after him Mt. Rabia were tenants (*raiyat*) *qua* the site under plaintiff. In her written statement in that case Mt. Rabia, referring to paragraph 2 of the plaint, stated that she was ignorant of what was therein alleged and added that her husband had erected the house in question at a cost of Rs. 15,000 and that the family had been in possession of the said house ever since *bataur malik* and that there was no written *raiyat nama*. Prior to the settlement of issues the statement of Mt. Rabia's agent, her brother, was recorded and he there stated that Mt. Rabia was the owner and not a tenant of the plaintiff. Mr. Tirath Ram for the appellant contended that as a matter of fact Mt. Rabia, if she had denied the plaintiff's title, had done so many years before, namely, when she had sold this house to Elahi Bakhsh, and he contended that the denial, if any, should be taken to date from the deed of sale in Elahi Baksh's favour and the respondent must be pinned with knowledge of it. The respondent was not, however, a party to that deed of sale nor to the suit which ultimately was filed by Elahi Bakhsh and disposed of against him. I am unable to see any justification for holding that he must be pinned with knowledge of the denial referred to as being evidenced by the deed. In the declaratory suit, however, the plaintiff says in his plaint that his right had been denied prior to suit probably in order to show that he had a cause of action and in any case I do not think that in that suit he could have sued for the eviction of Mt. Rabia (as contended by Mr. Tirath Ram), for the declaratory suit was the result of his objections being overruled by the Executing Court. The denial of his title in the declaratory suit would not work a forfeiture of which advantage would be taken in that suit. I am, therefore, unable to accede to Mr. Tirath Ram's contention that the plaintiff should have sued for eviction in that declaratory suit. In this view I am supported by the dictum of their Lordships of the Privy Council in a case reported as *Maharaja of Jeypore* v. *Rukmini Pattamahadevi* (1).

Next it was contended by Mr. Tirath Ram that, so far as the present appellant Chiragh Din was concerned, the suit was bad, inasmuch as in the declaratory decree it had specially been declared that the right of residence and the *malba* were liable to sale in execution of the decree in Umar Draz's favour. It was urged that, although that decree was finally passed on the 19th November 1917 the present suit was not instituted till December 1919 and that the plaintiff's silence for those two years should be regarded as a waiver of his right to enforce the forfeiture set up, more especially as the plaintiff's inaction for that period of two years in spite of the explicit declaration in the decree that the right of residence was liable to be sold, had induced Chiragh Din to pay a sum of Rs. 4,150, when the right of residence and *malba* were brought to sale. As against this Mr. Dalip Singh contended that mere inaction or silence for two years could scarcely be treated as a waiver, inasmuch as the plaintiff had, under article 143 of the Indian Limitation Act, a period of twelve years within which to sue for the eviction of the tenant who had denied his title. He further pointed out that, as soon as the right of residence was sold, *i.e.*, on the 8th October, 1919, the plaintiff lost no time in taking the necessary action to establish his right. That the repudiation of a landlord's title is a ground of forfeiture is now a recognised feature in this country. It has been given effect to in the Transfer of Property Act, 1882, in section 111 (*g*) and this rule is based on the English Law as to forfeiture which is that a tenant forfeits his holding if he denies his landlord's title in clear unmistakable terms—*vide Maharaja of Jeypore* v. *Rukmini Pattamahadevi* (1). The Transfer of Property Act is not in force in this Province but, it has repeatedly been held that the Courts in the Punjab will be guided by the principles therein enunciated. Section 111 (*g*) is as follows : "A lease of immoveable property determines by forfeiture, that is to say, ... in case the lessee . . . . renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease."

It would appear, therefore, that not only must there be a denial of title to bring about a forfeiture but the lessor must do

(1) 1919) 42 Mad. 589=36 M.L.J. 543=7 A.L.J. 552=29 C.L.J. 528=21 Bom. L.R. 655=(1919) M.W.N. 271=23 C.W.N. 889=26 M.L.T. 16=10 L.W. 381=50 I.C. 631 (P.C.).

some act showing his intention to determine the lease. The question is whether in the present case the landlord expressed his intention to determine the lease in any way or whether his inaction for a period of two years can be regarded as a waiver. This matter is not free from difficulty. As pointed out in *Kolangorath Raman Nayar* v. *Kannoth* (2), the mere assertion of a title as owner by a person having rights in land of a very substantial kind should not necessarily be treated as denial of the title of a landlord whose rights are of an attenuated character. The denial itself must be in clear unmistakable terms. In the present case the value of the site compared with the value of the buildings thereon is exceedingly small. The ground rent thereof appears to be practically negligible. There was no *raiyatnama* in writing, and in her written statement Mt. Rabia stated that she knew nothing of the lease set up. The plea in her written statement I would not regard as a serious denial but would treat it more as a denial of the plaintiff's claim in order to put him to proof. The subsequent statement by her agent, however, appears to me to be a definite and unequivocal claim to set up Mt. Rabia's title.

I must, therfore, hold that the landlord's title was denied in the declaratory suit and that this denial rendered the tenancy liable to forfeiture. But in order to give effect to this forfeiture it was necessary for the plaintiff to do some act indicative of his intention to determine the lease.

Mr. Tirath Ram did not deny that the plaintiff could sue for eviction within a period of 12 years. His contention was that the plaintiff must be held to have waived his right to forfeit the tenancy by his inaction for two years in spite of the decree which declared the right of residence liable to sale and thus induced the appellant to purchase a valuable right.

As I have said above, the matter is not free from difficulty but, it seems to me that there is some force in Mr. Tirath Ram's contention. Plaintiff in his declaratory suit had clearly asked for a declaration that the site was his and that all that was liable to be sold was the *malba*. The decree that was granted was that, although the site belonged to the plaintiff and was not liable to be sold, the right of residence and *malba* were available to the decree-holder, Umar Draz. In spite of this declaration the plaintiff took no steps to evidence his intention to determine the lease on the ground that it had become forfeited. The right of residence and the *malba* were in due course put up for sale in public auction and bought in by Chiragh Din and it was not till then that the plaintiff thought fit to evince his intention to determine the lease.

In the declaratory suit brought by him in 1916-17 Mt. Rabia was impleaded as a defendant, and in the plaint it was specifically stated that she had denied the plaintiff's title. Although it was not possible to claim a forfeiture in the declaratory suit, the plaintiff could have sued to evict Mt. Rabia on the ground alleged, *viz.*, her denial of his title, and I think that the plaintiff must be held to have known that Mt. Rabia had denied his title prior to the institution of the declaratory suit, for he definitely asserts this fact in the plaint in that suit. This being so, it is clear that he fought out the declaratory suit with the knowledge that his title had been denied by his tenant, and the decree passed in his suit to the effect that not only the *malba* but the *right of residence* also was attachable in the decree against his tenant, should have made him more diligent and prompt in indicating his intention to determine the lease. Instead of doing this, however, he remained passive until the right of residence and the *malba* had actually been auctioned and then, and then only, did he take any action. In these circumstances it seems to me that the appellant, Chiragh Din, can claim, with some justification, that he was induced to purchase at the auction-sale by reason of the inaction of the plaintiff which led him to conclude that the plaintiff had no intention of determining the lease, and that it would be inequitable to allow the plaintiff to take up a different attitude at this stage. According to the plaintiff's own admission in the plaint in the declaratory suit he was aware that his tenant had denied has title. In the course of the said suit the said title was again denied by Mt. Rabia. The decree in the said suit clearly declared that the right of residence in the house was liable to be sold.

(2) (1915) 2 L.W. 941=(1915) M.W.N. 793= 31 I.C. 164.

His inaction for two years, therefore, was conducive to the belief that he had no intention of taking advantage of the denial of his title to determine the lease, and it seems to me that there can be no doubt that it was under this belief that the appellant tendered his bids at the auction. Doubtless the plaintiff may, in ordinary circumstances have had 12 years within which to bring a suit to evict Mt. Rabia, but when his inaction has induced a third person to pay large sums of money I think it would be inequitable to hold otherwise than that the plaintiff had waived his right to determine the lease or at any rate was estopped from suing to evict.

I accordingly accept this appeal and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

1924 Lahore 285.

MARTINEAU, J.

Hukam Chand—Appellant

v.

The Bank of Multan, Limited, in Liquidation—Respondent.

Mis. F. A. No. 1167 of 1921, decided on 11th January, 1922, from the order of District Judge, Multan, dated 2nd May, 1921.

* *Companies Act* (VII *of 1913*) *S. 235 Sub-s. (3) —Suit for recovery of compensation for misfeasance —Art. 36, Limitation Act applies—Limitation Act, Art. 36.*

An application for the recovery of compensation for misfeasance made under S. 235 of the Company's Act is treated as a suit by virtue of Sub-s. (3) and such a suit is governed by Art. 36 of the Limitation Act, and as no new rights and liabilities are created, the cause of action does not arise on the date of the winding up order but time must run from the date of the misfeasance for which compensation is sought. [P. 286, C. 1.]

S. K. Mukerji—for Appellant.

Bhagat Ram Puri—for Respondent.

Judgment:—On the 12th August 1920 an application was made by the Liquidator of the Bank of Multan under section 235 of the Indian Companies Act, VII of 1913, for the recovery of Rs. 965-4-8 from Hukam Chand as compensation in respect of a certain misfeasance and breach of trust committed by him in 1910 when he was Manager of the Bank. The principal plea taken on behalf of Hukam Chand was that the application was barred by limitation under article 36 of the First Schedule of the Limitation Act, that Act being applicable to an application under section 235 of Act VII of 1913, by virtue of sub-section 3 of that section, as if such application were a suit. The District Judge has held that article 120 applies and not article 36, and that time runs from the date of the resolution for winding up the Company voluntarily, namely, the 14th April 1918, and that, therefore, the application is within time. He has passed a decree for Rs. 588, from which Hukam Chand now appeals.

It appears to me impossible to uphold the order of the learned District Judge. The application made under section 235 of Act VII of 1913 is by sub-section 3 to be treated as a suit for the purposes of limitation; and the suit is clearly one of the description, mentioned in article 36 of the First Schedule of the Limitation Act, being a suit for compensation for misfeasance. article 120 cannot be applied where any other article is applicable. It is true that an application under section 235 of Act VII of 1913 can be made only after a winding up order has been passed, and that to apply article 36 in the present case leads to the anomolous result that the limitation had expired before the winding up proceedings began. But the anomaly has been created by the Legislature, and its existence cannot get rid of the patent fact that the suit is one for compensation for misfeasance, and is, therefore, governed by article 33.

The learned District Judge says in his judgment that the winding up calls into existence new rights and new liabilities which had not existed before, and which are to be enforced by the liquidator and not by the Company, and hence he concludes that the period of limitation should commence to run from the date of the liquidation. He apparently bases his opinion on an observation made in *Pyrell Spinning and Weaving Company, Limited* v. *Manek Haji* (1), but that observation related to an application made against contributories and not to an application of the nature of the present one. In *Cavendish-Bentinck* v. *Fenn* (2) it was held by Lord Macnaghten

(1) (1886) 10 Bom. 483.
(2) [1887] 12 A.C. 652=57 L.J. Ch. 552=57 L.T. 773=36 W.R. 441.

on page 669 that section 165 of the English Companies Act of 1862 (which corresponds to section 235 of the Indian Act VII of 1913) created no new offence and gave no new rights, but only provided a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. The same view was taken with regard to section 214 of the Indian Companies Act of 1882 in *Kumarpuram Sheshadri* v. *Pestones Jamasee* (3).

I cannot, therefore, agree with the contention that section 235 of Act VII of 1913, creates new rights and liabilities and that the cause of action arises on the date of the winding up order. Time must run from the date of the misfeasance for which compensation is sought, and the application, having been made more than two years from that date is barred under article 36 of the First Schedule of the Limitation Act.

I accordingly accept the appeal, set aside the order of the District Judge, and dismiss the respondent's application. Under the circumstances I direct that the parties shall bear their own costs in both Courts.

Appeal accepted.

(3) (1903) 5 Bom. L.R. 633.

1924 Lahore 286 (1).

CHEVIS, J.

Fakir Chand—Petitioner

v.

Fakir—Opposite Party.

Crim. Rev. No. 1350 of 1921, decided on 2nd March, 1922, from the case reported by the District Judge, Attock at Campbellpur.

** (a) *Penal Code, S. 447—Trespass on land in tenant's possession—Complaint by landlord is sufficient.*

Where accused has entered upon property in the possession of a tenant with intent to commit an offence or to intimidate, insult or annoy that tenant, *held* that he is clearly guilty of an offence of criminal trespass and a complaint by the landlord is sufficient to set the law in motion just as much as a complaint by the tenant. [P. 286, C. 2.]

* (b) *Crim. Pro. Code, S. 439—Revision from acquittal lies.*

The High Court clearly has power on the revision side, to set aside even an order of acquittal and may well do so when the order is based on a misapprehension of law. (8 P. R. 1918, *Foll.*) [P. 286, C. 2.]

Order:—The Magistrate has acquitted the respondent of an offence under section 447, Indian Penal Code, merely because the complainant, who is the owner of the land was not in physical possession, the possession at the time of the alleged offence being with a tenant. As the learned District Magistrate points out, this is no sufficient ground for a discharge or acquittal, see *Imperatrix* v. *Keshaval Jekrishna* (1), *Nga Po Tok* v. *Emperor* (2) and *Prayag Singh* v. *Mrs. Morgan* (3). If the respondent has entered upon property in the possession of a tenant with intent to commit an offence or to intimidate, insult or annoy that tenant, he is clearly guilty of an offence of criminal trespass and a complaint by the landlord is sufficient to set the law in motion just as much as a complaint by the tenant.

This Court clearly has power on the revision side to set aside even an order of acquittal and may well do so when the order is based on a misapprehension of law, see *Emperor* v. *Thamman* (4).

I set aside the order of acquittal and direct the Magistrate to proceed with the case and dispose of it on the merits.

Order set aside.

(1) (1897) 21 Bom. 536.
(2) (1918) 20 Cr. L.J. 115=49 I.C. 99.
(3) (1921) 33 C.L.J. 118=25 C.W.N. 425=22 Cr. L.J. 494=62 I.C. 190.
(4) (1918) 8 P.R. Cr. 1918=17 P.W.R. Cr. 1918=19 Cr. L.J. 399=44 I.C. 751.

1924 Lahore 286 (2).

ABDUL RAOOF, J.

Chandu Lal—Appellant

v.

Daulat Ram and others—Respondents.

S. A. No. 1643 of 1921, decided on 23rd March, 1922, from the decree of Senior Sub-Judge, Ludhiana, dated 28th April, 1921.

Registration Act Ss. 17, 49—Partition—Document evidencing partition—Registration necessary—Oral evidence not allowed—Evidence Act, S. 91.

Where a document is intended to be the evidence of a partition effected between the parties thereto it requires registration under S. 17 and if unregistered is inadmissible in evidence according to the provisions of S. 49. Oral evidence as to the terms of such a document is shut out by S. 91 of the Evidence Act.

B. Tek Chand—for Appellants.

Jai Gopal Sethi—for Respondents.

Judgment:—This was a suit for the recovery of possession over a *deorhi*

marked *jim* on the plan. The trial Court decreed the suit and the lower appellate Court has dismissed it. The plaintiff has, therefore, come up in second appeal to this Court. The following facts will disclose the nature of the questions that are to be decided in this second appeal :—

The properties marked *alif*, *be*, *jim*, *dal*, *mim* and two *tawelas* were purchased jointly at an auction-sale on the 27th November, 1917, for Rs. 1,700 by three persons, namely, Chandu Lal, plaintiff, Bansi Ram father of the defendants, Daulat Ram and Mul Raj. An oral partition is said to have been made on the 16th February, 1918. According to the plaint the agreement by which the partition was effected was subsequently reduced to writing. According to the plaint the document was written after three days, namely, on the 19th February, 1918, and according to the defence the document was written on the same date immediately afrer the oral partition had been effected. The plaint stated that the properties *alif*, *jim* and *dal* by the oral partition fell to the lot of the plaintiff and that immediately possession was delivered to him, that the rest of the properties fell to the lot of Bansi Ram and Kishna Jat and that the plaintiff enjoyed possession over the *deorhi* marked *jim* for about fifteen months when he was forcibly dispossessed by the defendants.

The defendants resisted the suit on the allegation that the *deorhi jim* had been allotted to their father Bansi Ram and that they were in possession of it in accordance with the partition. The defendants further alleged that the partition was effected by a written document and that the plaintiff was not entitled to produce oral evidence to support his claim.

The trial Court held that the partition deed was compulsorily registrable under section 17 of the Indian Registration Act and for want of registration it was inadmissible in evidence with reference to the provisions of section 49 of the Act. It, however, held that the plaintiff was entitled to produce oral evidence to prove the partition and that the evidence adduced on his behalf established his title to the *deohri*.

In appeal by the defendants the lower appellate Court agreed with the Court of first instance in holding that the document required registration and that it was inadmissible in evidence. It, however, disagreed with the trial Court as to the admissibility of oral evidence to support the alleged partition and dismissed the suit of the plaintiff for want of proof.

In second appeal it has been contended by Mr. Tek Chand, the learned Advocate for the plaintiff-appellant, that the document was not a partition deed, but it was merely a memorandum of the oral partition and, therefore, did not require registration. It was also argued by the learned Advocate as a corollary to the above argument that as the partition was effected verbally oral evidence was admissible to prove the said partition. He relied on the cases of *Ram Das* v. *Nadir Shah* (1) and *Amar Nath* v. *Khudu Mal* (2) in support of his argument that a mere recital of an accomplished partition in a document did not make the document compulsorily registrable under section 17 of the Act. Mr. Sethi, on the other hand, has contended that from the construction of the partition agreement and from the surrounding circumstances of the case it is clear that the intention of the parties was that the document should be the only repository and appropriate evidence of the partition and as the deed was not registered it was not admissible under section 49 of the Registration Act to establish the fact that the property was so partitioned with the result that section 91 of the Evidence Act excluded oral evidence in support of the transaction. He has relied on *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (3) in support of his contention. It was held in that case that "a deed by which the partition of the immoveable property is effected or which declares such a partition previously effected by the parties, is compulsorily registrable under clause (*b*) of the Registration Act." The question to be decided, therefore, is whether it was intended by the parties to the partition agreement that the document was to serve as the repository of the arrangement arrived at by them. The document begins with the usual expression found in formal documents, *mayan keh Bansi Ram pisr Thakur Das etc., etc.* and ends with the usual expression to be found in formal deeds: *lehaza yeh ikrar nama likh diya hai keh sanad rahe.* It is signed

(1) (1922) 69 I. C. 608.
(2) (1920) 23 P.L.R. 1920=83 P.W.R. 1919=53 I.C. 123.
(3) (1910) 12 C.L.J. 25=15 C.W.N. 375=6 I.C. 346.

by the executants and is witnessed by two witnesses. The whole context of the document shows that it was intended to be a deed of partition. The contents of the document leave no room as to the intention of the parties and may be reproduced to bear out the view that I have taken :—

Mayan ki Bansi Ram pisr Thakur Das, Chandu Lal pisr Badawa Ram zat Brahman, wa Kishna walad Wazira Quam Jat Hindu saknae Samrala, Tahsil Samrala ke muqirran hain jo ki muzhiran ne makanat ba tafsil zail sarkari nakul o bazaria nilam muwarrikha 27th November 1917 ba ivaz mubligh 1700 rupaya ham har seh hissadaran manzur ho chuka hai aur rupaya dakhil Khazana Sarkar kar diya gaya hai woh ab ham har sen hissadaran ne bahami taqsim is tarah par kar liya hai—yake makan rihayashi jis men Naib Tahsildar Sahib Samrala abad the ma baithak jo ke kucha am men hai woh ba qabaz muzhir Bansi Ram wa doyam makan bila saqf maruf kohna is ki ek diwar bar janib i-gharb pukhta hai ma deorhi bila saqf wa malba darida ba qabza Muzhir Chandu Lal, soyam makanat har do tavelajat ba qabza muzhir Kishna Jat kar liya hai aur apna apna qabza her seh hissadaran ne kar liya hai kisi qism ka tanaza babat makanat ke ham har se hissadaran ka nahi raha hai. Agar koi shakhs hissadar har seh hissadaran men se kisi qism ka babat makant ro ke taqsim shuda ho chuke hain aur apna apna qabza kar liya giya hai mutriz ho ga to woh kissedar mubligh tin sau rupaya harjana ke dene ka zimmevar hoga, lihaza yeh iqrarnama likh diya hai ki sanad rahe

Muwarrisha 19 h February 1918.

(We, Bansi Ram, son of Thakur Das, and Chandu Lal, son of Badhawa Ram caste Brahmin, and Kishna, son of Wazira, caste Jat Hindu, residents of Samrala, do hereby declare as follows :

We, the three co-sharers, have now divided among ourselves the following houses, being Government *nazul* property with respect to which auction-sale, dated the 27th November for Rs 1,700 has been confirmed in favour of all three of us and the money has been deposited into the Government treasury; (1) Residential house which was occupied by the Naib Tahsildar of Samarala, with a *baithak* in a public *kucha* has been allotted to me. Bansi Ram, (2) unroofed house known as *kohna* having one of its walls to the west built of *pacca* masonry with an unroofed *deorhi* and debris to me, Chandu Lal, and (3) two stables to me, Kishna Jat. We have taken possession of the properties allotted to us respectively. We have been left no dispute whatsoever with respect to the houses. If any of us the three co-sharers, raises any sort of objection with respect to the houses, which have been divided and taken possession of by us respectively, he shall be liable to pay Rs. 300 as damages.

Hence, we have drawn up this agreement so that it may serve as authority.

Dated the 19th February 1918.)

Mr. Tek Chand has argued that the object for which this document was executed three days after the oral partition was to provide a penalty for the non-performance of the oral agreement, and he relies upon the following clause contained in the deed :

Agar koi shakhs hissedar har seh hissedaran men senisi gism ka babat makanat jo ke taqsim shuda ho chuke hain aur apna apna qabza kar liya giya hai mutriz hoga to woh hissedar mubligh tin sau rupaya harjana ke dene ka zimmewar hoga.

The gist of his contention is that the statement contained in the deed as to the partition was a mere recital of the facts relating to the oral partition for the purposes of the covenant as to the payment of money in case of a breach of the contract. In the case of *Gurumukh Singh* v. *Pholo* (4) a similar question arose with reference to a deed of exchange and it was decided in that case that "on consideration of the document as a whole it was clear that it was not intended by the parties to be merely a recital of a completed exchange with an agreement for payment of money as a penalty, but was intended to be the instrument superseding and embodying the oral bargain which necessarily precedes every such contract, and, therefore, required registration." In the case of *Buta Singh* v. *Gurdit Singh* (5) under somewhat similar circumstances the agreement of partition was held not to be a mere recital of a previous oral contract and the document was held to be compulsorily registrable.

It is not necessary to multiply authorities on this point, because each case must be decided with reference to the particular circumstances of its own. After considering the document as a whole I have not the least doubt that the document was

(4) (1894) 120 P.R. 1894.
(5) (1896) 10 P.R. 1896.

intended to be the evidence of the partition effected between the parties.

Mr. Tek Chand has laid great stress on the following expression in the document, namely, "*bahami taqeim is tarah par kar liya hai apna apna qabza har seh hissedaran ne kar liya hai kisi qism ka tanaza babat makanat ke hame har seh hissedaran ka nahin raha hai,*" and has argued that inasmuch as this referred to what had already taken place it must be concluded that the document was intended to contain a mere recital of an accomplished fact. This argument, in my judgment, has no force, because common experience shows that almost all documents are drawn up in this manner and the verb in the past tense is usually employed simply with the object of making it clear that the thing mentioned in the document was an accomplished fact. It conveys the idea that the contract entered into between the parties has actually taken place. The document, in my opinion, required registration and being unregistered was inadmissible in evidence with reference to the provisions of section 49 of the Registration Act. The decision of the question as to the inadmissibility of oral evidence to prove the terms of the contract embodied in the document depends upon the true construction of section 91 of the Evidence Act. That section provides that "when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained." Now, it is manifest that the terms of the contract in this case have been reduced to the form of a document. The document itself, therefore, could have been given in proof of the terms of the contract, but, as already held, it cannot be admitted in evidence for want of registration. The evidence as to the terms of the contract is, therefore, inadmissible under section 91.

Mr. Tek Chand in the last resort contended that his client was at least entitled to a joint possession over the *deorhi* in dispute if his claim to an exclusive possession could not be recognised. This claim, however, was not put forward in the Courts below and I do not think I would be justified in allowing the plaintiff to set up, for the first time in second appeal, a new plea. If the plea had been raised in the Courts below the defendants possibly would have met it on various grounds. In that case it would have been necessary to adduce evidence in support of the defence. I am not, therefore, disposed to entertain the plea. He has also contended that his client should be granted a decree for possession on his possessory title, as he had been in possession for considerable time before he was forcibly dispossessed by the defendants. The decision of this plea also must rest upon evidence and, therefore, it cannot be allowed to be raised in second appeal.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1924 Lahore 289.

ABDUL QADIR, J.

Musa and another—Appellants

v.

Gul Muhammd and others—Respondents.

S. A. No. 1889 of 1921, decided on 14th February, 1922, from the decree of District Judge, Gujaranwala, dated 23rd May, 1921.

(a) *Co-sharers—Gift to two persons without defining shares is not necessarily joint—Where parties are other than Hindus, presumption of tenancy-in-common arises.*

A joint gift cannot be assumed merely by the circumstance that it is made in favour of two or more persons without defining their shares and in cases of donees who are incapable of forming a joint Hindu family, the presumption is that they were tenants-in-common without benefit of survivorship. (39 P.R. 1909, *Foll.*)

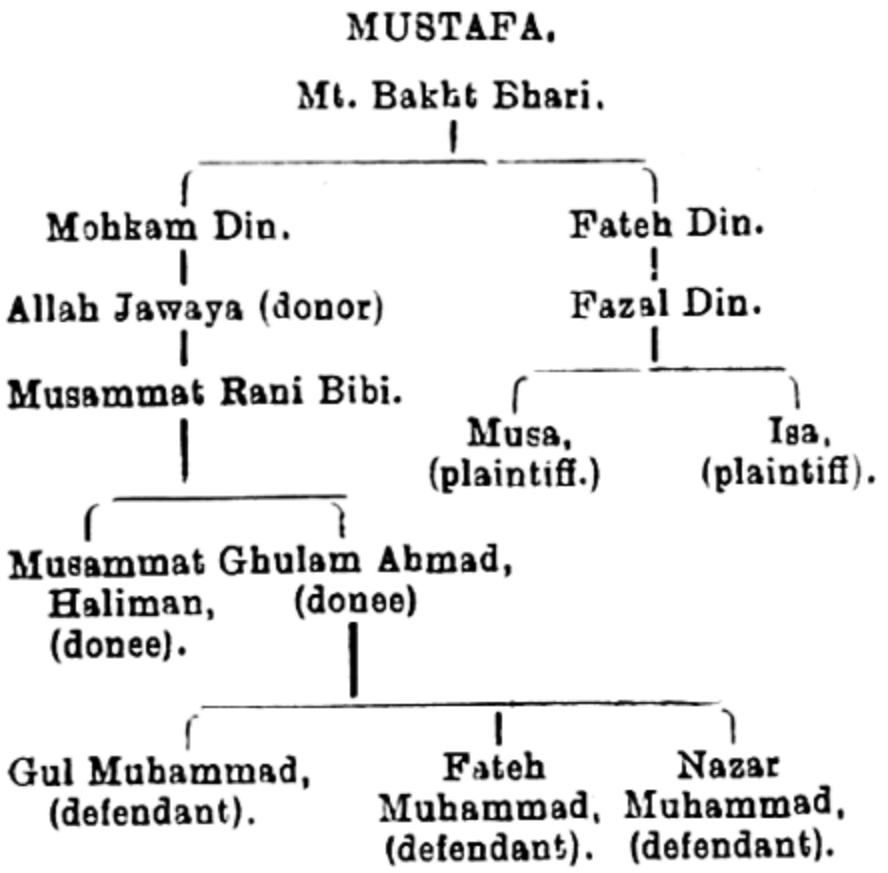
(b) *Punjab Courts Act (1918), S. 41 (3)—Certificate not necessary if point of custom is not disputed.*

Where the custom relied on by the appellants is well known and there is no dispute between the parties as to its existence and no issue was framed by the trial Court about it, no certificate is necessary. (22 P.R. 1916, *Foll.*)

L. Amar Nath Monga—for Appellants.

Ch. Ghulam Muhammad—for Respondents.

Judgment :—The following pedigree-table will illustrate the relationship between the parties :—



The plaintiffs, Musa and Isa, brought a suit against the defendants, sons of Ghulam Ahmad, for possession of 50 *kanals* 18 *marlas* of land, situated in Gujrat District, and representing the share of Mt. Haliman deceased. They claimed that they were entitled to the land in suit as collaterals of the late Allah Jawaya, who had made a gift of it in favour of Mt. Haliman and that it now reverted to them, because Mt. Haliman had died without issue and her line had become extinct. The trial Court dismissed the suit and the plaintiffs appealed, but their appeal was dismissed *in limine* by the District Judge, who held, agreeing with the Court of first instance that the donor had made a joint gift in favour of Mt. Haliman and her brother Ghulam Ahmad, and that on her death the whole of her share would pass to her brother or his descendants by right of survivorship.

The plaintiffs have perferred a second appeal to this Court against the above decision and their case has been argued before me by Lala Amar Nath Monga, and that for the respondent by Chaudhri Ghulam Muhammad.

The facts of the case are briefly as follows :—In 1888 Allah Jawaya, who had no sons, gifted the land to Mt. Haliman and Ghulam Ahmad, children of his daughter. The brother and sister both remained in joint possession and have been recorded as owners in equal shares. In 1901, it is said, Mt. Haliman gifted her share to her brother, Ghulam Ahmad, and mutation was sanctioned in his favour in 1902. Mt. Haliman lived for some years after making this gift and died childless on the 19th Ssptember, 1908. The plaintiffs brought the present suit on the 1st October, 1920 and, making an allowance for holidays that preceded the institution of the suit, it has been held to have been filed within twelve years of the death of Mt. Haliman, when the plaintiffs' right to sue began. The first two disputed points between the parties were, whether the plaintiffs were collaterals of the donor and whether the land was ancestral. Both these points were decided by the trial Court in favour of the plaintiffs and are no longer contested. The defendants had also contended that the suit was barred by time. As indicated above, this point was also found in favour of the plaintiffs. The remaining three issues in the case were the following :—

Issue No. 3.—Was a joint gift made in favour of Haliman and Ghulam Ahmad and what was the effect of it ?

Issue No. 4.—If the gift be proved joint, then, does the property revert to the plaintiffs ?

Issue No. 6.—Have the plaintiffs a right of succession and a right of question, when the property had been gifted to Haliman Bibi and when Haliman Bibi has again gifted the very property to Ghulam Ahmad ?

Of these three issues, Issue No. 3 is the only one on which the appeal has been decided by the lower appellate Court, and Issues Nos. 4 and 6 have not been discussed.

It is contended for the appellants that a joint gift cannot be assumed merely by the circumstance that it is made in favour of two or more persons without defining their shares, and that in cases of donees, who are incapable of forming a joint Hindu family, as the donees in this case were, the presumption is that they were tenants-in-common without benefit of survivorship. It is urged that this principle is recognised by a Division Bench of the Chief Court in *Munni* v. *Umrao Singh* (1), and that this ruling which is really helpful to the appellants has been misunderstood by the Courts below as helping the defendants. Reliance is also placed on an unpublished decision of the Chief Court. First Appeal No. 116 of 1911 decided on the 2nd August, 1913, where the parties were

(1) (1909) 89 P.R. 1909=55 P.W.R. 1909=59 P.L.R. 1909=1 I.C. 720.

Muhammadans as in this case, and in which the learned Judges made the following observations as to a plea of joint tenancy raised by one of the parties in the said case:

"The contention is that by the deed of 1907 Mt. Fazal Bibi and her son Feroz Muhammad became joint tenants with survivorship in the whole to Mt. Fazal Bibi owing to the accident that she outlived her son by a few days, and that on her death the whole would pass to the defendant Mt. Hussain Bibi (her mother) as heir. We do not think it necessary to discuss this contention in detail, as we agree with the District Judge that there is no excuse for dragging into the case the doctrine of a technical joint tenancy. He has rightly relied on the ruling in *Munni* v. *Umrao Singh* (1) which we consider binding on us, and ample authority for holding that the doctrine is entirely inapplicable except conceivably among members of a Hindu joint family. We are here dealing with Muhammadan agriculturists of the Punjab to whom the technicalities of English conveyancing are unknown either by law or custom and we decline to read into the deed of 29th October 1907 any construction based upon the theory of survivorship. It should be taken that Ghulam Nabi's intention in 1907 was to leave the land in suit to his daughter and her son as tenants-in-common in equal shares."

The learned Vakil for the respondent raises an objection, to start with, that a question of custom appears to be involved in the case according to the contention of the appellants and there being no certificate this appeal cannot be entertained. He refers to the case of *Chinti* v. *Ishar* (2) as authority in favour of this contention. He also urges that the finding that the gift was joint was a finding of fact.

The Vakil for the appellants, replying to the above objections, says that even if he is not allowed to dispute the finding of fact, he is entitled to urge that the legal effect of the so-called jointness of the gift has not been correctly understood, and that this being a point of law can be raised in second appeal. I think there is force in this contention and it must prevail. Regarding the objection as to want of certificate about custom the Vakil for the appellants argues that the custom relied on by his client was well-known and there was no dispute between the parties as to its existence and no issue having been framed by the trial Court about it, no certificate was necessary. He adds that, if it is held that there is a question as to the existence of a custom in this case, then the proper procedure would be to remand the case for an enquiry being made on the point and a finding recorded on it. He sites a Division Bench ruling of the Chief Court, *Sohna Mal* v. *Nanak Chand* (3) as an authority in support of this suggestion. I think that ruling is applicable to the present case and the want of a certificate should not stand in the way of this appeal, as the Courts below have not gone into the question of custom.

Another point urged on behalf of the respondents is that neither the trial Court nor the lower appellate Court have decided a matter which has an important bearing on the case, that is, whether a valid gift had been made by Mt. Haliman in her lifetime in favour of Ghulam Ahmad and, if so, what would be the effect of that gift on the relative claims of the parties. It is pointed out that the trial Court had framed a distinct issue (Issue No. 6) about this matter but failed to give any decision on it. The Vakil for the appellants admits that the point was important and has not been decided and suggests that if a remand is ordered it may be directed that a decision should be given on Issue No. 6.

After carefully considering the arguments on both sides, I think that the view taken by the lower appellate Court as to the effect of the jointness of the gift by Allah Jawaya in favour of Mt. Haliman and Ghulam Ahmad is opposed to the authorities cited above and is not correct, and the alleged jointness does not create any right of survivorship in favour of Ghulam Ahmad's descendants. It is necessary, therefore, to remand the case for a decision on the merits under Order 41, rule 23, Civil Procedure Code, treating the joint gift as creating only a tenancy-in-common and not a joint tenancy. The case is, therefore, sent back to the lower appellate Court for decision with particular reference to Issue No. 6 as well as on the question of custom involved in Issue No. 4. The stamp on this appeal will be refunded and costs will abide the result.

Case remanded.

(2) (1917) 100 P.R. 1917=71 P.W.R. 1917=43 I.C. 299.

(3) (1916) 22 P.R. 1916=212 P.W.R. 1915=34 I.C. 904.

1924 Lahore 292.

ABDUL QADIR, J.

Khilu Ram—Appellant

v.

M. Bhiranwan Bai and another—Respondents.

S. A. No. 1951 of 1921, decided on 11th February, 1922, from the decree of District Judge, Jhang at Sargedha, dated the 14th June, 1921.

Adverse possession—Once begun is not suspended during seisin by limited owner.

In a case is which limitation once began to run against a male owner, the fact that between him and the next reversioner, a widow with a life-estate intervened, would make no difference and would not give a fresh starting point for limitation. (6 P.R. 1912, *Foll*) [P. 292, C. 2.]

Ganga Ram—for Appellant.

M. L. Puri and *G. S. Salariya*—for Respondents.

Judgment:—Mt. Bhiranwan Bai, daughter of Dev Ram, sued for possession of a house, which originally belonged to her father, alleging that she had been forcibly dispossessed by the defendant, Khilu Ram, in 1919. She stated that after the death of her father, her mother, Mt. Dhani Bai, had been in possession and had made a gift of the house in her favour and that she herself had been in possession after the death of her mother for one year. In the alternative she claimed the house as an heir to her deceased father. The defendant alleged that the house had been sold to him by the father of the plaintiff and in the alternative pleaded that he had been in possession for 13 or 14 years, and, therefore, his possession was adverse to the plaintiff and her predecessors-in-interest. He contended that the plaintiff was not entitled to succeed. The trial Court held it proved on the evidence that the defendant had been in possession of the house for 13 or 14 years prior to the suit and that there was nothing to show that his possession was a permissive one. It held that as the defendant had occupied the house in the lifetime of the plaintiff's father, the date of adverse possession must be taken from the date of such occupation. On this finding the plaintiff's suit was dismissed.

On appeal the learned District Judge granted the plaintiff a decree for possession of the house in dispute on the ground that it seemed to him "that the possession of the defendant could not become adverse to the plaintiff till after the death of her mother, for she had no right to claim possession so long as her mother, the widow of the defendant's transferor, was alive."

Against this decree the defendant has come up to this Court in second appeal. Lala Ganga Ram has argued the case for the appellant, and Mr. M. L. Puri for the respondent.

The contention on behalf of the appellant is that it having been found by both the Courts on evidence that the possession of the appellant started in the lifetime of the father of Mt. Bhiranwan Bai, the possession became adverse to her, as she claimed to be the heir of her father. It is urged that she had set up a case of recent dispossession, which she has not been able to prove, while the defendant has been able to show that he has been in possession for more than 12 years, and that, therefore, the possession of the defendant must be presumed to be adverse for the whole of that period. Lala Ganga Ram relies on the case of *Mansa Ram* v. *Behari* (1), in which a Division Bench of the Chief Court recognized that in a case in which limitation once began to run against a male owner, the fact that between him and the next reversioner a widow with a life-estate intervened would make no difference and would not give a fresh starting point for limitation. Mr. M. L. Puri in reply admits the soundness of the proposition that if possession of the defendant became adverse to the father of the plaintiff, she cannot sue after 13 or 14 years from that date, and the possession must be regarded as adverse to her for all that time, but he argues that the District Judge has not come to a distinct finding that the possession had become adverse in the lifetime of Mt. Bhiranwan Bai's father and that in the absence of any such finding this appeal should be dismissed or the case should be remanded for a finding on this point by the lower appellate Court. He says he can show from the evidence that the possession of the defendant must have at one time been permissive, and that, therefore, it was for the defendant to show on what date it became adverse. It is urged that the defendant has produced no evidence which would show when his adverse possession began. The reply, with which

(1) (1912) 6 P.R. 1912=218 P.L.R. 1911=204 P.W.R. 1911=12 I.C. 453.

the learned Vakil for the appellant meets this argument, is that the plaintiff-respondent should not be allowed to set up in second appeal a case which is absolutely at variance with her pleadings as embodied in her plaint. If she had alleged that the possession of the defendant was permissive at any time, it would have certainly been for the defendant to show as to when it became adverse, but she herself took up the position that she had been forcibly dispossessed shortly before suit, and, therefore, according to her the defendant was a trespasser and in adverse possession. The only question, therefore, was from what date his adverse possession started. He alleged a sale in his favour and relied for that on an entry in a *bahi*, which has been held to be inadmissible in evidence. The result is that he has not been able to prove that he ever entered into possession by virtue of a sale, and under these circumstances the trial Court presumed that his possession, having started 13 or 14 years before suit, was adverse to the plaintiff as well as to her predecessors-in-interest. The lower appellate Court appears to have accepted this finding and in the passage quoted above, the only question it raises is the time from which the adverse possession may be taken to have commenced, but in coming to the conclusion that the lifetime of the plaintiff's mother is to be excluded from calculation it has erred in law. It has been admitted by the learned Counsel for the respondent that the correct view of the law on this point is that given in *Mansa Ram* v. *Behari* (1). I hold, therefore, that adverse possession of the defendant started in the lifetime of Dev Ram, and that the suit of the plaintiff cannot succeed.

I accept this appeal and setting aside the decree of the lower appellate Court restore that of the Court of first instance dismissing the plaintiff's suit, but on the question of costs I agree with the District Judge that the circumstances of the case are such that the parties may be allowed to bear their own costs throughout, as both sides appear to have mixed a good deal of fiction with truth and the defendant has failed to prove the main plea which he had set up, *i.e.*, a sale in his favour.

Appeal allowed.

1924 Lahore 293.

SCOTT-SMITH, J.

Muhammad Amin and others—Appellants

v.

Karm Dad and others—Respondents.

S. A. No. 1967 of 1921, decided on 3rd March, 1922, from the decree of District Judge, Gujranwala, dated, 7th July, 1921.

Co-sharers — Suit for possession of land in exclusive possession of another co sharer does not lie —Plaintiff may sue for partition.

Where a co-sharer takes and retains possession of a portion of the *shamilat* (for as long as 20 years in this case), he cannot be dispossessed therefrom until partition takes place. The plaintiffs co-sharers in such a case have no right to oust defendant or even to get joint possession with him so long as there has been no partition of the *shamilat*. [P. 294, C. 1.]

Niaz Ali—for Appellants.

Nanak Chand—for Respondents.

Judgment:—The facts of the case out of which the present second appeal arises are not quite correctly stated in the judgment of the lower appellate Court and are briefly as follows:

The plot of land in suit, *Khasra* No. 599, six *marlas* in area, is admittedly a portion of *shamilat taraf* Adowal. The plaintiffs, Karam Dad and four others, sued for possession on the ground of their own long possession and alleged that the defendants had turned them out a few months before suit. The trial Court held that the defendants had succeeded in proving their own adverse possession of the land for more than twelve years as owners and dismissed the plaintiffs' suit. The lower appellate Court apparently accepted the finding that Hasam-ud-Din, father of the defendants, had been for a long time in possession of the plot in suit as a co-sharer in the *shamilat*. It went on to hold that adverse possession was not proved and that the plaintiffs were entitled to possession as co-sharers. It accordingly accepted the appeal, but instead of giving the plaintiffs a decree for joint possession gave a decree for exclusive possession of the land in suit.

The defendants have filed a second appeal to this Court and their Counsel has taken me through the entries in the revenue records according to which it is clear that the defendants have for some twenty years been in possession through their tenants of the plot in suit. It appears that their predecessor bought the adjoining *Khasra*

No. 598 and along with it took possession of the small plot in dispute. Counsel for the respondents does not dispute the finding that the defendants and their predecessor have been in possession for many years, and the finding being one of fact cannot be disputed in second appeal. He states that there was originally a well in this plot which fell into disrepair and subsequently disappeared altogether, the site being cultivated by tenants, and that his clients have now sued because the defendants have made a new well in the land. He says that what his clients really want is joint possession as they also are co-sharers in the *shamilat*. It is clear that both the parties are co-sharers in *shamilat taraf* of which the plot in suit is a part, and the defendants' possession as co-sharers has not been adverse to the plaintiffs. *Wazir Singh* v. *Mehtab Singh* (1) and *Jhangi* v. *Ramzan* (2) are authorities for the view that in certain cases a co-sharer may take and retain possession of a portion of the *shamilat* and that he cannot be dispossessed therefrom until partition takes place. The same principle was applied in a case of joint *Khata* in the Single Bench ruling reported as *Ganesh Mal* v. *Ibrahim* (3). Under the circumstances of this case, as the defendants are co-sharers and have been long in possession of this plot, I am of opinion that the plaintiffs have no right to oust them or even to get joint possession with them so long as there has been no partition of the *shamilat*. The plaintiff can, if so advised, apply to the Revenue Authorities for partition of the *shamilat* and in those proceedings it will be settled who is to get possession of the plot or any part of it. But unless and until partition takes place the defendants are entitled to remain in possession.

I, therefore, accept the appeal and setting aside the judgment of the lower appellate Court, dismiss the plaintiffs' suit with costs throughout.

Appeal allowed.

(1) (1889) 108 P.R. 1889.
(2) (1910) 13 P.R. 1910 = 20 P.W.R. 1910 = 60 P.L.R. 1910 = 5 I.C. 808.
(3) (1919) 104 P.R. 1919 = 53 I.C. 569.

1924 Lahore 294.

BROADWAY, J.

Bishen Singh—Appellant

v.

Bishna—Respondent.

S.A. No. 2159 of 1921, decided on 22nd February, 1922, from the decree of Senior Sub-Judge, F.C., Ludhiana, dated 12th July, 1921.

* (a) *Evidence Act, S. 115—Minority known to other party—Minor not estopped from setting it up.*

A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. (162 P.R. 1919, *Foll.*).

** (b) *Specific Relief Act, S. 41—Minor repudiating sale by himself on the ground of minority need not refund the purchase-money—Contract Act Ss. 64 and 65.*

A minor who repudiates a sale effected by him on the ground that he was minor on the date of sale, cannot be compelled to repay the purchase money, as, a contract by minor is void *ab initio*. A Court of Equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which as against that person the Legislature has declared to be void. (30 C. 539 (P.C.), *Foll.*).

L. Durga Das—for Appellant.

L. Balwant Rai—for Respondent.

FACTS :—On the 3rd of July 1912 one Bishna, a minor, sold a vacant site belonging to him to one Bishen Singh. Both vendor and vendee resided in the same village. On the 5th of October 1920 Bishna instituted a suit for possession of the vacant site, pleading that the sale was void owing to his minority. The trial Court held that the plaintiff had failed to prove that he was a minor at the time of the sale and also that he was estopped by his conduct from raising the plea of minority and dismissed the suit. Bishna then appealed to the Senior Subordinate Judge, who decreed the claim holding that he was a minor at the date of the sale ; that he was not estopped from raising the plea of minority, as the fact of his being a minor was known to the defendant-vendee ; and that the defendant was not entitled to be re-paid the money paid by him under the sale.

Against this decree the defendant Bishen Singh prefers this second appeal.

Judgment :—[After stating facts, the judgment proceeded] :—

It has been found as a fact that Bishna was a minor at the date of the sale and

the decision on this point is not open to examination. Mr. Durga Das has, however, contended that the question whether Bishna could or could not plead his minority was dependent on whether Bishen Singh had knowledge of Bishna's being a minor and that the finding on this question of knowledge was open to attack, inasmuch as it had been arrived at on insufficient material. The learned Senior Subordinate Judge has based his finding on this point on the facts, (1) that the parties were near collaterals (not denied before me) ; (2) that they were residing in the same village, (3) that the sale deed refers to a suit which had been brought by Bishna for restitution of conjugal rights and for the expenses of which he needed money ; and (4) that in that suit it had been found that Bishna was a minor, a fact which must have been known to the appellant at the time when he entered into the transaction, inasmuch as the judgment on appeal in the suit for restitution of conjugal rights shows that the First Court had decided it before the sale was effected. Mr. Durga Das contended that these circumstances did not warrant the conclusion that the appellant had knowledge of Bishna's minority at the date of the sale. In this view I am unable to agree, as it seems to me that there was evidence from which the appellant's knowledge could be inferred. I must, therefore, hold that this question cannot be entertained in second appeal, *vide Kashi Singh* v. *Ram Narain* (1).

Now, it is evident that the question of estoppel is dependent on whether the appellant knew of Bishna's disability, for there could be no estoppel where the truth of the matter was known to both the parties and as pointed out in *Harnam Singh* v *Narain* (2), a false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. I must, therefore, hold that Bishna was not estopped from pleading minority.

The next point raised by Mr. Durga Das was that his client was entitled to a refund of the money paid by him. He admitted that this refund could not be claimed under sections 64 and 65 of the Contract Act, as was held by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (3). He contended, however, that inasmuch as it was Bishna who was seeking to avoid the sale, sections 39 and 41 of the Specific Relief Act were applicable and the Courts had power, under the latter section, to require the party claiming the relief to make any compensation to the other which justice may require. Mr. Balwant Rai contended that this question had been settled against the appellant in *Mohori Bibee* v. *Dharmodas Ghose* (3), where their Lordships say : " These sections, no doubt, do give a discretion to the Court which discretion had been exercised by the Courts below " and their Lordships saw no reason for interfering with the discretion so exercised. Mr. Durga Das contended that their Lordships by their remarks in this connection evidently intended to hold that in cases of this nature the Courts had the power to act under section 41 and he drew my attention to *Bhana* v. *Bela Singh* (4) and *Balak Ram* v. *Dadu* (5). The latter of these authorities was dealt with in *Wasinda Ram* v. *Sita Ram* (6) (see page 394) and in the former the question was not really decided. In *Mohori Bibee* v. *Dharmodas Ghose* (3) their Lordships of the Privy Council deal with a contention raised to the effect that one who seeks equity must do equity, and in dealing with this contention say that this point was the same as that raised in connection with section 41 of the Specific Relief Act, and they conclude by saying that " the short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." As a contract entered into by a minor is void *ab initio* these last remarks of their Lordships of the Privy Council seem to be applicable and indicate that a refund cannot be allowed. In these circumstances I am constrained to hold that the appellant cannot be allowed a refund of the money paid by him and I, therefore, reject this appeal. In the circumstances, however, I leave the parties to bear their own costs in this Court.

Appeal dismissed.

(1) (1917) 19 O.C. 321=3 O.L.J. 560=37 I.C. 138.
(2) (1919) 162 P.R. 1919=1 L.L.J. 122=54 I.C. 186.
(3) (1903) 30 Cal. 539=30 I.A. 114=7 C.W.N. 441 =5 Bom. L.R. 421=8 Sar. 374 (P.C.).
(4) (1919) 98 P.R. 1919=51 I.C. 410.
(5) (1910) 76 P.R. 1910=98 P.W.R. 1910=112 P.W.R. 1910=7 I.C. 1000.
(6) (1920) 1 Lah. 389=51 P.W.R. 1920=59 I.C. 393.

1924 Lahore 296.

SCOTT-SMITH, J.

Gopal Singh—Appellant

v.

Bhaga and another—Respondents.

S. A. No. 2159 of 1921, decided on 9th June, 1922, from the decree of District Judge, Ludhiana, dated the 21st July, 1921.

* *Civ. Pro. Code, O. 3, rr. 1, 2—Power-of-attorney validity—Objection if not raised in trial Court is not allowed in appeal.*

An objection as to the validity of a power-of-attorney, if not taken in the trial Court, must be taken to have been waived and should not be allowed to be raised for the first time in appeal as, if the objection is raised at that time namely in the trial Court it could easily cured by the agent by obtaining a properly executed power-of-attorney. (15 W.R. 245, *Ref.*) [P. 296, C. 2 and P. 297, C. 1.]

Jai Gopal Sethi—for Appellant.

B. P. Khosla—for Respondents.

Judgment :—This is a second appeal by Gopal Singh, plaintiff, whose suit was dismissed on appeal by the District Judge on the ground that the plaint was filed by a person who was not a recognised agent within the meaning of the Code of Civil Procedure. The suit was filed by Mt. Rajji, mother of Gopal Singh, who purported to be a duly appointed *mukhtar*. A power-of attorney was filed with the plaint. No objection was taken in the trial Court as to the validity of the power-of-attorney, and on the 28th of January, 1921, a decree was passed in favour of Gopal Singh. The defendants appealed making Gopal Singh respondent through Mt. Rajji, his *mukhtar*. No objection was taken to the validity of the power-of-attorney in the grounds of appeal in the lower appellate Court. Service was effected on Mt. Rajji and at the hearing of the appeal objection was taken for the first time to the validity of the power-of-attorney. The District Judge upheld the objection and, setting aside the decree of the first Court, dismissed the plaintiff's suit.

Gopal Singh himself has now filed the present appeal through Mr. J. G. Sethi, Advocate, who contended on his behalf that the objection being a technical one and not having been taken in the first Court, it should be deemed to have been waived. It is also contended that if it be held that Mt. Rajji was not the duly appointed or recognised agent of Gopal Singh, then service upon her for purposes of appeal was insufficient, and the decree in favour of Gopal Singh could not be set aside without his personally having been served. Mr. Sethi has referred to the following authorities. *Bisandas* v. *Lakhmichand* (1). In that case it was held that the *munim* of a firm is not, for the purpose of presenting a plaint, the recognised agent (under section 17 of the Civil Procedure Code) of a partner who is present within the jurisdiction. The *munim* and such partner should join in presenting the plaint, or appointing a Pleader. It was also held that the partner's not so joining was not a ground on which an appellate Court should reverse the decree of a lower Court unless the irregularity affected the merits of the case or the jurisdiction of the Courts.

Munoo Dossee v. *Ishan Chunder Banerjee* (2). In that case an objection was raised in the trial Court that the plaint had not been filed by a recognised agent within the meaning of section 17, Act VIII of 1859, and was disposed of in favour of the plaintiff. The lower appellate Court threw out the case on the ground that the person who filed the plaint was not a recognised agent. The High Court held that the case should not have been thrown out on such a technical objection which did not affect the merits of the case.

Parvatibai v. *Vinayek Pandurang* (3). In that case no objection was taken to the status of the recognised agent until after the decree was passed and the High Court held that the objection could not be raised in execution for the first time.

The case reported as *Munoo Dossee* v. *Ishan Chunder Banerjee* (2) is the one which most resembles the present case. The only difference is that there the objection was raised in the trial Court and was decided in favour of the plaintiff, and, though the High Court agreed that the objection was a valid one, it was of opinion that the appellate Court should not have set aside the decree upon that ground alone. Here no objection at all was raised in the trial Court and, therefore, there was no disposal of the point. The defendants were represented by learned Counsel in that Court and it was his duty to see that the plaint was properly filed, and as no objection was raised on behalf of the defendants, I consider that it must be

(1) 6 B.H.C.A.C 159.
(2) 15 W.R. 245.
(3) (1888) 12 Bom. 68.

held to have been waived. If the objection had been raised at that time it could easily have been cured by Mt. Rajji obtaining a properly executed power-of-attorney from Gopal Singh. In my opinion it was not fair that an objection of this sort should have been entertained for the first time in the Court of Appeal.

I, therefore, accept the appeal and setting aside the order of the lower appellate Court remand the case thereto for decision of the appeal in accordance with law. Stamp on this Court will be refunded and other costs shall be costs in the case.

Appeal allowed.

1924 Lahore 297 (1).

SCOTT-SMITH, J.

The Firm Ralia Ram Jowanda Mal—Appellants

v.

The Official Receiver of the Insolvent's Estate at Gujranwala and another—Respondents.

Mis. F. A. No. 2214 of 1921, decided on 8th June 1922 from the order of District Judge, Gujranwala, dated 1st June, 1921.

Hindu Law--Debts—Son's property is liable to pay debts of insolvent father.

By the insolvency of a Hindu father governed by the Mitakshara Law his son's interest as well as his own interest in the joint family estate vest in the Official Assignee and the son's property is to be treated as that of his father so far as the Official Assignee in concerned. The son, no doubt, has his remedy but he has to establish circumstances which would show that his share is not liable for the debts of his father. (3 Lah. 329, *Foll.*) [P. 297, C. 2.]

Diwan Mehr Chand—for Appellants.

Judgment :—This is an appeal from an order passed by the District Judge of Gujranwala in insolvency proceedings refusing to proceed against the property of Salig Ram, the son of Barkat Mal, insolvent. Barkat Mal was adjudicated an insolvent on the 3rd of October, 1912. His son Salig Ram carries on a shop at Ferozepore, and on behalf of the appellant firm, the creditor of Barkat Mal, it is alleged that the shop at Ferozepore belongs to a joint Hindu family of which the insolvent is the manager. The Official Receiver, in his report of the 27th May, 1921, asked the District Judge for his direction whether the property in the possession of Salig Ram in Ferozepore should be attached or not in the interest of the creditors. On the 1st of June, 1921, the District Judge upon that report made the following note:—"You cannot proceed against the property of Salig Ram if he was not adjudged insolvent." Subsequently the appellant firm petitioned that he should be allowed to follow the property of the firm which had passed into Salig Ram's hands.

This application was rejected by the learned District Judge summarily, referring to his note of the 1st of June, 1921.

For the appellant the case of *Bihari Lal* v. *Sat Narain* (1) is referred to in which a Full Bench of this Court by its order of the 8th of April, 1922, held that by the insolvency of a Hindu father governed by the Mitakshara Law his son's interest as well as his own interest in the joint family estate vest in the Official Assignee, and his property is to be treated as that of his father so far as the Official Assignee is concerned. It is pointed out at the end of the judgment that the son, no doubt, has his remedy, but he has to establish circumstances which would show that his share is not liable for the debts of his father. This decision is applicable to the present case.

I, therefore, accept the appeal and setting aside the order of the learned District Judge remand the case to him that he may decide the application of the present appellant after going into all the facts of the case. Appellant's costs in this Court will abide by the decision of the lower Court.

Appeal allowed.

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(1) 1923 Lah. 1 (F.B.).

1924 Lahore 297 (2).

HARRISON, J.

Talib Hussain—Appellant

v.

Muhammad Hussain--Respondent.

S. A. No. 2241 of 1921, decided on 17th May, 1922, from the decree of District Judge, Gurdaspur, dated 25th July, 1921.

Specific Relief Act, S. 54—No injunction where no breach of contract, nor infringement of rights has occurred.

Plaintiff rebuilt a joint wall between his house and that of the defendants which was owned half and half by him and the defendant; after rebuilding he sued for an injunction that the defendant is not to treat the half belonging to him as his property unless and until he pays him

Rs. 300. *Held* that whatever the powers of a Court may be in adjudicating on the rights of parties and in passing injunctions (or conditional injunctions), in consequence of such adjudications it has no authority to create and impose conditions as to the enjoyment of property owned by a party where neither breach of contract nor the infringement of any right is alleged to have taken place. [P. 298, C. 1.]

Mehr Chand Mahajan—for Appellant.

Sheikh Niaz Ali—for Respondent.

Judgment :—The facts of this case are very clear and the only question is whether the plaintiff is entitled to the relief he seeks. There is a joint wall between his house and that of the defendants which he has re-built. He admits that it is owned half and half by him and the defendant and he sues for an injunction that the defendant is not to treat the half belonging to him as his property unless and until he pays him Rs. 300. The suit was decreed by the Munsif and dismissed by the learned District Judge who gave the plaintiff an opportunity even on appeal, of amending his plaint and suing for any sum of money to which he might be entitled. Of this opportunity he declined to avail himself and now urges on second appeal that he is in equity entitled to the relief he seeks.

To give him such a relief would be, in my mind, equivalent to holding that a Civil Court has power to impose conditions as a disciplinary measure on the enjoyment of private property or is empowered to take away private property until such time as the owner complies with what the Court considers to be an equitable condition and treats the other side fairly. Whatever the powers of a Court may be in adjudicating on the rights of parties and in passing injunctions (or conditional injunctions) in consequence of such adjudications, it is wholly a different matter to say that where a party admittedly owns a piece of property the Court has any authority to create and impose conditions as to the enjoyment of the same, neither breach of contract nor the infringement of any right being alleged to have taken place. It would be a wholly different matter if the plaintiff had succeeded in proving, as he tried to do, that there had been an agreement between him and the defendant which had been broken. He merely comes on equitable grounds and says that because he has rebuilt the wall, the defendant, who admittedly owns half of it, would not be allowed to enjoy his rights because he is acting in an unreasonable way towards him, the plaintiff. He does not ask for contribution and has wholly failed to show any reason why he should succeed in obtaining the peculiar relief he seeks.

I dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 298.

BROADWAY, J.

Sucha Singh and others—Appellants

v.

Pal Singh and another—Respondents.

S. A. No. 2379 of 1921, decided on 3rd March, 1922, from the decree of District Judge, Amritsar, dated 18th July, 1921.

Custom (Punjab)—Widow—Alienation for future maintenance is not valid beyond her lifetime or for husband's unsecured debts.

A widow has no right to encumber her estate in which she only has a life interest by charging it with the expense of her future maintenance not being at liberty to anticipate wants by raising money or contracting for such liabilities before they arise. The mere fact that a creditor to whom a genuine and just debt was owed and who did not bring into Court a case relating to his claim, would not be sufficient to reject the claim as not being for necessity. Property which is ancestral is not liable for the debts of husband ; such debts are not a charge on the property. (11 P. R. 1885, *Foll.*)

Badruddin Kureshi—for Appellant.

L. C. Mehra—for Respondents.

Judgment :—On the 25th of March 1920 one Musammat Uttmi, widow of Jowala Singh sold certain land to Kharak Singh and Sucha Singh the consideration entered.....in the deed being a sum of Rs. 2,000. On the 10th of April 1920 Pal Singh, son of Hira Singh, instituted this suit alleging that the land sold was ancestral and that the sale was without consideration and necessity. He alleged that he was a collateral of Jowala Singh and as such entitled to a declaration that his reversionary rights would not be affected by this alienation on the death of Mt. Uttmi. The sum of Rs. 2,000 was made up of five items :—

(1) Rs. 690 left with the vendees for payment to Gurdit Singh ;

(2) Rs. 800, cash paid at the time of registration ;

(3) Rs. 40 paid for registration expenses ;

(4) Rs. 80 left with the vendees for payment to Arur Singh ; and

(5) Rs. 390 left with the vendees for payment to Kala Singh.

The trial Court held that the sums of Rs. 690 and 390 (items Nos. 1 and 5) had been shown to be for necessity, but that the other items had not. The plaintiff was, therefore, given a decree declaring his right to get possession of this property on the death of Mt. Uttmi on payment of Rs. 1,080.

The vendees appealed to the District Judge against the findings of the trial Court *qua* the disallowed items, while the plaintiff filed cross-objections claiming that the two items allowed should also be disallowed. The learned District Judge dismissed the vendee's appeal and accepting the cross-objections of the plaintiff decreed the claim in full. The vendees have now come up to this Court in second appeal through Mr. Kureshi, and I have heard Mr. Lal Chand Mehra on behalf of the plaintiff-respondent.

The only question argued at the bar was whether necessity for the sum of Rs. 2,000 had been established. It was not disputed that the property was ancestral, nor were any of the other points, raised in the Courts below, discussed. Item No. 3 (Rs. 80), left with the vendees for payment to Arur Singh had been disallowed by both the Courts on the ground that the debt due to Arur Singh had not been proved. This is a question of fact which cannot be gone into. Item No. 2 (Rs. 800), has been disallowed on the ground that Mt. Uttmi was not justified in raising money in this manner for her future maintenance. In *Nihal Singh* v. *Rajon* (1) it was held that a widow had no right to encumber her estate in which she only had a life interest by charging it with the expense of her future maintenance, not being at liberty to anticipate wants by raising money or contracting for such liabilities before they arise. This item thus appears to have been rightly disallowed.

Item No. 1 (Rs. 690) left with the vendees for payment to Gurdit Singh needs some consideration, as the finding of the learned District Judge is not too clear. This item consists of Rs. 350, principal and Rs. 340 interest. If the principal is due there will be no reason to disallow the interest. Of this Rs. 350, Rs. 300 were said to have been taken by Jowala Singh, husband of Mt. Uttmi, some eight or nine years before suit for the purchase of two bullocks and Rs. 50 taken in cash. The writer of the entry relating to this transaction as well as the marginal witnesses are dead and naturally could not be produced. There are, however, two witnesses, Harnam Singh and Atma Singh, who have sworn that Jowala Singh received two oxen and Rs. 50 in cash in their presence. The learned District Judge has disallowed this amount as he regarded it "unsuitable and unnecessary" for Mt. Uttmi to agree to the alienation as far as this last item was concerned, there being no suit by the creditor to prove his claim. He has not come to any definite finding as to whether the claim was a genuine one or not.

Item No. 5 (Rs. 390) left with the vendees for payment to Kala Singh has also been disallowed by the District Judge without any finding as to the genuineness or otherwise of the transaction. The learned District Judge says that "in the absence of any suit by the creditor of her deceased husband I am of opinion that this voluntary payment on her part of an old claim of this nature should not be allowed." It seems to me that the mere fact that a creditor to whom a genuine and just debt was owed and who did not bring into Court a case relating to his claim would not be sufficient to reject the claim as not being for necessity. I think, however, that neither this nor the item of Rs. 690 can be allowed for the reason that the property which was ancestral, was not liable for the debts due by Jowala Singh, such debts not having been made a charge on the property, *vide Jagdip Singh* v. *Narain Singh* (2) and *Mikor* v. *Chhaju Ram* (3). As contended by Mr. Lal Chand Mehra, if the creditors, Gurdit Singh and Kala Singh, could not have recovered their claims from the ancestral property, the widow had no necessity to sell the said ancestral property in order to meet the claim.

I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) (1885) 11 P.R. 1885.

(2) (1913) 4 P.R. 1913=160 P.W.R. 1912=173 P.L.R. 1912=15 I. C. 866.

(3) (1919) 17 P.R. 1919=6 P.W.R. 1919=49 I.C. 281 (F.B.).

1924 Lahore 300.

ABDUL RAOOF, J.

Nur Din—Appellant

v.

Roshan Din—Respondent.

S. A. No. 2444 of 1921, decided on 8th March, 1922, from the decree of District Judge, Jhelum, dated 17th June, 1921.

Custom (Punjab)—Adoption to be complete must conform to all formalities of dattaka *adoption—Appointed heir does not lose rights in his natural family.*

An adoption of the nature recognized under the Hindu Law is an unknown thing among the agriculturists. An adoption among the agriculturists simply operates as an appointment of an heir, and the mere appointment of an heir does not deprive the appointed heir of his right to succeed in the natural family. If the adoption in any case is made according to the *dattaka* form, then the adoption is taken to be of such a complete nature as to transfer the adopted son completely from the family of the natural father but where necessary formalities required for a good adoption according to *dattaka* form were not observed, the adoption is not complete.

N. C. Mehra—for Appellant.

P. N. Rozdon—for Respondent.

FACTS:—One Satar Muhammad had four sons, Kutab Din, Ilam Din, Fazal Din and Nur Dad. Ilam Din had two sons, Roshan Din, the plaintiff in this case, and Nur Din, the defendant. Roshan Din, plaintiff, is said to have been adopted by Nur Dad, his uncle, on whose death he succeeded to his lands on the strength of the provisions made in a registered deed which may be described either as a deed of adoption or a deed of gift. On the death of Ilam Din a dispute arose as to the succession to his property. The plaintiff claimed a half share in it while Nur Din claimed to have his name mutated in respect of all the property on the allegation that the plaintiff having been adopted by Nur Dad was not entitled to succeed to the property left by his natural father. Eventually the entire property was mutated in the name of Nur Din, defendant alone, and Roshan Din plaintiff was referred to a civil suit. Hence this suit.

Judgment:—[After stating facts the judgment proceeded]. The principal plea raised in defence was that, according to the custom applicable to agriculturists, the plaintiff owing to his adoption by Nur Dad had lost his right to inherit the property left by his natural father. Another plea raised was that Ilam Din at the time of his death had made an oral will by which he had bequeathed the property to the defendant and had expressly declared that the plaintiff was not to get any share in his property. The defendant produced three witnesses to prove the fact of adoption and to establish the custom set up by him. Those witnesses were Jalal-ud-Din, Nur Din and Jhanda. As to the fact of adoption their evidence was to the effect that no formality had been observed at the time of the adoption and the members of the brotherhood had not been gathered. As to the custom their evidence was utterly useless to the defendant, because they all stated that there was no custom of adoption in the community to which the parties belonged and that there had been no instance of any adoption at all. The deed of adoption produced, taken along with the evidence given by these witnesses, can hardly establish the proposition that there was a complete adoption of the plaintiff so as to entirely exclude him from the family of his natural father and to transfer him into the family of the adoptor. In fact it was admitted at the argument that an adoption of the nature recognized under the Hindu Law is an unknown thing among the agriculturists. An adoption among the agriculturists simply operates as an appointment of an heir. In this case there can be no doubt, after reading the so-called deed of adoption, that the object of the adoptor was simply to make a gift in favour of the plaintiff. This was in fact the view taken by the Court of first instance. In some cases the test laid down is that if the adoption in any case is made according to the *Dattaka* form then the adoption is taken to be of such a complete nature as to transfer the adopted son completely from the family of the natural father. The Court of first instance held that necessary formalities required for a good adoption, according to *Dattaka* form, were not observed in this case. On the second point also the trial Court held that the defendant had not succeeded to establish the will set up by him. The suit was accordingly decreed by the trial Court.

In appeal the lower appellate Court took a view slightly different from that taken by the trial Court on the question of adoption, It concurred in holding that the oral evidence as to the alleged adoption was valueless and preferred to decide the issue on the

interpretation of the deed of 1889, and after considering the provisions in the deed it came to the conclusion that although no formalities had been observed the adoptor intended to make a complete adoption. As regards the gift in favour of the plaintiff the lower appellate Court held that it was made simply with the object of making the devolution of his property on the plaintiff a certainty. The lower appellate Court, however, held that even this complete adoption did not deprive the plaintiff of his right to inherit the property of his natural father. In support of this contention the learned Judge relied on *Jhanda Singh* v. *Kesar Singh* (1) where it is laid down "that the ordinary rule under the Customary Law is that an adopted son does not lose the right of succeeding in his natural family except possibly in the Eastern Punjab (*i. e.*, the Delhi and Karnal Districts). where the appointment of an heir approaches in nature more nearly to the adoption of the Hindu Law, and this applies *a fortiori* in the case of a son of the adopted son."

As already observed, the defendant in this case has not succeeded in establishing that the case of the parties in this case is an exception to the general rule laid down in the above case. It is strenuously contended by the Counsel for the appellant that this rule can apply only where a claim is advanced by the adopted son against collaterals and that against a brother the adopted son cannot succeed.

In my opinion, the view taken by the trial Court was a correct view. In this case it had not been proved that there was a complete adoption. The mere appointment of an heir in my opinion, would not have the effect of depriving the appointed heir of his right to succeed in the natural family. The lower appellate Court, therefore, rightly upheld the decree of the Court of first instance. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

(1) (1910) 37 P.R. 1910=62 P.W.R. 1910=50 P.L.R. 1910=6 I.C. 712.

1924 Lahore 301.

SCOTT-SMITH, J.

Sardar Khan and others—Appellants

v.

Abdulla Khan and another—Respondents.

S. A. No. 2693 of 1921, decided on 16th June, 1922, from a decree of District Judge, Attock at Campbellpur, dated the 22nd August, 1921.

* *Civ. Pro. Code, O. 21, r. 35—Land in actual possession of judgment-debtor—Decree-holder must obtain actual possession—Formal possession not sufficient—Civ. Pro. Code, O 21, r. 95.*

The mere formal possession of immoveable property by a decree-holder cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupancy of a tenant or other person entitled to occupy the same. In such cases it is necessary for the decree-holder to get actual possession of the land decreed to him. O. 21, r. 95 corresponds with O. 21, r. 35, and the procedure for delivery of possession is the same in both. Similarly, the procedure is the same under rr. 36 and 96. (43 All. 520 (F.B.), 36 Bom. 373 (F.B.), *Foll.*; 5 Cal. 584, *Dist.*). [P. 302, C. 1.]

Nanak Chand—for Appellants.

M. S. Bhagat—for Respondents.

Judgment:—This is a second appeal from the order of the District Judge, Attock, confirming the order of the trial Court dismissing the plaintiff's claim for possession of a site in a village as barred by time. The plaintiff obtained a decree for possession on the 26th May, 1908, and on the 10th November, 1908, made an application for execution. On the 4th February, 1909, the bailiff reported that possession had been given, and the decree-holder, Zardad Khan, put in a *dakkl nama* and the proceedings were consigned to the record-room. The present suit was brought for possession of the same land on the ground that the plaintiffs had obtained possession in execution, and that they were subsequently dispossessed by the defendants, judgment-debtors. The Courts below have held on the evidence that the defendants never gave up possession and that the plaintiffs never obtained actual possession in execution of the decree. The learned District Judge went further and said that the bailiff's report and the plaintiff's receipt filed in the execution proceedings were false documents which misrepresent the facts. He held that it was most improbable that the defendants would

quietly give up possession of the disputed land, and on the evidence he held as a fact that they did not. From this order a second appeal has been filed in this Court.

The finding that the plaintiffs never obtained possession of the land decreed appears to be a finding of fact which cannot be contested in second appeal. Mr. Nanak Chand, however, refers to *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1) as an authority for the proposition that formal possession, if given to a decree-holder, is sufficient to give the plaintiff a fresh starting point of limitation. Now, the case reported in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1) was one, as pointed out in *Jang Bahadur Singh* v. *Hanwant Singh* (2) relating to *zemindari* property which was in possession of tenants, and of which actual possession could not be delivered. Such a case is provided for by Order 21, rule 36 of the Civil Procedure Code, and in such a case only symbolical possession can be given. In the present case the judgment-debtor was in actual possession, and actual possession, therefore, had to be given in accordance with Order 21, rule 35 of the Code. In *Mahadev Sakharam Parkar* v. *Janu Namji Hatley* (3), which was a case in which possession had to be given under Order 21, rule 95, it was held that the merely formal possession of immoveable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupancy of a tenant or other person entitled to occupy the same.

Now, Order 21, rule 95 corresponds with Order 21, rule 35, and the procedure for delivery of possession is the same in both. Similarly, the procedure is the same under rules 36 and 96, and therefore, the authority cited is applicable to the present case. In *Jang Bahadur Singh* v. *Hanwant Singh* (2), also a Full Bench case, the ruling in *Mahadev Sakharam Parkar* v. *Janu Namji Hatley* (3) was approved of and that in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1) was distinguished. I agree with the decisions in those two Full Bench cases, and hold it was necessary for the decree-holders to get actual possession of the land decreed to them. It was found as a fact that they never got possession, and that the defendants-judgment-debtors never gave up possession.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

(1) (1880) 5 Cal. 584=5 C.L.R. 548 (F.B.).
(2) (1921) 43 All. 520=19 A.L.J. 469=63 I. C. 212 (F.B.).
(3) (1911) 36 Bom. 373=14 Bom. L.R. 115=14 I.C. 447 (F.B.).

1924 Lahore 302.

SHADI LAL, C.J., and FFORDE, J.

Ganwa and another—Appellants

v.

Joti Prasad and others—Respondents.

L. P. A. No. 67 of 1922, decided on 24th November, 1922, from the decree of Le Rossignol, J. dated 7th February, 1922.

Limitation Act, Art. 10—Property in tenant's possession—Date of a sale is the starting point.

Property which is in the possession of a tenant does not admit of physical possession within Art. 10. Where on the date of sale the property was in the possession of tenants, *held*, that the subject-matter of the sale did not admit of physical possession and that the second part of the article prescribes the rule of limitation applicable to this case.

Mehr Chand Mahajan—for Appellants.

Devi Dial—for Respondents.

Judgment:—This appeal arises out of an action for the pre-emption of a plot of agricultural land, and the sole question for determination is whether the claim was barred by limitation. Now the undisputed facts are as follows:—

The sale was effected on the 11th February, 1918, but the property sold was at that time in possession of tenants who were not evicted until June 1918. It appears that a sale-deed was subsequently executed and registered in September 1918.

It is beyond dispute that article 10 of the First Schedule to the Indian Limitation Act of 1908 governs the action, but the matter in controversy is whether the first part of the third column of that article or the second part applies to the claim. Now, it has been repeatedly held both by this Court as well as by the Allahabad High Court that property, which is in the possession of a tenant does not admit of physical possession within the meaning of that article. This principle is firmly established, and it is now too late to question its correctness.

Whether the subject of the sale does or does not admit of physical possession must be determined with reference to the date of the sale, and it is immaterial whether the property afterwards became susceptible of physical possession. The date of the sale is the crucial date for deciding whether the first part of the article governs the action, and it is common ground that on that date the property in question was in the possession of tenants. We must, therefore, hold that the subject-matter of the sale did not admit of physical possession and that the second part of the article prescribes the rule of limitation applicable to this case.

The sale-deed was registered in September, 1918, and the action, which was brought within one year from that date, was not barred by the law of limitation. We accordingly accept the appeal and, reversing the judgment appealed against, we restore the order of the District Judge, remanding the case for re-decision. The vendees must pay the costs incurred by the plaintiff in this Court as well as in the Court of the learned Judge in Chambers.

Appeal allowed.

1924 Lahore 303.

SHADI LAL, C.J., AND FFORDE, J.

Chuha Mal and another—Appellants

v.

Haji Rahim Bakhsh—Respondent.

L.P.A. No. 73 of 1922, decided on 27th November, 1922, from the decree of Scott-Smith, J., in C.A. No. 322 of 1921, dated 21st February, 1922.

(a) *Evidence Act, S. 65—Discretion as to admissibility should not be disturbed—Civ Pro. Code, S. 100.*

The question of the admissibility of secondary evidence is a point properly to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion therefore should not be overruled except in a clear case of miscarriage. (19 Cal. 438 (P.C.), *Foll.*) [P. 304, C. 1.]

(b) *Evidence Act, S. 65—Party must prove the original.*

A party entitled to produce and producing secondary evidence of a document is not relieved from the duty cast upon him by law namely of proving the execution of the original. [P. 304, C. 1.]

C. H. Garden Noad and *Harbhajan Das*—for Appellants.

M. Obed Ullah and *Sardha Ram*—for Respondents.

Judgment:—This appeal arises out of an action for the possession of a plot of land which the plaintiffs claimed to be their property. Their claim was resisted by the defendant, Rahim Bakhsh, but both the trial Court and the District Judge on appeal came to the conclusion that the plaintiffs had proved their title. On second appeal Mr. Justice Scott-Smith held that the plaintiffs had not proved the document relied upon by the District Judge in support of his finding and that there being no other evidence in support of the title, their suit should be dismissed.

The plaintiffs have preferred this appeal under clause 10 of the Letters Patent, and it is contended on their behalf that the document P. 5 has been wrongly excluded from consideration. Now, there can be no doubt that the plaintiffs' ancestor, Dhani Ram, purchased the plots of lands situated at Sarai Rohilla Khan, and the question for consideration was whether the land in dispute formed part of those plots. In order to establish their contention the plaintiffs produced a document P. 5 which is a copy of a sale-deed executed on the 17th April, 1917, by one Matu in favour of Abdul Samad, Abdullah, and Abdul Hamid, by which a building on a plot of land was sold, and in the boundaries given in the deed it is shown that the sites to the east and west of the plot, upon which the structure stood, belonged to the ancestor of the plaintiffs. Now, this document has been rejected on two grounds:—

(1) that the plaintiffs should have produced the original deed, and that secondary evidence thereof was not admissible under the law; and

(2) that they have failed to prove the execution of the deed of which P. 5 is a copy.

As regards the first objection, the learned Counsel for the plaintiffs argues that Abdul Samad, one of the vendees, who is a defendant in the case, was called upon to produce the original document, but neither he nor his co-vendees produced it in reasonable time, and the trial Court consequently passed an order allowing secondary evidence of the contents of the deed. The learned Counsel relies upon clause (c) of section 65 of the Indian Evidence Act, and contends that the conclusion of the trial Court on the question of the admissibility of secondary evidence could not be disturbed by the

appellate Court, more especially when no objection to that effect was taken in the Court of District Judge. There can be no doubt that secondary evidence of a document may be given when the party offering that evidence cannot, for any reason not arising from his own default or neglect, produce the original in reasonable time; and it seems that the trial Court was of the opinion that this rule was applicable to the circumstances of the present case. The matter depended upon the discretion of the Court; and, as pointed out by their Lordships of the Privy Council in *Harripria Debi* v. *Rukmini Debi* (1), 'the question of the admissibility of secondary evidence is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage. We are, therefore, of opinion that the first objection raised to the admissibility of P. 5 cannot be sustained.

There is, however, no evidence to prove the execution of the original sale-deed of which P. 5 is a copy. It is urged that the plaintiff could not prove the execution of a document which was not produced before the Court, but we do not think that the difficulty, if any, should relieve the party from the duty which the law casts upon him. The scribe, to whose evidence our attention has been invited, only states that the original deed might have been executed by Matu, but that ambiguous statement cannot be treated as proof of the execution of the document. Mr. Noad, however urges that, having regard to the fact that this objection was not raised in the first appellate Court, his clients should have been given an opportunity to produce further evidence to prove the execution. This is a matter which is purely in this discretion of that Court, and, as we are going to remand the case, we leave it to the District Judge to decide whether, in the circumstances, further evidence should be taken for the purpose mentioned by the learned Counsel.

The learned Counsel for the appellants also contends that, apart from the document page 5, there was other evidence in support of the District Judge's finding on the question of ownership, and that that finding being one of fact could not be disturbed in second appeal. In this connection, our attention has been invited to the oral evidence of certain witnesses including the defendants' witness, Muhammad Ismail, which, according to the learned Counsel, proves the plaintiffs' title to the land. Now this evidence, though mentioned by the trial Court in its judgment, was not specifically referred to by the learned District Judge. It is true that, as he was concurring in the finding of the Court of first instance, it was not necessary for him to make an express mention of the various pieces of evidence in support of his conclusion; and it may be that when he says that "an examination of the evidence leaves no doubt," he had about the plaintiffs' title also the oral evidence in view. We are, however, unable to say whether he would have considered the oral evidence alone sufficient for establishing the title. The question is one of fact, and the conclusion of the District Judge one way or the other would not be open to challenge in the Court of Second Appeal. In these circumstances, we consider that the District Judge, who is the Judge of fact, must adjudicate upon this question.

We accordingly accept the appeal and, setting aside the judgment of the Single Judge as well as that of the District Judge, we remit the case to the latter for re-decision with reference to the forgoing remarks. The costs shall abide the event.

Appeal accepted. Case remanded.

(1) (1892) 12 Cal. 438=19 I.A. 79=6 Sar. 177 (P.C.)

1924 Lahore 304.

ABDUL RAOOF, J.

Ramji Das proprietor of Firm Sewa Ram Dayal Das and others—Petitioners

v.

The Firm Briji Lal Jagan Nath of Cawnpore—Respondent.

Mis. Civ. App. No. 144 of 1922, decided on 24th April, 1922, from the Court of the Junior Sub-Judge, Jullundur.

Civ. Pro. Code, Ss. 22 and 23—Mere inconvenience is not sufficient ground—Whether sufficient grounds exist depends upon the facts of each case.

On the ground of mere inconvenience a suit ought not be transferred under Ss. 22 and 23, because the plaintiff has a right to choose his own forum and it is for the Court to see in each case whether there are good grounds for exercising the discretion to transfer the case.

Fakir Chand—for Petitioners.

Badri Das—for Respondent.

Order:—This is an application made ; the provisions of sections 22 and 23, Procedure Code, for the transfer of a in which the applicants are the dants and the opposite party the tiffs. The parties are the proprietors ie two firms which deal in sugar. have got branches of their shops at ipore. The defendants agreed under a act to sell 6,000 bags of sugar to the tiffs. They were, however, unable to y all that they had contracted for. offered to supply sugar of similar ty, but the plaintiffs refused to accept : of a different quality. The plaintiffs ituted a suit basing their cause of action on non-delivery of the goods promised to be delivered by the defendants. The defendants filed written statement in defence of the suit and one of the grounds urged in defence was that the Jullundur Court had no jurisdiction to try the suit. A preliminary issue was struck on this point. Apparently certain proceedings were taken, but before any final order could be given by the Court the defendants presented this application to this Court. It may be mentioned that before the presentation of this petition for the transfer of the case the defendants had made an infructuous application to the Court below to stay its hand and to make an order transferring the case. This, of course, was not in its power to do. The present petition presented before me is supported by an affidavit, which states that the entire dealings between the parties took place at Cawnpore where both the parties have their firms and still carry on business; and that all the witnesses, who are to be examined in the case, belong to Cawnpore and that it is necessary to examine the officers-in-charge of the supply of Sugar Department of the Government and their registers relating to the purchase of the same. In paragraph 6 of the affidavit it is stated that the trial of the suit in the Jullundur Court will entail unnecessarily heavy expense to the defendants to prove their case and the defendants apprehend that justice will not be done to them if the suit is allowed to go on at Jullundur, and that the suit has been brought at Jullundur simply to harass the defendants.

Mr. Badri Das, who has appeared for the plaintiffs, opposes this application for transfer and argues that sufficient cause has not been made out in the affidavit for the transfer of the case. He has cited a number of authorities before me, some of which only may be mentioned.

In *Amjad Ali* v. *Habib Ullah* (1) it was held that on the ground of mere inconvenience a suit ought not to be transferred under sections 22 and 23, Civil Procedure Code, because the plaintiff has a right to choose his own forum.

In *Muthia Chetty* v. *Arunachalam Chetty* (2) it was held that a transfer ought only to be made on very strong grounds.

In *Askaran* v. *Bhola Nath* (3) it was held that cogent reasons alone would justify an order of transfer under these sections.

It is of course for the Court to see in each case whether there are good grounds for exercising the discretion to transfer the case. No counter affidavit has been filed on behalf of the plaintiffs and Mr. Badri Das on their behalf is not able to controvert the facts stated in the affidavit. Having regard to the fact that the contract was entered into at Cawnpore it is reasonable to believe that almost all the evidence to be given by the parties will be available at Cawnpore and in fact it is positively asserted by the petitioners that all their witnesses are residents of Cawnpore and this is not controverted by the plaintiffs. If all these witnesses are to be brought from Cawnpore to Jullundur the process would be very expensive. It is, however, suggested by Mr. Badri Das that they may be examined by a Commission. In my opinion, having regard to the peculiar circumstances of the case, it will conduce to the convenience and interest of both the parties that the trial of the suit should proceed in the Court at Cawnpore: Mr. Badri Das has also complained that there has been a great deal of delay in making this application for transfer. It is, however, admitted that only a preliminary issue on the question of jurisdiction was struck and the other issues on the merits have not yet been settled. It was no doubt a mistake on the part of the defendants to have made an application for transfer in the Court of first instance and to have urged the plea that the Jullundur Court had no jurisdiction, but the delay apparently took place on account of these

(1) (1893) A.W.N. 58.
(2) (1914) 7 Bur. L.T. 1=7 L.B.R. 129=23 I.C. 345.
(3) (1918) 21 O.C. 217=48 I.C. 105.

infructuous proceedings. The delay of course in this case has not been of such a nature as to in any way prejudice the plaintiffs. The trial of the suit is in a very preliminary stage. In my opinion it will not cause inconvenience to the parties if the case is tried at Cawnpore and its trial at Jullundur is bound to cause unnecessary expense and inconvenience to the petitioners. I, therefore, direct the Court below to return the plaint to the plaintiffs with an endorsement to the effect that it may be presented to the proper Court.

Order accordingly.

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* * 1924 Lahore 306.

CAMPBELL, J.

Pragji Soorji & Co. of Bombay—Petitioners

v.

Kalu Mal-Shori Mal & Co. of Amritsar—Respondents.

Civ. Mis. Pet. No. 227 of 1922, decided on 15th May, 1922.

Civ. Pro. Code, Ss. 22, 23—Transfer to original side of a High Court from a Court subordinate to another High Court is not governed by Ss. 22, 23—High Court has inherent jurisdiction which should be sparingly used—Civ. Pro. Code, S. 151.

Ss. 22 and 23 do not apply where transfer to the Original Side of a High Court from a Court subordinate to another High Court is desired. The High Court has the power in exercise of its inherent jurisdiction to grant the petitioner the relief for which he asks by an order of stay but the right of a plaintiff to institute a suit in a Court in which the law permits him to sue should not be interfered with by the High Court in exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the defendant would not be subjected if the suit were brought in another competent Court. The mere fact that it would be more convenient to the applicant to have the action tried elsewhere at Bombay, is no sufficient reason to force the plaintiffs summarily out of the Court in which they are entitled legally to sue and to deprive them of the substantial sum expended by them on Court-fees in a proceeding for which there is no provision in the Code of Civil Procedure and by the application of inherent powers not utilised in practice except for the purpose of preventing or remedying grave abuse. (65 Ind. Cas 782, 20 A.L.J. 118, 44 A. 278, A.I.R. 1922 (All.) 65, *Dist.*). [P. 306, C. 1, P. 307, C. 2, P. 308, C. 1, P. 309, C. 2 and P. 310, C. 1.]

Mackey—for Petitioners.

C. Bevan Petman and *Duni Chand*—for Respondents.

Order:—The present application is described as being made under sections 22 and 23 (3), Code of Civil Procedure, and is by Pragji Soorji and Co. of Bombay praying that this Court will stay a suit filed against the petitioners in the Court of the Subordinate Judge, Amritsar, by Kalu Mal-Shori Mal and Co., Amritsar, and order the return of the plaint in order that the plaintiffs may, if they think proper, present it in the High Court at Bombay.

It is obvious that the two sections quoted are not directly applicable. They deal with cases where a party to a suit instituted in a Court subordinate to an appellate Court wishes to secure the transfer of the suit to another Court subordinate either to the same appellate Court or to the same High Court or to another High Court. They do not legislate for such a situation as the present (where transfer to the Original Side of a High Court from a Court subordinate to another High Court is desired.)

In a case precisely similar to the present it was argued before Mr. Justice Das of the Patna High Court, *Jawahir Kumari Debi* v. *Naresh Chandra Bose* (1) that the Original Side of the Calcutta High Court was a District Court subordinate to the Calcutta High Court and reliance being placed upon a decision by a Single Judge of that Court reported as *Kedarnath Mondal* v. *Ganesh Chandra Adak* (2). The point was left undecided, the petition being rejected on other grounds, but Mr. Justice Das evidently was not impressed by the argument. In *Kedarnath Mondal* v. *Ganesh Chandra Adak* (2) it was held that when a High Court exercises its Original Civil Jurisdiction it comes within the definition of a District Court as contained in the Code of Civil Procedure for purposes of the Inventions and Designs Act V of 1888. It was not said, however, that a High Court on the Original Side is a Court subordinate to itself within the meaning of section 23 of the Code of Civil Procedure, and the contrary was ruled by the Madras High Court in *Hindustan Assurance and Mutual Benefit Society, Ltd.* v. *Mulraj* (3), where one point was directly in issue, after consideration of the terms of sections 2 (4) and 3 of the Code. It seems to me impossible to hold otherwise.

Mr. Petman, who opposes the petition on behalf of the respondents admits, however, that this Court has the power, in exercise of

(1) (1920) 1 Pat. L.T. 389=57 I.C. 649.
(2) (1909) 12 C.W.N. 446.
(3) (1915) 27 M.L.J. 645=27 I.C. 455.

its inherent jurisdiction, to grant the petitioner the relief for which he asks by an order of stay, but contends that to obtain so exceptional a remedy the petitioner must make out a far stronger case than would give him a claim to an ordinary transfer and must prove that the suit instituted in Amritsar is an abuse of the process of the Court. Mr. Mackay, who appears for the petitioners claims that the ordinary *criteria* should apply by which questions of transfer are decided by Courts empowered to do so, and also asserts that the suit is purely vexatious and has been filed in order to harass and annoy the petitioner and to serve as a means of extortion.

The substance of the plaint is as follows :—

On the 8th November, 1920, the parties entered into a partnership at Bombay for trading in dyes, spices, and asafœtida at various places in India. On the 27th July, 1921, the partnership was dissolved under a written agreement by which the *status quo ante* the 8th November, 1920, was to be restored, the defendants were to account for and pay to the plaintiffs their share of the proceeds of all sales, and to make over their share of goods in stock at Bombay and other stations within eight days, and the parties were to be entitled to account to the partnership and on such accounts to pay and receive interest on the capital at annas 10 per cent. per mensem. The defendants had failed to render accounts on demand or to deliver unsold goods within the stipulated period. Hence a decree was sought for (*a*) rendition of full accounts, (*b*) payment of monies found due on the said accounts, (*c*) Rs. 5,000 the price of unsold goods not delivered, and (*d*) Rs. 50,000 damages for late delivery of unsold goods. Reliefs (*a*) and (*b*) were valued at 7 lakhs of rupees.

The petitioners admit that the respondents by reason of their having a branch in Amritsar, were entitled to sue at that place but they declare by affidavit that both parties have large businesses in Bombay; that the petitioners' business is a one man business; that their business in Amritsar is managed by a paid servant; that the partnership was made in Bombay; that all the books of the partnerships were kept and are in Bombay; that two of the sons of the defendant firm live in Bombay and manage the respondents' business there, that one of them was the manager of the respondents' side of the partnership; that all the arrangements for dissolution were made in Bombay; that the terms of dissolution were settled by correspondence between Bombay Solicitors; that witnesses and voluminous account books will have to be brought to Amritsar from Bombay; that the sole proprietor of the petitioner firm cannot leave Bombay and has no one to depute for the conduct of the case at Amritsar. The whole cause of action arose in Bombay; and that no legitmate advantage can accrue to the plaintiffs-respondents from a trial of the suit in Amritsar.

In the counter-affidavit filed by the respondents' agent it is admitted that the petitioners' branch at Amritsar is managed by a paid servant; that the partnership was made in Bombay and the dissolution agreement signed there. It is denied that two of the sons live permanently in Bombay, and that one of them managed the partnership business. It is asserted that the sons divide their time between a number of branches of the respondents' business and that the Bombay branch is managed at times by paid servants. It is contended that the petitioners have competent agents who can conduct the case at Amritsar, that the Bombay witnesses can be examined by commission and that the accounts at Bombay cannot be voluminous since the partnership lasted eight months only. It is denied that the whole cause of action arose at Bombay and is asserted that deliveries of goods in respect of which damages are claimed took place at various other places. It is asserted further that the plaintiffs have the right to select the forum of their suit, that the suit is a *bona fide* one, that their present head-office is at Amritsar; that transfer to Bombay would entail great loss and hardship to the plaintiffs, that the plaintiffs would have to take their books to Bombay and that they would lose Rs. 3,000 paid in Court-fees at Amritsar and also fees paid to Counsel on the same place.

In amplification of the above Mr. Petman has argued that delivery of goods in terms of the dissolution agreement had to be made at a large number of branches all over India some of which are near enough to Amritsar to enable witnesses to attend there personally; that in any case a large number of commissions will have to issue; that the plaintiffs want a statement of accounts, not the original books, and the books will only have to be examined if there is a challenge,

in which case they can be examined at Bombay; that the original books of the branches are presumably at those branches: that there is no reason to suppose that there will be a large number of witnesses from Bombay itself; that the Solicitors' letters probably will be admitted and need not be proved; that the cost of litigation to the plaintiffs will be greater at Bombay than at Amritsar; and that although the agreements were entered into at Bombay there is no dispute about their terms and the plaintiffs only require what is due to them under those terms. In reply Mr. Mackay points out that the plaintiffs' affidavit is not sworn to personally by L. Nathu Mal, the alleged head of the plaintiffs' firm, that the branch accounts are more likely to be at Bombay now than at the branches, that much of the goods to be delivered was in transit through Bombay, etc., the import port, at the time of dissolution, and that in fact everything in connection with the partnership is at Bombay.

It will be seen that there is not much dispute about actual facts between the parties and since the defendants have not yet filed their pleas in the Amritsar Courts the above summary describes the situation as clearly as can be done at the present stage.

As regards the law I hold for reasons already given that sections 22 and 23 of the Code do not apply to this proceeding.

To determine the principles on which the extraordinary jurisdiction of this Court should be exercised I have to examine certain authorities which have been placed before me.

(1) *Shiv Parshad* v. *Kanhaya Shah Ruchi Shah* (4). This was an application under sections 22 and 23 (2) for transfer of a suit from Rawalpindi to Delhi. It was laid down that there must be strong reason for depriving a plaintiff of his right to bring his suit in any Court in which the law allows and a Sind decision was cited with approval. [*Firm of Shamussuddin Mahir Bux* v. *Firm of Ali Mahomed Alidina* (5)] which held that a transfer should not be made from one Court to another merely on the ground that the defendant had all his evidence at the place of sitting of the second Court.

(4) (1919) 167 P.R. 1919=54 I.C. 935.
(5) (1914) 8 S.L.R. 43=25 I.C. 674.

In the face of this pronouncement by this Court *Rabban Bibi* v. *Sohadra Bibi* (6) a judgment by the Oudh Judicial Commissioners quoted by Mr. Mackay can have no weight. There stay was ordered and the plaint was returned for presentation to a Court in another Province on the ground of what the Court considered to be the real interests of the parties and the general convenience by their witnesses.

(2) *Harendra Lall Roy* v. *Sarvamangala Dabee* (7). Here the High Court directed transfer under the Letters Patent to the High Court from a subordinate Court, because questions of difficulty arose in the suit, both parties resided in Calcutta, the defendant was *parda-nashin* and poor, all her witnesses and all persons who knew of the transactions in suit were residents of Calcutta or the neighbourhood and the Court considered that to insist upon the suit being tried at the place of institution would place inseparable difficulties in the way of the defendant.

This case was quoted by Mr. Mackay but it has several points of distinction from the present.

(3) *Inayatullah Khan* v. *Nisar Ahmad Khan* (8), another case cited by Mr. Mackay. A Bench of the Allahabad High Court, promising that a plaintiff has "*prima facie* right to decide the place of trial, ruled not without hesitation" on the balance of convenience that a suit instituted at Shahjahanpur should be heard by a Court in the Central Provinces. It was a case covered by section 23 (3), Civil Procedure Code. A Single Bench ruling of the same Court *Madho Prasad* v. *Moti Chand* (9) that mere convenience is not a ground for transfer was dissented from.

(4) *Jawahir Kumari Debi* v. *Narash Chandra Bose* (1) referred to already. The question whether the Patna High Court had power under sections 22 and 23 (3) to transfer from a Court subordinate to itself to the Original Side of the Calcutta High Court was left undetermined and the application for such transfer was refused on the merits. The learned Judge considered the real ground for the petition to be that it would be more expensive and less convenient

(6) (1913) 20 I.C. 758.
(7) (1897) 24 Cal. 183.
(8) 1922 All. 65=44 All. 278=20 A.L.J. 118=65 I.C. 782.
(9) (1919) 41 All. 381=17 A.L.J. 371=50 I.C. 368.

to have the trial in the Court of the Subordinate Judge, Purneah. He stated that an examination of all the cases on the point led to the conclusion that the Courts have exercised their powers to transfer suits from one Court to another only when they have been satisfied that the proceedings in one Court constitute abuse of the power of the Courts and that in the case before him he was not satisfied that there had been an abuse of the process of the Court.

(5) *Hindustan Assurance and Mutual Benefit Society, Ltd.* v. *Mulraj* (3) also referred to earlier in this judgment. The case was the converse of the present case and the prayer was for stay of a suit for damages for a libel published in Madras which had been instituted in the Madras High Court and for a direction that the plaintiff should sue in a Court in the Punjab. It was held that the plaintiffs have the choice of the forum and that their choice should not be restricted because the defendants may find it more difficult to make their defence in one forum than in another. It was held further that the High Court has inherent jurisdiction to stay any suit which is an abuse of the Court, and the application was refused after consideration of the principles laid down in certain English cases in which the question was whether an action should proceed in England or in another country. One of the three English cases mentioned was *Logan* v. *Bank of Scotland* (10) which was not discussed in detail but on which both the parties before me rely as a guide to decision of the present application.

(6) *Logan* v. *Bank of Scotland* (10). The action was brought in England to recover damages for misrepresentations in the prospectus of a Company of which the Bank of Scotland were bankers and the Court of appeal restored the order of a Master in Chambers which had stayed proceedings on the ground that the action was vexatious and oppressive and an abuse of the process of the Courts. All the parties lived in Scotland except one defendant Scott, who resided in London and who was held not to be a substantial defendant, being an undischarged bankrupt. All the transactions which gave rise to the alleged cause of action took place in Scotland. The Bank of Scotland had no branch out of Scotland except one in London. The Company was registered in Scotland; its business was carried out exclusively in Scotland; none of its business was transacted by the London branch of the Bank; all the books were in the hands of the Liquidator in Edinburgh; and the plaintiff's affidavit showed that all the evidence would have to be obtained from Scotland.

These facts are claimed by Mr. Mackay to establish an analogy with the present case and to support his client's demand for an order of stay in the Amritsar Court, but it appears to me that, as contended by Mr. Petman, as they were used and emphasized by Sir Gorell Barnes, who delivered the judgment, in order to show that the action was not *bona fide* in England. That was the conclusion arrived at and the reason for the action being stayed. The President remarked that if Scott were a real defendant and it had been necessary to bring one action to join him and the Bank in England, the Bank might have had to submit; but that as Scott was not defending and apparently had no means to do so it was impossible to believe that he was joined because the plaintiff wished to enforce his remedies against him. Finally, it was pointed out that the order involved no hardship on the plaintiff who could make his claim at less expense and trouble to himself in Scotland.

There does not appear to me to be much similarity between the position of Logan in regard to the Court of Session in Edinburgh and that of the plaintiffs in the present suit in regard to the High Court of Bombay. The head of the plaintiff firm, Nathu Mal, is admitted in the petitioners' affidavit to reside mostly at Amritsar and the allegation that he does not take an active part in the business of his firm at Bombay or elsewhere is denied. The firm admittedly consists of Nathu Mal and six sons. Nothing is said in the affidavit about four of the sons, and the statement that two live regularly in Bombay has been denied. The business of the partnership, the subject of the litigation, is admitted to have been carried out at several places throughout India including Amritsar.

The rule to be deduced from the authorities, particularly the two most directly applicable, *Jawahir Kumari Debi* v. *Nuresh Chandra Bose* (1) and *Hindustan Assurance and Mutual Benefit Society, Ltd.* v. *Mulraj* (3) is that the right of a plaintiff to institute a suit in a Court in which the law permits him to sue should not be interfered

(10) [1906] 1 K.B. 141=75 L.J.K.B. 218=94 L.T. 153=22 T.L.R. 167=54 W.R. 270.

with by the High Court in exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the defendant would not be subjected if the suit were brought in another competent Court. Here I can discern no such intention on the part of the present plaintiffs and all that the defendants have succeeded in showing is that it would be more convenient to them to have the action tried at Bombay. This is no sufficient reason, for this Court to force the plaintiffs summarily out of the Court in which they are entitled legally to sue and to deprive them of the substantial sum expended by them on Court-fees in a proceeding for which there is no provision in the Code of Civil Procedure and by the application of inherent powers not utilised in practice except for the purpose of preventing or remedying grave abuse.

The Allahabad ruling *Inayatullah Khan* v. *Nisar Ahmad Khan* (8) is distinguishable by the fact that it was delivered in a case provided for by sections 22 and 23 of the Code, and in so far as its reasoning differs from that adopted in *Hindustan Assurance and Mutual Benefit Society, Ltd.* v. *Mulraj* (3). I prefer to follow the latter authority.

The application is dismissed with costs. Counsel's fee Rs. 200. The records will be returned to the Sub-Judge's Court, Amritsar.

Petition dismissed.

1924 Lahore 310.

ABDUL QADIR, J.

Kishen Singh—Petitioner

v.

Girdhari Lal and another—Respdts.

Cr. Rev. No. 251 of 1922, decided on 20th May, 1922, from the order of Sessions Judge, Ludhiana, dated 9th Feb., 1921.

•(a) *Crim. Pro. Code, S. 439—Dismissal for default.*

A criminal revision petition dismissed in default without any decision on the merits can be reheard. (10 C.L.J. 80, *Foll.*). [P. 310, C. 2.]

(b) *Crim Pro. Code, S. 197—Municipal secretary.*

No sanction is necessary to prosecute a Municipal Secretary for any wrong done by the latter. (1 Wier 243. *Dist.*). [P. 311, C. 2.]

Jai Gopal Sethi—for Petitioner.

Balwant Rai—for Respondents.

FACTS:—One Chaudhri Kishen Singh brought a complaint on the 12th October, 1920, against Girdhari Lal and Niamat Ali under sections 427/109, Indian Penal Code, alleging that they had without any authority from the Municipality ordered two *tharas* (raised platforms) in front of his house to be demolished and had thus committed mischief, by which damage to the amount of more than Rs. 50 was caused to the complainant. Girdhari Lal was at the time working as the Honorary Secretary of the Municipality and Niamat Ali was its paid Overseer. The Magistrate to whom the complaint was entrusted for enquiry began to record some evidence under section 202, Criminal Procedure Code, before issuing process against the accused persons. While doing so he came to know that the complainant had applied to the Local Government for sanction to prosecute Girdhari Lal and that the Government had refused such sanction. On learning this, he dismissed the complaint without any reference to the merits, holding that the complainant should at first obtain sanction. This order was passed on the 13th December, 1920. The complainant applied to the Sessions Judge for revision and that learned Judge dismissed the application on the 9th February, 1921. Against that order he filed a petition for revision in this Court.

Judgment:—The petition has been argued before me by Mr. Jai Gopal Sethi, while Mr. Balwant Rai has argued the case on behalf of Girdhari Lal respondent. Niamat Ali respondent, though served, was not present.

A preliminary objection was raised by Mr. Balwant Rai to the effect that the petition having been once dismissed in default, the petitioner had got it restored, but it was doubtful whether this Court could restore a criminal petition, once so dismissed or could review an order passed by itself as a Court of Criminal Jurisdiction. As the petition was never decided on the merits I do not see any force in this objection and Mr. Sethi refers to *Bibhuty Mohun Roy* v. *Dosimoni Dassi* (1), as an authority on the point that a petition dismissed in default without any decision on the merits can be re-heard.

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(1) (1909) 10 Cr. L.J. 287=10 C.L.J. 80=3 I.C. 393.

As regards the main question involved in the case, *i.e.*, whether a sanction to prosecute was necessary or not, I am of opinion that it was not.

I have been shown the records of the Municipality and it appears that it had been decided by that body to construct a drain in front of the house of Kishen Singh. The Municipal servants, who went to construct that drain, demolished the *tharas* of the petitioner in doing so and it is alleged that they did so under the orders of Girdhari Lal, Secretary. It is urged that no resolution of the Committee had been passed for the demolition of the *tharas* and that Girdhari Lal was actuated in doing so by motives of personal malice. It is contended that in a case like this no sanction was necessary, whether Girdhari Lal acted in his official capacity as Secretary or in his private capacity. It is argued by Mr. Sethi that the terms of section 197, Criminal Procedure Code, relate only to the necessity of sanction to prosecute such public servants as are not removeable from office except with the sanction of the Local Government and that a Secretary of a Municipality does not belong to that category, as he is removeable by the Committee. If he acted in his individual capacity it is obvious that no sanction would be required. Mr. Balwant Rai contends in reply that Girdhari Lal was a duly appointed Municipal Commissioner and was acting as such when he was acting as an Honorary Secretary, and because a Municipal Commissioner cannot be removed from his office except by the Local Government, it should be held that the act attributed to him, if done by him, was done in his capacity as a Municipal Commissioner. He also refers to *The Chairman of the Municipal Council, Ellore, In re* (2) where it was held that a Chairman of a Municipality was a public servant, who could not be prosecuted except after obtaining the sanction of the Local Government. Mr. Sethi's reply to this is that a Chairman is ordinarily not removeable from office without the sanction of the Local Government. He points out, on a reference to the Punjab Municipal Act, sections 20, 21 and 22, that the appointment of a Chairman is subject to the approval of the Government and his removal is also in the hands of the Local Government. He argues, therefore, that the ruling regarding the prosecution of a Chairman of a Municipality can furnish no analogy for the case of a Secretary. I think there is hardly any doubt that Girdhari Lal was acting as Secretary of the Municipality in dealing with the matter, which led to the demolition of the *tharas* and I have not been referred to any authority which makes it necessary for a complainant to obtain a sanction under section 197, Criminal Procedure Code, before prosecuting a Municipal Secretary for any wrong done by the latter. Moreover, it is noteworthy that the complaint filed by Kishen Singh was against Niamat Ali also for prosecuting whom no sanction was required and there seems to be hardly any reason why that was dismissed summarily without the least reference to the merits.

I accept this revision and order that the complaint of the petitioner be taken up again and decided according to law.

Revision allowed.

(2) 1 Weir 243=2 Weir 221.

1924 Lahore 311.

BROADWAY, J.

Mahomed Afzal and another—Petitioners

v.

Emperor—Respondent.

Cr. Rev. No. 359 of 1922, decided on 17th June, 1922, from the order of Addl. Sessions Judge, Ferozepore, dated 23rd February, 1922.

Crim. Pro. Code, S. 106—Penal Code, S. 342—S. 106, Crim. Pro. Code applies only to offences involving breach of the peace.

Section 106, Criminal Procedure Code, can only be applied when the person concerned has been convicted of an offence involving a breach of the peace, *i.e.*, the offence must be one of which a breach of the peace is in law a necessary ingredient. (2 Lah. 279, *Ref.*) It cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement.

Iftikhar Ali—for petitioner.

C. H. Carden Noad—for respondent.

Judgment:—The petitioners in this case, Mohammd Afzal and Shera, have applied, under section 439, Criminal Procedure Code, for revision of an appellate decision of the Additional Sessions Judge of Ferozepore, dated 23rd February 1922. They have been convicted of an offence under section 342, Indian Penal Code, and sentenced to eight months' rigorous

imprisonment and Rs. 50 fine or in default to two months' rigorous imprisonment. In addition they have been called upon under section 106, Criminal Procedure Code, to furnish security in a sum of Rs. 500 to keep the peace for one year on the expiry of their sentences.

Mr. Iftikhar Ali on behalf of the petitioners has raised two points; (1) that the evidence did not warrant the conviction and (2) that the order under section 106, Criminal Procedure Code, is bad in law. I have carefully studied the judgments of the two Courts. As remarked by Rossignol, J., in his admitting order, the judgment of the appellate Court is not satisfactory. At the same time that of the First Court is comprehensive and clear, and I assume that it is because of that that the learned Additional Sessions Judge contented himself with dealing with the points raised as briefly as he has. I have also examined such of the evidence as was necessary in order to ascertain how far the learned Vakil's contentions were correct. After giving my careful consideration to the case I have no doubt in my mind that the Courts below are right in thinking that the petitioners have committed an offence under section 342, Indian Penal Code, and I consider that the sentences are appropriate.

The applicability of section 106, Criminal Procedure Code, is, however, of considerable doubt. It has been held by the various High Courts that section 106, Criminal Procedure Code, can only be applied when the person concerned has been convicted of an offence involving a breach of the peace. It has been held that in such cases the offence must be one of which a breach of the peace is in law a necessary ingredient (see the cases cited at page 107 of Boy's Criminal Procedure Code, Volume II). In *Abdulla* v. *Emperor* (1) the same view was adopted by Martineau, J. In section 339 wrongful restraint is defined as follows :—

"Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person."

While wrongful confinement is defined in section 340 in the following terms :—

"Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person."

Although the matter is not quite clear it seems to me that it cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement and, therefore, the order in this case under section 106, Criminal Procedure Code, must be regarded as illegal.

I, therefore, accept this petition in so far as to set aside the order under section 106, Criminal Procedure Code, but maintain the conviction and sentences in all other respects.

Petition partly accepted.

(1) (1921) 2 Lah. 79=22 Cr. L.J. 709=63 I.C. 869.

1924 Lahore 312.

ABDUL RAOOF, J.

Mt. Begaum—Appellant

v.

Jafar Hassan—Respondent.

Civ. Rev. Pet. No. 1410 of 1922, decided 12th January, 1923, from the order of Senior Sub-Judge, Ludhiana, dated 22nd February, 1922.

Civ Pro. Code, O. 33, rr. 15 and 7—First application not pressed and so rejected—Second one barred.

Where the first application was rejected without an enquiry into the pauperism of the petitioner, because the petitioner had refused to press her application in consequence of an alleged compromise : *Held* that a second application to sue as pauper is barred. (20 Bom. 86 and 17 All. 526, *Foll.*) [P. 313, C. 1.]

Umar Bakhsh—for Appellant.

Md. Iqbal—for Respondent.

Judgment:—This is an application asking this Court to revise an order refusing to allow the applicant to sue as a pauper. The applicant first made an application on the 23rd of November, 1920, for permission to sue as a pauper. On the 30th of November, 1920, some sort of compromise was effected between the applicant and the opposite party in consequence of which the applicant did not press her application and the Court on the 1st of December made an order refusing the application on the ground that it was not pressed. On the 25th of August, 1921, the applicant applied for a review of the order of refusal but the review was not granted. The present application

was made on the 3rd of October, 1921, in respect of the same right to sue and was rejected on the ground that in consequence of the compromise the petitioner was not entitled to sue. The question which I have to decide is whether this application is barred or not by the provisions of Order 33, rule 15, Civil Procedure Code. This rule provides that "an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right."

It was contended on behalf of the applicant that rule 7, Order 33, Civil Procedure Code, under which it is said the order of refusal was made contemplates an inquiry into the question of pauperism and that it is only after holding such an enquiry that the Court can make an order under that rule either allowing or refusing to allow the applicant to sue as a pauper. The argument is that as the first application was rejected without an enquiry into the pauperism of the petitioner the order of refusal cannot be said to have been made under rule 7 and that, therefore, the order of refusal made on the first application cannot be a bar to the present application. A similar question under almost similar circumstances was raised before the Bombay High Court in the case of *Ranchod Morar* v. *Bezanji Edulji* (1) and it was held "that the order rejecting the plaintiff's first application was an order under section 409 of the Code of Civil Procedure; that both the applications were made in respect of the same right to sue, and that the order rejecting the first application operated as a bar under section 413 of the Code to the entertainment of the second application." Rule 7 of Order 33 of the present Code makes the same provision as was contained in section 409, Civil Procedure Code, and rule 15 of the same order is almost the same as section 413 of the old Code. In the Bombay case the Court had made an order of refusal as the petitioner had refused to go on with his application. In the present case also the petitioner had refused to press her application in consequence of the alleged compromise.

A further contention was put forward on behalf of the petitioner, that in this case there was no order of refusal but simply an order rejecting the application and therefore, neither rule 7 nor rule 15 applied. A similar argument was put forward in the Bombay case and the learned Judges held that section 409 was the only section in the Code under which the order rejecting the application could have been made and that, therefore, it must be taken to be an order of refusal. In the case of *Naraini Kuar* v. *Makhan Lal* (2) the learned Judges of a Division Bench at page 528 are reported to have made the following observation :—

"It is obvious from section 413 that when an order...under section 409 is made, ...there is a bar to any further application to sue as a pauper."

Following the two above decisions I must hold that the present application is barred. The application is rejected with costs.

Application rejected.

(1) (1896) 20 Bom. 86.

(2) (1895) 17 All. 526 = (1895) A.W.N. 106.

1924 Lahore 313.

HARRISON, J.

Mt. Khusal Devi—Appellant

v

Sukh Dial—Respondent.

Mis. F. A. No. 570 of 1922, decided on 5th December, 1922, from the order of Senior Sub-Judge, Lahore, dated 24th January, 1922.

* *Guardians and Wards Act, S 39—Failure of guardian to give security ordered—Order of District Judge saying anybody else should apply for appointment—Order amounts to removal.*

One S was appointed guardian of the person and property of the three minors and in the same order he was directed to give ten thousand rupees security. This he never did and he intimated definitely that he could not do so. The District Judge thereupon passed an order, recited the fact that no security had been given and said that anybody who wished to be appointed guardian could now apply. *Held*, that the order of District Judge is tantamount to an order of removal under S 39, on the ground that the guardian had continuously failed to perform the duties of his trust and, had contumaciously disregarded the order of the Court. [P. 314, C. 1.]

Dej Raj Sawhny—for Appellant.

Durga Das—for Respondent.

Judgment:—The facts of this case are that on the 1st August, 1914, one Sahib Dayal was appointed guardian of the person and property of three minors and in the same order he was directed to give ten thousand rupees security. This he

never did and on the 11th December, 1914, he said definitely that he could not do so. On the 17th December, 1915, Major Frizelle, District Judge, passed an order which, in my opinion, is tantamount to removal of the guardian under section 39. It recited the fact that no security had been given and said that anybody who wished to be appointed guardian could now apply. This order was interpreted as an order of removal on the 13th October, 1920, by *Sheikh* Rahim Bakhsh, Senior Subordinate Judge at the time. It is a fact which appears to me to be wholly immaterial that *Lala* Maya Ram in interpreting it in 1917 was of opinion that Sahib Dayal has not been removed. Now, on the 28th August, 1921, or more than seven years after the original order, Sahib Dayal applies to the Senior Subordinate Judge to be allowed to put in the security and to be treated as the guardian, the principal minor having in the meatime reached the age of 18. The Senior Subordinate Judge allowed the application and ordered a certificate of guardianship to be given him and directed that he should produce the security at once. Against that order this appeal is lodged.

Counsel has put before me the conflicting views of the Madras and Bombay High Courts as to whether an order of appointment is complete and effective before the security has been lodged or is to be treated as a conditional order which will become absolute after and when that security is lodged. I do not think it is necessary to go into this question beyond saying that the order in the sense that it can be appealed against is, in my opinion, a complete order but it does not become operative until the security is put in. Inasmuch as the person appointed definitely stated that he was not in a position to give security and did not attempt to do so, I read the order of Major Frizelle as tantamount to an order of removal under section 39 on the ground that the guardian had continuously failed to perform the duties of his trust and had contumaciously disregarded the order of the Court. I think the view taken by *Sheikh* Rahim Bakhsh is perfectly correct. Finding, therefore, that the guardian appointed has been removed I hold that there is no guardian at present though there has been one in the past. This guardian was debarred from functioning until several conditions were fulfilled, and he did not, as matter of fact, act as such.

I, therefore, accept the appeal and set aside the order allowing security to be lodged. Costs of the appellant will be paid by the respondent.

Appeal accepted.

1924 Lahore 314.

MARTINEAU, J.

Dhuman—Petitioner

v.

Ramji Mal—Respondent.

Civ. Rev. No. 586 of 1922, decided on 14th February, 1923, from the order of Senior Sub-Judge, Jhelum, dated 20th April, 1922.

Provincial Small Cause Courts Act (IX of 1887), Sch II, Art. 15—Suit to recover balance of purchase-money is not for specific performance of contract.

A suit by a vendor for recovery of the balance of purchase-money due from the vendee is not a suit for specific performance of a contract. (43 Cal. 59, *Dist.*) [P. 315, C. 1.]

Kahan Chand— for Petitioner.

Amar Nath Chona—for Respondent.

Judgment:—The plaintiff sold property to the 1st defendant for Rs. 150. He was paid Rs. 87 out of the price, and he sues to recover the remaining Rs. 63.

The suit was tried by a Munsif who exercised the powers of a Court of Small Causes for the trial of cases up to Rs. 100 in value, and he passed a decree in the plaintiff's favour.

The defendants appealed to the Senior Subordinate Judge, who, without deciding whether the suit was one cognizable by a Court of Small Causes, found that the Munsif had tried it in his capacity as such a Court, and that the defendants had not objected to the procedure adopted, and accordingly held that the appeal did not lie and dismissed it.

It is contended in revision that the suit was one for specific performance of a contract, falling under article 15 of the Second Schedule of the Provincial Small Cause Courts Act, and, therefore exempt from the cognizance of a Court of Small Causes. *Sheik Galim* v. *Sadarjan Bibi* (1) is relied upon in support of this contention. In that case the plaintiffs, who were mortgagors,

(1) (1916) 43 Cal. 59=21 C.L.J. 532=19 C.W.N. 1332=29 I.C. 621.

were suing to recover the balance of the mortgage-money, and it was held that the claim could only be regarded as one for the specific performance of so much of an agreement to lend money as had not already been performed. That case seems to be distinguishable from the present one. The sale to the plaintiff is complete, and he is only suing for the money that is payable to him under the contract. This cannot, in my opinion, be said to be a suit for the specific performance of a contract. I hold that the suit was cognizable by a Court of Small Causes, and that the decree passed by the Munsif was, therefore, not appealable.

I dismiss this application with costs.

Application dismissed.

1924 Lahore 315.

HARRISON, J.

Bhag Singh—Appellant

v.

Khushal Singh and others—Respondents.

S. A. No. 814 of 1922, decided on 24th November, 1922, from the decree of District Judge, Jullundur, dated 20th January, 1922.

Landlord and tenant—Abadi—*Occupancy tenant cannot build on* shamilat *land nor can he set up adverse title.*

An occupancy tenant who occupied a portion of the *shamilat* land with the consent or the acquiescence of the proprietors for agricultural purposes, cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it was given ; but if he diverts the site to other purposes, as for instance, to build upon, and disclaiming the title of the proprietors, sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the suit of the proprietors. (65 P.R. 1885, *Foll.*) [P. 315, C. 2.]

Badri Das—for Appellant.

Faqir Chand—for Respondents.

Judgment:—Bhag Singh, an occupancy tenant in village Kandolah, brought this suit against two of the proprietary body, asking for an injunction restraining them from interfering with him or preventing him from building a wall round a vacant site within the *abadi*. The suit was dismissed by the learned District Judge after considering all the evidence produced by the plaintiff on finding that, although he had established long user and although he had shown that he himself had leased the vacant site to others on three occasions, he had not established his title, or, in other words, that the plaintiff had failed to establish any adversity or any overt act against the landlords. He appeals, urging that the uninterrupted user and the rent-deeds prove his title and a totally new point that as an occupancy tenant residing in the village he is entitled by custom to build a wall wherever he chooses. The only point before the lower appellate Court was whether plaintiff had proved his title to the land in suit and this is the only point which I propose to decide.

The case is precisely similar to *Bhani* v. *Bhag Mal* (1) where it was held that an occupancy tenant who occupied a portion of the *shamilat* land with the consent or acquiescence of the proprietors for agricultural purposes cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it was given ; but if he diverts the site to other purposes, as for instance, to build upon, and disclaiming the title of the proprietors sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the suit of the proprietors.

Here the plaintiff has placed a *belna* on this vacant site and has used it. He has also had three deeds executed by tenants in his favour, but as none of these were registered there is nothing to show that the landlords received any notice of his claim to be entitled to let the site. All that they knew was that he and his father and others made use of this vacant site, the use being very similar in nature to that described in *Framji Cursetji* v. *Goculdas Madhowji* (2), and there was no sort of overt act of adversity until the time when the plaintiff began to build his wall. I find that it is clearly established by the circumstances that the possession from the very start has been permissive, and that there has been no adversity whatsoever.

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

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(1) (1885) 65 P.R. 1885.
(2) (1892) 16 Bom. 388.

1924 Lahore 316.

CAMPBELL, J.

Wahid Baksh and others—Appellants

v.

Lalta Pershad—Respondent.

S. A. No. 1786 of 1922, decided on 3rd February, 1923, from the decree of District Judge, Multan, dated 17th May, 1922.

• (a) *Limitation Act, Art. 177—Deceased neither defendant nor respondent on the date of death—Art. 181 applies—Limitation Act, Art. 181.*

An application for bringing on record the legal representatives of a deceased person who was not a defendant or respondent on the date of his death is governed by Art. 181 and not by Art. 177. [P. 318, C. 1.]

• (b) *Civ. Pro. Code, O. 22, r. 4—Failure to object to a time barred application does not render it valid* (Obiter).

No failure by the persons concerned to object to an action taken on application presented after expiry of the time limited by law would alter the fact of abatement. [P. 117, C. 2.]

• (c) *Evidence Act, S. 17—Admission made for shortening litigation in a compromise petition which was found to be invalid by appellate Court, is not binding.*

Where an admission was made by defendant appellant in a compromise filed in the appellate Court, admitting ownership of plaintiff-respondent over disputed land for a special purpose to shorten proceedings and to avoid further litigation, it cannot be held to be binding in the face of the finding by the High Court in second appeal that the agreement containing the admission was not an agreement within the meaning of O. 33, r. 3 and did not adjust the suit either wholly or in part. The statement was at the most an admission which could constitute a fresh piece of evidence coming up for consideration for the first time in the appellate Court in which case it must be shown that it was formerly produced and admitted under O. 41, r. 27. [P. 318, C. 2,]

Dalip Singh—for Appellants.

Badri Das—for Respondent.

Judgment:—This second appeal is the outcome of a suit instituted so long ago as the 13th August, 1912, by Wahid Bakhsh and others against Lalta Pershad. In 1907 Lalta Pershad purchased a plot of one *kanal* one *marla* field No. 6781 in Taraf Mubarak, a suburb of Multan, and proceeded to build a house. Wahid Bakhsh and others based their suit on the allegation that Lalta Pershad had encroached to the extent of 16 *marlas* on the adjoining field No. 1751 of Taraf Ismail of which they asserted themselves to be the proprietors. They asked for a decree for possession of those 16 *marlas* and for an injunction requiring Lalta Pershad to demolish his structures erected upon a portion of the encroachment and restraining him from building upon the rest of it.

Lalta Pershad pleaded that he was not in possession of any land which did not belong to him, and issues were framed, (1) whether the land in suit belongs to the plaintiffs and has been taken possession of unlawfully by the defendant, and (2) whether the plaintiffs are entitled to an injunction.

The first Court decreed the claim. Lalta Pershad appealed to the District Judge, Sheikh Amir Ali, and in that Court the following statement was made on his behalf:—

"The defendant is willing that a decree may be passed in plaintiffs' favour for possession of 16 *marlas* more or less, by demolition of the buildings, if necessary, which may be found in the possession of defendant out of *Khasra* No. 1751 in Taraf Ismail. This will be decided by actual measurements through a Revenue Officer in execution proceedings."

The plaintiffs-respondents agreed and the District Judge passed a decree accordingly.

The Executing Court appointed a *Naib Tahsildar* to take measurements who reported an encroachment by the defendant of 4 or 5 *marlas*. As the result of a personal visit to the spot with two *patwaries*, each of which arrived at a different estimate of the measure of the encroachment, the Munsif eventually ordered the plaintiffs to be placed in possession of 16 *marlas*. The defendant appealed to the District Judge (Mr. Coldstream) who also visited the scene, found the problem an exceedingly difficult one to unravel, and reduced the area to be given to the plaintiffs to 12 *marlas*.

The plaintiffs came to the High Court on second appeal and Lalta Pershad lodged cross-objections which pointed to an opinion expressed by the District Judge that the decree of his predecessor was not a decree at all and urged that this opinion was correct and that the so-called decree should be held incapable of execution. A Single Judge held that in the decree there was no adjudication which determined conclusively the rights of the parties with regard to any of the matters in controversy before him, that it was not a decree at all, that it was not based on a compromise within

the meaning of Order 23, rule 3, Civil Procedure Code, since the so-called agreement between the parties did not result in the adjustment of the suit either in whole or in part, and that the agreement should not have been recorded. The learned Judge accepted the appeal, set aside the whole proceedings in execution and rejected the plaintiffs' application for execution. He added " the effect of this order will be that the order of Sheikh Nasir Ali, Munsif, of the 28th April, 1915 (the original trial Court) will remain in force and that the appeal lodged against that order in the Court of the District Judge will be considered still pending and must be decided by that Officer." This judgment was upheld on Letters Patent Appeal by a Division Bench.

A third District Judge (Lala Ganga Ram) proceeded to decide the appeal afresh. He declared the points for decision to be, (1) whether Lalta Pershad had encroached upon the land of field No. 1751, and if so to what extent, and (2) whether the plaintiffs are owners of the land which is found to have been encroached upon.

On the first point he issued a commission to the Revenue Assistant and in accordance with his report decided that the defendant had encroached on 16 *marlas* of field No. 1751. On the record he held that the plaintiffs had failed to prove that they are owners of the land encroached upon. The appeal was accepted and the plaintiffs' suit was dismissed.

The plaintiffs have again preferred a second appeal to this Court and urge (1) that owing to the death of Mohammad Zaman, one of the plaintiffs, on 16th October, 1918, and the failure by the defendant-appellant to apply within the time limited by law for the substitution of his legal representative, the appeal has abated, and (2) that Lala Ganga Ram had no business to go into the question of the ownership of field No. 1751 and the right of the plaintiffs to obtain a decree against the defendant for any portion of it found in his possession, since this had never been contested by the defendant and had, moreover, been waived expressly by him in the plaintiff's favour before Sheikh Amir Ali.

As regards the point of abatement the facts are these:

Sheikh Amir Ali's decree which has been declared to be no decree was passed on 8th November, 1916. The Munsif's order in execution was passed on 4th June, 1918. Mr. Coldstream's order in appeal is dated 14th April, 1919. The Single Bench decision of this Court is dated 4th February, 1920, and that of the Letters Patent Appeal Bench, 13th November, 1920. Muhammad Zaman was reported by a process-server on 4th November, 1918, to have died and it is not disputed that he was dead on that date. Order 22, rule 4, Civil Procedure Code, is by rule 12 of the same order not applicable to proceedings in execution of a decree and no application was made for bringing Muhammad Zaman's legal representative on the record of those proceedings. In the memorandum of second appeal to this Court against Mr. Coldstream's order it was contended, though wrongly, that the Court below had had no jurisdiction to decide the case without bringing Muhammad Zaman's representative on the record, and the Single Judge did not touch the point.

In the Letters Patent Appeal judgment it was remarked that the fact of Muhammad Zaman's death had been brought to the notice of the Court, that the question of abatement did not require decision then, and that it could be agitated before the appellate Court in the ordinary course.

On 2nd June, 1920, between the dates of the two High Court judgments, and well within six months of the Single Bench decision, Lalta Pershad applied to the District Judge under Order 22, rule 4 for the legal representatives of Muhammad Zaman to be made a party. No order was passed on the application as the record was in the High Court. On 10th March, 1921, after the return of the record, Lalta Pershad repeated the application which was granted and the Court ordered notices to issue to Ghulam Yasin and others the representatives named. The notices were served and these persons appeared before the District Judge through Counsel, who consented to the issue of the commission to the Revenue Assistant and does not appear at any stage of the appeal to have raised the objection of abatement. The question now for decision is simple, and is whether, within the time limited by law, application was made under Order 22, rule 4 (1) for the legal representative or representatives of Muhammad Zaman to be made a party or parties. If no such application was made, the appeal abated, and no failure by the persons concerned to object to action taken on

application presented after expiry of the time limited by law would alter the fact of abatement.

An application was made, as already stated, by Lalta Pershad on the 20th June, 1920. Muhammad Zaman died not later than 4th November, 1918, and, according to article 177 of the Limitation Act, in its form previous to 1st January, 1921, an application for making the legal representative of a deceased defendant or respondent a party had to be made within six months of the date of the death of the deceased defendant or respondent. Muhammad Zaman, however, was not a deceased defendant or respondent either on the date of his death or on any date within six months of that occurrence. It is true that this Court ordered on 4th February, 1920 (and the order undoubtedly is final) that the appeal against the original decree of the Munsif should be considered still pending, but this does not alter the hard fact that Muhammad Zaman was not a respondent to any appeal when he died. I cannot accept for a moment the argument put forward with much confidence by Mr. Dalip Singh for the plaintiffs-appellants that this Court's order, whether right or wrong, rendered abatement an inevitable result of Muhammad Zaman's death. If an application had been presented to the Courts below within six months of Muhammad Zaman's death for the substitution of his legal representatives as parties in his place to the proceedings then in progress, namely, proceedings in execution of a decree, the application would not have been one under Order 22, rule 4 (1) for that rule does not apply to proceedings in execution of a decree. Article 177, therefore, does not govern the case and the only other article which can apply is article 181 which allows a period of three years from the date when the right to apply accrues. It is unnecessary to determine whether that date was the date of Muhammad Zaman's death or the date of the High Court's order setting aside the execution proceedings and declaring that the appeal was to be considered as still pending, since the 20th June, 1920 is within 3 years of either date.

The learned Counsel for the present respondent and appellant in the Court below, Lalta Pershad, has two alternative arguments which need not now be considered, namely, (1) that if the appeal abated, the order of the District Judge making the representatives of Muhammad Zaman parties read with the facts that abatement was alleged in both appeals to the High Court, that no further objection was made to the District Judge, and that the latter proceeded with the appeal and decided it must be taken to be an order setting aside the abatement passed under Order 22, rule 9, and (2) that the District Judge's order continuing the appeal with these persons as parties was not appealable under section 105, Civil Procedure Code.

The second point urged in appeal that by consent of the parties the question did not arise before Lala Ganga Ram of the plaintiffs' ownership rights in the portion of field No. 1751 encroached upon by the defendant is also without force. In his original pleadings the defendant denied that the plaintiffs were owners in Taraf Ismail and the question was distinctly put in issue whether they were owners of the land in suit. In his statement before Sheikh Amir Ali the defendant agreed to a decree being passed in the plaintiff's favour for any portion of field No. 1751 that he might be found in possession of, in execution proceedings but that admission was made for a special purpose to shorten proceedings and avoid further litigation and it cannot be held to be binding in the face of the finding by the High Court that the agreement before Sheikh Amir Ali was not an agreement within the meaning of Order 22, rule 3, and did not adjust the suit either wholly or in part.

Nor does it operate as an estoppel, since it is not shown to have caused the plaintiff to act upon the belief that their ownership of the whole of field No. 1751 had been recognized. The terms of Lala Ganga Ram's judgment make it clear that the question was argued on its merits before him by both sides, and that waiver and estoppel were not alleged by the plaintiffs. The statement before Sheikh Amir Ali was at the most an admission which could constitute a fresh piece of evidence coming up for consideration for the first time in the appellate Court. There is nothing on the record to show that it was formally produced and admitted under Order 41, rule 27, but, if it was, it must have been considered, for the statement is reproduced in *extenso* in Lala Ganga Ram's judgment.

A final plea is taken by the plaintiffs-appellants that Lala Ganga Ram has drawn wrong inferences from the facts and should

have presumed that the appellants were entitled to possession because the land is recorded as *abadi deh* and is, therefore, *Shamilat* of Taraf Ismail, and because the appellants are owners in that *Shamilat*. It was held, however, on a consideration of all the evidence, that the appellants were owners only of certain portions of field No. 1751, which were acquired by them separately in three groups and which did not include the land encroached upon, and that their ownership rights were confined to those portions. This finding of fact cannot be touched in second appeal.

When the proceedings before Sheikh Amir Ali had been declared null and void, the defendant was fully entitled to adhere to his original position which was that, even if he had encroached upon field No. 1751, the plaintiffs could not turn him out without proving that they had a better right to the land encroached upon than he had.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

1924 Lahore 319.

ABDUL RAOOF, J.

The firm Abdul Hakim Muhammad Sadik —Appellants

v.

Joho Jautzen—Respondent.

S. A. No. 903 of 1914, decided on 13th March, 1923, from the decree of Addl. District Judge, Delhi, dated 19th January, 1914.

Contract Act, S. 107—Right of resale given by a contract—Passing of property in goods is not necessary to give the right—Re-sale should take place within a reasonable time.

Where a right of re-sale is given by the contract between the parties it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale. The seller electing to exercise this right is not only bound to wait a reasonable time after giving notice of his intention before actually reselling but he is bound to exercise the right within a reasonable time after the date of the breach; otherwise the price obtained on such re-sale if it has been unreasonably delayed until the market has fallen will not be a true criterion of the damage. (25 Cal. 505 (F.B.), 19 All. 535, *Foll.*; 39 Cal. 568, *Dist.*) [P. 320, C. 1.]

Balwant Rai—for Appellant.

Manohar Lal—for Respondent.

Judgment:—This second appeal has arisen out of a suit for recovery of damages on account of a breach of contract on the part of the defendants. The defendants indented for 20 cases of oriental beads and 8 cases of needles. Out of the former, they took delivery of 10 cases only and out of the latter only of 6 cases. Thereupon, the plaintiffs re-sold the goods which resulted in a loss. Therefore, they sued the defendants for damages incurred by them. The two Courts below have dealt with the two cases separately because the facts relating to the contract for the purchase of beads are slightly different from those relating to the contract for the needles. The main defence in the suit relating to the beads was that the goods were not in accordance with the order as the packing and the number of beads in each string were not according to order. It has been found by both the Courts that the goods were not packed according to the order. In the indent it was clearly noted that the beads were to be packed in long bundles, but when they arrived they were found to be in round bundles. There were other defences put forward also, such as the cancelment of the indent by mutual agreement between the plaintiff's agent and the defendant's and that the agent had promised to make an allowance on account of the less number of beads in each string. As regards the authority of the agent of the plaintiff the trial Court was inclined to favour the view that he had no power to make any allowance and that the plaintiff was not bound by any promises but the Court having found that the packing was not done according to the order it materially affected the goods and the plaintiff was not entitled to sue for short proceeds on the re-sale. As regards the needles the Court found that the defendant was liable and granted decree in favour of the plaintiff for the sum of Rs. 552-10-8.

Both parties appealed. The lower appellate Court has taken a different view and has granted a decree for Rs. 164·5 in favour of the plaintiff in respect of the re-sale of the beads also and has upheld the decree for Rs. 552-10-8 in respect of the needles.

The defendants have, therefore, presented two second appeals to this Court. The first contention put forward by Mr. Balwant Rai is that as the property in the goods had not passed to the purchasers the case

did not come within the provisions of section 107 of the Indian Contract Act and the plaintiffs had no right of re-sale. In support of his contention the learned Vakil has relied upon the case of *Yule & Co.* v. *Mahomed Hossain* (1). The decision in this case was dissented from by the same Court in the case of *Moll Schutte & Co.* v. *Luchmi Chand* (2). It was held in the latter case that where a right of re-sale is given by the contract between the parties it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale. In the present case the right of re-sale is given by the contract itself. Therefore, the plaintiffs were entitled to re-sell the goods and claim the difference. The suit, therefore, was maintainable. The learned Vakil has also relied upon the decision in the case of *Angulia & Co.* v. *Sassoon & Co.* (3). The facts of that case were entirely different. The sugar contracted to be sold was in bulk and the learned Judges held that there might be a case where neither the provisions of section 107 of the Indian Contract Act applied, nor the provisions in the indent. Here, the provision as to the re-sale clearly applies and the rule laid down in *Moll Schutte & Co.* v. *Luchmi Chand* (2) clearly governs the case.

The next contention put forward by Mr. Balwant Rai is that as the packing was not according to the order his clients were entitled to reject the goods. The question to be decided is whether the packing was so defective as to affect the goods, *see* Remfry on Sale of Goods in British India, page 492. Reference is made there to a case where in a contract of sale of rice it was agreed that the rice would be packed in double bags. Having regard to the facts of that case it was held that the want of packing in double bags necessarily affected the quality and description of the goods. In the present case it has been clearly found by the Courts below that the beads were not of different quality from that ordered in the indent. The mere fact that they were packed in round cases instead of long cases would not justify a finding that the quality and description of the goods had in any way suffered. It has been clearly found by the Courts below that there is no difference between the beads received from those ordered by the defendants. Moreover, having regard to the fourth clause in the indent, it is hardly open to the defendants to raise this contention. That clause runs as follows:—

"I shall not be entitled to refuse to pay for goods or to refuse to accept any draft in respect of them for which the representing samples have not been submitted to me. *Partial damage* or short quantity or measure or inferiority or difference in quality or design or colour shall not be a ground of objection to pay for the goods or to accept the drafts or to take delivery of the goods."

In this provision the difference in packing is not excepted. If any of the contingencies mentioned in clause (4) had arisen it was open to the defendants to take the advantage of the clause in the indent providing for a reference to arbitration. The defendants ought to have taken delivery and then ought to have referred the matter to arbitrators and ought to have claimed compensation. The lower appellate Court, in my opinion, was right in holding that the defendants were not entitled to resist the suit upon this ground.

The third point argued by Mr. Balwant Rai is that, upon the facts admitted, the goods had arrived in July 1908 and that, therefore, the plaintiffs had not exercised their right of re-sale within a reasonable time and are not entitled to maintain the suit. In support of his contention he has relied upon the following passage to be found at page 402 of Remfry on Sale of Goods in British India:—

"Section 446. The seller electing to exercise this right is not only bound to wait a reasonable time after giving notice of his intention before actually re-selling, but he is bound to exercise the right within a reasonable time after the date of the breach, otherwise the price obtained on such re-sale if it has been unreasonably delayed until the market has fallen, will not be a true criterion of the damage."

This rule is based upon the decision of a Division Bench of the Allahabad High Court in the case of *Prag Narain* v. *Mul Chand* (4). At page 540 of the report the

(1) (1897) 24 Cal. 124=1 C.W.N. 71.
(2) (1898) 25 Cal. 505=2 C.W.N. 283.
(3) (1912) 39 Cal. 568=16 C.W.N. 593=13 I.C. 705.
(4) (1897) 19 All. 535=(1897) A.W.N 150.

learned Judges made the following observation :—

"In Addison's Law of Contract, 9th Edition, page 526, the rule on the subject is thus stated :—'If the goods have been re-sold by the vendor within a resonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between the price agreed to be given and the price realized on the re-sale, with the costs and expenses of the re-sale, but if the re-sale has been unreasonably delayed until the market has fallen, the price realized on such re-sale, will not afford a true criterion of the damage.' These are authorities for holding that if the seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer. A seller may, with the deliberate intention of causing loss to the buyer, delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract."

Having regard to the rule laid down in this case, it is necessary to ascertain certain, facts before deciding the appeal finally.

I accordingly refer to the lower appellate Court the following issues under Order 41, rule 25, Civil Procedure Code :—

(1) On what date was the contract finally repudiated by the defendants ?

(2) What was the price of the beads and needles prevailing in the market on that date, and what would be the amount due to the plaintiffs calculated at the rate prevailing on that date ?

(3) Was the delay in selling the goods in the present case reasonable ?

The Court below will allow the parties to produce such further evidence as they may like to tender in support of their cases. On receipt of findings ten days will be allowed to the parties to take objections to the findings.

Issues remitted.

1924 Lahore 321.

ABDUL RAOOF AND ABDUL QADIR, JJ.

Hayat—Appellant

v.

Ahmun and others—Respondents.

S. A. No. 855 of 1917, decided on 6th June, 1922, from the decree of District Judge, Jhelum, dated 14th December, 1916.

Custom (Punjab) — Succession — Sister and collaterals — Onus lies on sister to prove her preferential rights.

In a contest to succeed to the non-ancestral property between collaterals of the eighth degree and sisters, the onus lies on the latter to prove that they have a preferential right as against the former when there is an entry in the *riwaj-i-am* against them. (1 Lah. 1 and 1 Lah. 433 *Appr.*; 2 Lah. 98, *Dist.*)

Among Khotis Muhammadans of tahsil Pind Dadan Khan District, Jhelum, collaterals of the eighth degree have a preferential right to succeed as against sisters of the late male holder. [P. 323, C. 2.]

Amar Nath Chona—for Appellant.

Zafrulla Khan—for Respondents.

Judgment:—The land in dispute belonged to one Muhammad. The plaintiffs, alleging themselves to be his reversioners, have brought this suit for a declaration that the decree, dated the 27th April, 1915, based upon an award shall not affect their reversionary rights after the death of Mt. Gauhran. The following facts will disclose the nature of the suit and the questions to be determined in this appeal.

The parties are *Khoti* Muhammadans of Chak Hamid, Tahsil Pind Dadan Khan District, Jhelum. There were three sons of one Hasham, namely, Sharfa, Bakhtawar and Dadu. The plaintiffs Nos. 1 to 5 are the descendants of Dadu, while plaintiff No. 6 is descended from Bakhtawar. The defendants are descended from Sharfa. The pedgiree filed on the record shows that the plaintiffs are related to Muhammad, whose land is in dispute in the eighth degree. The following genealogical table will show the relationship of the defendants to the said Muhammad :—

IBRAHIM

(widow Mussammat Gauhran alive, defendant No. 1),

Sardar (died)	Muhammad (died childless of plague on 3rd April 1907).	Mussammat Sardaran
Mussammat Satto, (or Sat Bhari, defendant No. 2)		Hayat, (defendant No. 3)

On the death of Muhammad, which took place on the 3rd April, 1907, his land was mutated in the name of Mt. Sat Bhari, his brother's daughter on the 5th June, 1907, but this mutation entry was amended subsequently and on the 3rd December, 1908, half of the land was allotted to Mt. Gaubran. Muhammad being childless had brought up Mt. Sat Bhari as her daughter and intended to marry her to Hayat, his sister Mt. Sardaran's son. He, however, died before effecting this contemplated marriage and Mt. Sat Bhari was afterwards married outside the family and lost all claim to any share in the land of Muhammad. On the 4th March, 1912, Mt. Gaubran and Hayat, defendant No. 3, executed an agreement of arbitration for the decision of their dispute in respect of the land in question. The arbitrators made an award giving the land measuring 57 *kanals* 5 *marlas* and a house to Hayat and held Mt. Gaubran to be entitled to maintenance. On the application of Mt. Gaubran the award was filed in Court and a decree was passed on it on the 27th April, 1915. The plaintiffs in the suit impugn the decree on the grounds of collusion and fraud and claim a right to succeed to the land as reversioners after the death of Mt. Gaubran, the mother of Muhammad, alleging that the land was ancestral. Mt. Gaubran, Mt. Sat Bhari and Hayat were impleaded as defendants, but Mt. Sardaran, the mother of Hayat, and the sister of Muhammad was not made a defendant.

The suit was resisted practically by Hayat, the defendant No. 3 alone, who denied the *locus standi* of the plaintiffs as reversioners and set up his claim as an adopted heir and *khana damad* of Muhammad and also pleaded that the deceased had left a will in his favour. He further alleged that, according to the custom governing *Khotis*, an alienation in favour of a sister and sister's son was allowed. The ancestral nature of the property was also denied.

The trial Court held that according to the pedigree, the plaintiffs were the reversioners of Muhammad in the 7th degree. It is, however, admitted on all hands that they are the reversioners in the eighth degree. The allegations as to the adoption of Hayat and as to the will by Muhammad were held to be unfounded and the property was found to be ancestral, with the result that the suit was decreed by the trial Court.

An appeal was preferred by Hayat. The appellate Court thought it necessary to amend the issue relating to the ancestral nature of the land and called upon the trial Court to find whether the land was proved to be ancestral *qua* the plaintiffs. Two witnesses, namely, the *lambardar* of the village and Kirpa Ram, *Naib Sadar Qanungo*, were produced to prove the ancestral character of the land. The last mentioned witness produced a document, Ex. P-e, described as an extract from the *Shajra-i-Nasab wa Haqug Malikan* of *Mauza Khotian* placed on the record of the Revised Settlement of 1888. The trial Court, relying mostly on the evidence supplied by this document, held that the land in dispute was proved to be ancestral. No objection was taken against this finding by the appellant and it was accepted by the appellate Court. The main question discussed and considered by the lower appellate Court was whether, according to the custom applicable to the *Khotis*, Mt. Sardaran, the sister of the *propositus*, had a right to exclude the plaintiffs the reversioners in the eighth degree, and succeed to the land left by her brother. Upon this question the appellate Court found against the defendant and in favour of the plaintiffs, and dismissed the appeal, maintaining the decree of the trial Court.

Hayat has come up in second appeal to this Court and his case has been argued before us by Mr. Amar Nath Chona. The learned Counsel has contested the finding of the Courts below as to the ancestral character of the land and has argued that on a correct interpretation of Ex. P-e, the land must be held to be the self-acquired property of Muhammad. Having regard to the fact that no objections were taken by his client in the Courts below to the findings returned by the trial Court, it is hardly open to the learned Counsel to re-agitate the question in second appeal. Moreover, the finding after all is a finding of fact based on evidence and we doubt very much whether it can be challenged here on the ground that a wrong construction has been put upon a document produced in evidence. Over and above this, having regard to the course adopted before us in the argument, the question of the nature of the land is not of much consequence.

The argument put forward on behalf of the appellant is that it lay upon the

plaintiffs to establish that, according to the custom applicable to the *Khotis* of Tahsil Pind Dadan Khan, the reversioners in the eighth degree had a right to exclude the sister of the last owner. On the other hand, it has been contended on behalf of the respondents that under the general custom applicable to agriculturists sisters as well as their issue being usually excluded from inheritance it lay upon the appellant to establish that his mother. Mt. Sardaran, excluded the plaintiffs. It may at once be remarked that there is entire absence of evidence on this point either on behalf of the plaintiffs-respondents or on that of the defendant-appellant. The decision of this appeal, therefore, solely depends on the determination of the question of *onus probandi*.

According to paragraph 24 of Rattigan's Digest of Customary Law, 9th Edition, sisters are usually excluded, as well as their issue. In the case of *Hussain Bibi* v. *Nigahia* (1), the parties were Muhammadan Rajputs of Nakodar Tahsil in the Jullundur District. The plaintiffs, who were collaterals in the eighth degree of the last male owner, sued to contest a gift of the land made by Mt. Bholi, mother of the deceased in favour of her daughters. The land in dispute was found to be non-ancestral. According to the *riwaj-i-am* sisters or their sons had no right to inherit, and it was held that "in questions of succession to self-acquired property between collaterals of the eighth degree and sisters the *onus* of proving that they have a preferential right is in the first instance on the latter." It was also held that "in regard to Muhammadan Rajputs of the Jullundur District the *onus* was also clearly on the sisters in view of the entries in the *riwaj-i-am* of the District."

In the case of *Jiwi* v. *Sandhi* (2) it was held "that among Mussulman Rajput agriculturists of the Jullundur District the *onus probandi* was on the plaintiff, the sister of the deceased, to prove that she is entitled to succeed to her brother's land in preference to the defendants, collaterals in the sixth degree, the entry in the *riwaj-i-am* being against her, although the land was non-ancestral *qua* the defendants."

Now, in the present case also the entry in the *riwaj-i-am* is against the right of sisters to succeed. In the General Code of the Tribal Custom in the Jhelum District, Volume XIX, the 68th question was framed as follows:—

"Does the property ever devolve upon sisters or upon sisters' sons?"

The answer given was as follows:—

"Among Sayyads a sister can hold until marriage only, if there are no descendants and no brothers. Her son cannot inherit."

"Among Awans of Tallagung, Mairs and Kahuts and miscellaneous Chakwal tribes sisters and their sons can inherit if there are no daughters and no agnates within the fourth degree."

"Among *Khojas* sisters take a share according to Muhammadan Law," and

"*Among all other tribes a sister or her sons can never inherit.*"

In this case the finding is that the property in dispute is ancestral, but even if it were non-ancestral, according to the two rulings above cited, the burden of proving that Mt. Sardaran had a right to succeed as against the present plaintiffs lay upon the appellant and this *onus* he has failed to discharge.

A different rule, however, appears to have been laid down in the case of *Fatima Bibi* v. *Shah Nawaz* (3) in which it was held: "that where no custom having been ascertained as to the rights of sisters as against collaterals of the 9th degree in the case of acquired property, the Courts should have fallen back on the personal law of the parties, for the decision of the case and that the suit must consequently be decreed in favour of the sisters."

The attention of the learned Judges of the Division Bench, who decided the above case, does not appear to have been drawn to the above mentioned two decisions which were also given by two Division Benches. This case has been strongly relied upon by the learned Counsel for the appellant, but it cannot help the case of the appellant, because in the first place the collaterals in that case were in the 9th degree, and in the second place an emphasis appears to have been laid upon the circumstance that the rules laid down in a *riwaj-i-am* refer generally to ancestral and not to acquired property. Moreover, the entry in the *riwaj-i-am* in the reported case was found to have been discredited in various cases. We agree in the view taken in the

(1) (1920) 1 Lah. 1=1 L.L.J. 89=34 P.W.R. 1920=70 P.L.R. 1920=55 I.C. 828.

(2) (1920) 1 Lah. 483=2 L.L.J. 384=58 I.C. 986.

(3) (1921) 2 Lah. 98=3 L.L.J. 152=60 I.C. 509.

two cases reported as *Hussain Bibi* v. *Nigahia* (1) and *Jiwi Sandhi* (2) and hold that the decisions of the Courts below in this case are correct.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

1924 Lahore 324.

SHADI LAL, C.J., and ABDUL QADIR, J.

Sher and another—Appellants

v.

Piara Ram and others—Respondents.

S. A. No. 1733 of 1917, decided on 3rd August, 1922, from the decree of District Judge, Mianwali, dated 16th April, 1917.

(a) *Punjab Land Revenue Act (XVII of 1887), S. 158—Partition—Lesser area than due allotted—Suit for making up deficiency by allotting area omitted in partition—Civil Court can try.*

The plaintiffs who were co-sharers in the Shamilat of the village were allotted on partition a certain area to which they were entitled in accordance with their share in the joint holding. It was, however, subsequently discovered that one of the holdings awarded to the plaintiffs was wrongly assumed to contain more area than it actually did, the result being that there was a shortage in the plaintiff's share. After the discovery of this shortage it was found that a certain field had been omitted from the partition as indeed nobody knew of the existence of this field. The plaintiffs brought an action claiming that on a partition of the aforesaid field they were entitled not only to an area corresponding to their recorded share but also to the area that fell short in the previous partition in order that they may be compensated for the deficiency, *held* that a question of title was raised and the suit was therefore triable by a Civil Court.

(b) *Limitation Act, Art. 96—Suit for possession of land equal to the shortage of area allotted at partition—Art. 96 does not apply.*

Where plaintiffs were allotted an area at a partition which fell short of what the plaintiffs were entitled to and the plaintiffs sued for a possession of an area equal to such shortage from a field which was omitted from the partition, *held* that no relief on the ground of mistake such as is contemplated by Art. 96 is claimed and hence the article does not apply. Art. 96 is intended to apply to those cases in which the Courts are asked to relieve parties from the consequences of mistakes committed by them in the course of contractual transactions, and it is doubtful whether a suit for possession of immoveable property or for a declaratory decree with respect to such property comes within the article.

(c) *Civ. Pro. Code, O. 7, r. 7—Relief based on facts and circumstances consistent with the rules of Court only, will be granted.*

Where the special relief prayed for was for possession but the Court granted a declaration which no doubt was sustainable on the general allegation made in the point, *held* that the suit raised a question of title and hence can be determined only by a Civil Court. If the plaint sets out facts in issue that are material, the plaintiff is entitled to relief which those facts will sustain under the general prayer but he cannot desert specific relief prayed and under the general prayer ask specific relief of another description unless the facts and circumstances mentioned in the plaint will, consistently with the rules of the Court, maintain that relief.

Nanak Chand—for Appellants.

Judgment:—The facts which have given rise to this second appeal are briefly as follows:—In January 1908, the plaintiffs, who were co-sharers in the *shamilat* of the village, were allotted on partition 550 *kanals*, 18 *marlas*, the area to which they were entitled in accordance with their share in the joint holding. It was however, subsequently discovered that one of the holdings awarded to the plaintiffs was wrongly assumed to contain 272 *kanals*, while as a matter of fact the area of that *khasra* No. was only about 160 *kanals*, the result being that there was a shortage of 112 *kanals*, 5 *marlas*. After the discovery of this shortage it was found that a field marked 15-W in the map had been omitted from the partition; indeed, nobody knew of the existence of this field. This field has an area of 222 *kanals*, 4 *marlas*.

The plaintiffs have now brought the action, which has led to the present appeal, claiming that on a partition of the aforesaid field, they are entitled, not only to an area corresponding to their recorded share, but also to 112 *kanals*, 5 *marlas* in order that they may be compensated for the deficiency mentioned above. The learned District Judge, while holding that the plaintiffs are not entitled to possession, has granted them a declaratory decree to the effect that they, on an "application for partition of the *shamilat* area 222 *kanals*, 4 *marlas* will be entitled to an area of 112 *kanals*, 5 *marlas*, the equivalent of the deficiency in the area allotted to them on the partition of *shamilat* of 1907-1908, the particular portions to be given being left to the discretion of the Revenue Authorities." Against this decree some of the defendants have preferred an appeal to this Court, and two contentions have been raised on their behalf:—

(1) that the suit is excluded from the cognizance of the Civil Court, and

(2) that the claim is barred by time.

As regards the first contention, it is sufficient to say that the suit was not one for a re-partition of the land of which partition had been effected in 1908. The plaintiffs do not suggest that anything done by the Revenue Officer in 1908 should be undone, or that any land which was allotted by him to any of the co-sharers should be taken back from them. What they want is that, when the *shamilat* holding No. 15-W is partitioned, they have a right to get, in addition to their proper share, an area of 112 *kanlas*, 5 *marlas*. The question of title is undoubtedly raised, and it can be determined only by a Civil Court. It is true that the suit was one for possession, but the District Judge was fully justified in granting a declaratory decree. As pointed out in *Hemendra Nath Roy* v. *Upendra Nath Roy* (1), if the plaint sets out "facts in issue that are material, the plaintiff is entitled to relief which those facts will sustain under the general prayer, but he cannot desert specific relief prayed and under the general prayer, ask specific relief of another description, unless the facts and circumstances," mentioned in the plaint "will, consistently with the rules of the Court, maintain that relief." There can be no doubt that the allegations in the plaint sustain the relief granted by the District Judge, and we see no reason to interfere with his discretion.

On the question of limitation we are asked to hold that the rule prescribed by article 96 of the Limitation Act applies to the case, and that the suit which was brought after the expiry of three years from the date of the discovery of the mistake is barred by time. It is to be observed that in the Court of first instance the defendants placed their reliance upon the plea of adverse possession and that plea was overruled by the trial Court. Before the District Judge they did not contend that the suit was barred under article 144 or any other article of the Limitation Act, and it is for the first time in this Court that article 96 has been invoked. It must be remembered that the *terminus a quo* under this article is the date on which the mistake became known to the plaintiffs, and that is purely a question of fact. Further, as held by the Judicial Commissioner of Oudh in *Ramian Khan* v. *Muhammad Yakub Khan* (2) article 96 is intended to apply to those cases in which the Courts are asked to relieve parties from the consequences of mistakes committed by them in the course of contractual transactions, and we doubt whether a suit for possession of immoveable property or for a declaratory decree with respect to such property comes within the purview of the article. Mr. Nanak Chand for the appellants places his reliance upon an unreported judgment of the Punjab Chief Court in *Kazi Sultan Mahmud* v. *Alim Khan* (3), but we find that, though that case related to immoveable property, the relief was claimed on the ground of mistake, and hence it was held that article 96 was applicable. It is unnecessary to consider whether the rule laid down by that judgment is correct, because no relief on the ground of mistake such as is contemplated by article 96 is claimed in the present case. The relief granted by the District Judge is one for a mere declaration of title, and the case comes within the purview of article 120. It is true that the main reason why the declaration is granted is that the plaintiffs did not get their proper share at the time of the last partition but they do not want any transaction which was brought about by mistake to be upset. No relief is claimed in respect of the past transaction, the only thing claimed is that in future they are entitled to have the deficiency made good.

We accordingly hold that the suit is not barred by time. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) (1916) 43 Cal. 743=22 C.L.J. 419=20 C.W.N. 446=32 I.C. 437.
(2) (1911) 11 I.C. 537.
(3) (1906) 9 P.L.R. 1906.

1924 Lahore 325.

BROADWAY AND MARTINEAU, JJ.

Md. Majid Ullah Khan—Appellant

v.

Md. Hamid Ullah Khan—Respondent.

F. A. No. 3169 of 1917, decided on 14th December, 1921, from the decree of Senior Sub-Judge, F. C., Delhi, dated 15th August, 1917.

(a) *Partition Act, S. 2—Applies when partition is not convenient.*

Action can be taken under the Partition Act when a partition cannot conveniently be made and not only when the property is wholly impartible. [P. 327, C. 1.]

(b) *Court-fee—Items allowed in final decree in partition suit—*Ad valorem *fee must be paid.*

Where the object of appeal is to attack various items allowed or disallowed in the final decree, *held* that before this final decree can be attacked on these grounds an *ad valorem* Court-fee should be paid on the amounts entered in the various grounds of appeal. (1 Lah. 234, *Foll.*) [P. 327, C. 2.]

(c) *Civ. Pro. Code, S. 149—Extension refused.*

Where the insufficiency of Court-fee was brought to the notice of appellant's pleader, while, filing the appeal but he deliberately refused to pay, no extension could be allowed. (1 Lah. 234, *Foll.*) [P. 327, C. 2.]

Moti Sagar—for Appellant.

Syed Mohsin Shah—for Respondent.

Judgment:—One Maulvi Sami Ullah Khan died on the 7th April, 1908, and after his demise disputes arose between his two sons who were his heirs. The younger son M. Majid Ullah Khan, brought a suit for partition claiming half of the property and Rs. 1,200 on account of certain carriages and other moveables. His right to partition was recognised by a decree of the Chief Court, dated the 13th January, 1917, and a preliminary decree was granted. Ever since then the two brothers have been fighting as to the mode of partition and as to what each one was entitled to, of the moveables. On the 6th June, 1917, Mr. Murari Lal passed an order detailing the amount payable to each other by the parties, and in dealing with the immoveable property (which consists of a *Kothi* at Aligarh and six shops in Gali Batasha in Delhi), he found that the Gali Batasha property was capable of partition and that, therefore, there was no necessity to apply the provisions of the Partition Act thereto. With respect to the *Kothi* at Aligarh he found that there was not sufficient material on the record to decide whether the Partition Act should be applied or not, and directed that a Commission should be appointed through the Aligarh District Court for a report on this point. On the same day he passed an order that a Commission for a partition of the Gali Batasha property should be appointed and one Lala Baburam was so appointed, his remuneration being fixed at Rs. 50. On the 16th July, 1917, Mr. Tapp, who had succeeded Mr. Murari Lal, referred to the report of the Commissioner relating to the Gali Batasha shop and found that they could be divided properly. He came to the conclusion, from an examination of the plan that the *Kothi* at Aligarh could not be partitioned. He suggested in his order that one party should buy the half share of the other and noted that "If this is not done the Court will have to direct the sale of the whole and the sale proceeds would be divided." No commission was ever appointed *qua* the Aligarh *Kothi*. Finally, on the 15th August, 1917, Mr. Tapp passed a final decree in the case directing that certain moveable property should be sold and the proceeds shared between the two brothers. M. Majid Ullah Khan was to be given possession of that half of the premises situated in Gali Batasha which was coloured pink on the plan; M. Hamid Ullah Khan was to pay to his brother a sum of Rs. 3,128 (as amended on review by order, dated the 17th October, 1917). It was also ordered that as the Aligarh *Kothi* was incapable of partition, it was to be sold and half the proceeds paid to M. Majid Ullah Khan. Against this final decree both parties have preferred separate appeals; M. Majid Ullah Khan through Mr. Moti Sagar and M. Hamid Ullah Khan through Mr. Roshan Lal.

Mr. Moti Sagar, in Civil Appeal No. 3169 of 1917, contended that the order of the Court declaring that the Aligarh *Kothi* was not capable of being partitioned and should, therefore, be sold, was wrong, inasmuch as it was not based on any evidence on the record and that the said *Kothi* was quite capable of being divided between the parties. He also attacked an item allowed by the Court below to the respondent. Inasmuch as this is an appeal from a final decree, it was necessary to pay Court-fees on the amount which it was alleged had been wrongfully allowed. No such Court-fee has been paid and Mr. Moti Sagar admitted that the appeal was bad *qua* this ground No. 5 on that account. The item is a small one, but having regard to the remarks in *Lekh Ram* v. *Ramji Das* (1) we cannot regard the omission to pay the proper Court-fee as being due to a *bona fide* mistake and this portion of the appeal, therefore, must be dismissed.

Turning now to the question as to whether the Aligarh *Kothi* is capable of partition. Mr. Mohsin Shah, who appeared for the respondent, contended that the evidence in the case itself was sufficient to show that

(1) (1920) 1 Lah. 234=3 L.L.J. 370=57 215.

this *Kothi* was incapable of partition. Objection was taken to the admissibility of such evidence, Mr. Moti Sagar contending that had his client understood that the other side were relying on the previous record his client would have been able to produce and would have produced further evidence. It appears, however, that when the proceedings were before Mr. Murari Lal it was understood that the former record would be treated as a part of the execution record, *vide* page 14 where Mr. Murari Lal specifically refers to the previous record. The evidence to which Mr. Murari Lal has referred is to be found at page 232, line 11, page 243, line 18, page 251, line 11 and page 229, line 2, of the printed book in the original appeal. Muhammad Raffi-ud-Din (p. 232) says that by a partition of this *Kothi* its condition cannot remain undisturbed. Khwaja Abdul Majid (p. 243) says: "The Aligarh house cannot be partitioned into two parts in my opinion. It cannot remain so useful." At page 251, Jamil-ud-Din states that the house can be partitioned but its utility would decrease; and at page 229 M. Hamid Ullah states that "the Aligarh house is not fit for partition. It would not be tenanted if it is partitioned." The plan of the house shows that it is a bungalow and there seems no doubt that a division would reduce the utility of the premises. Section 2 of the Partition Act (IV of 1893) lays down that whenever in any suit for partition it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the share-holders therein, or of *any other special* circumstance, a division of the property cannot reasonably or *conveniently* be made, and that a sale of the property and distribution of the proceeds *would be more beneficial for all* the share-holders, the Court may, if it thinks fit, on the request of any of such share-holders interested to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds. It will thus be seen that action can be taken under the Partition Act when a partition cannot conveniently be made and not only when the property is wholly impartible.

Having regard to the evidence referred to above and the fact that the two share-holders are obviously on bad terms, it seems to us that it certainly would tend to the convenience of all concerned if action were taken under the Partition Act. The plan of the house clearly shows that it would not be easy to partition the house and in all probability a partition of the same would materially reduce its value. Under these circumstances we are not prepared to interfere with the order of the Court below directing the sale of this house under the provisions of the Partition Act.

The appeal fails and is dismissed with costs.

We now turn to the appeal by M. Hamid Ullah Khan, (No. 3170 of 1917). Mr. Moti Sagar objected to this appeal on the ground that it was improperly stamped. This objection must, in our opinion, prevail. The object of this appeal is to attack various items allowed or disallowed in the final decree, and we consider that before this final decree can be attacked on these grounds an *ad valorem* Court-fee should be paid on the amounts entered in the various grounds of appeal. It appears that the insufficiency of the stamp was pointed out to the learned Advocate when the appeal was first filed. In spite of this the learned Advocate refused to pay in any further Court-fees, claiming that a Rs. 10 stamp was sufficient. In our view the stamp was insufficient, and the omission to pay the proper Court-fee was not due to a *bona fide* mistake but was deliberate. Following the principles enunciated in *Lekh Ram* v. *Ramji Das* (1) we decline to grant time under section 149, Civil Procedure Code, for the deficiency to be made up.

Grounds Nos. 3 and 6 of the appeal, however, deal partly with matters which are open to consideration and we have heard Mr. Mohsin Shah with regard to them. In ground No. 3 the final decree was attacked on the ground that it having been held that the Aligrah *Kothi* was incapable of partition the Court below should have determined the value of the plaintiff's share. As the Court below has acted under the Partition Act we can see no force in this and Mr. Mohsin Shah stated that he did not press it. In ground No. 6 the final decree was attacked on the ground that the Court below should have acted under the Partition Act *qua* the Gali Batasha shops. A plan of these shops clearly shows that they can conveniently be partitioned. As a matter of fact they have been partitioned, and M. Majid Ullah Khan has been put in possession of the portion allotted to him. Further, as pointed out by Mr. Moti Sagar, the partition of this property has been

practically recognised by the appellant himself in a suit for rent brought *qua* a portion of the property which the appellant claimed had fallen to his share on partition. There is thus no force in this ground either, and Mr. Mohsin Shah finally stated that he did not desire to press it.

This appeal also fails and is dismissed with costs.

Appeals dismissed.

1924 Lahore 328.

BROADWAY AND HARRISON, JJ.

Budha Mal and another—Appellants

v.

Shib Dayal—Respondent.

S. A. No. 192 of 1918, decided on 8th May, 1922, from the decree of District Judge, Lahore, dated 10th December, 1917.

(a) *Landlord and tenant—Repudiation of liability by tenant—Landlord can sue for rent of whole period of tenancy.*

A landlord is entitled to sue for the rent of the whole period of the tenancy as damages even before the expiration of the period of lease where the tenant repudiates his liability to pay rent and the landlord is not bound to wait until the rent would become due.

(b) *Civ. Pro. Code, S. 100—Technical plea not allowed.*

A technical plea, that the suit was premature, should not be allowed to be taken for the first time in appeal.

M. S. Bhagat—for Appellants.

Tek Chand—for Respondent.

Judgment:—The plaintiff in this case has been given a decree by the District Judge for Rs. 778, being the amount of one year's rent due for a brick kiln after various calculations have been made on both sides. The defendants present this second appeal, urging various grounds of which only two are pressed and these are practically the same, namely, that the suit was premature, and, therefore, must be dismissed and that rent for the whole year was not due.

The facts are clearly given in the judgment of the learned District Judge and it is clear that the defendants had been in occupation of this brick kiln during the preceding year, which terminated on the 31st of August, 1913, and continued in possession until the 15th of November, 1913, after renewing the lease for a period of a year. They vacated the premises on or before the 15th November of their own accord, but in spite of this the principal defendant wrote to the landlord on the 15th, saying that they had been turned out of the kiln by him, that the lease had thus been terminated and that they were not liable to pay any rent. The present suit was instituted on the 24th March, 1914, and the plaintiff claimed rent up to the 31st of August, 1914, or to the last day of the tenancy. In the first Court no plea was taken that the suit was premature but this was made a ground of appeal to the District Judge, who held that the plaintiff had a full cause of action for his whole relief and for the payment of a year's rent because of the defendants' repudiation of all liability in that the latter had put forward the false contention that he had been turned out by the plaintiff and maintained that the lease had been terminated and then through no fault of his. The District Judge also held that, even if this view were not correct, this was one of those rare cases in which the power to give relief on a cause of action, which accrued after the institution of the suit, should be exercised.

Council urges that, although the plea was not specifically taken in the first Court it is so patent from the plaint itself that the cause of action had not arisen that even on second appeal the suit must be dismissed for that portion of the rent which by the terms of the lease was made payable in July, 1914, and he contends that no repudiation and no denial of the relative positions of the parties can ever entitle a landlord to sue for rent which has not accrued under the terms of the lease at the time the suit is instituted. We find on the analogy of a suit for damages based on a breach of contract that the right to sue did accrue on the repudiation by the defendants and that the landlord was entitled to claim the full amount of his rent as damages due to him on account of the breach which took place on the defendants' repudiating all liability and that he was not bound to wait until the end of the year or until the month in which the remainder of the rent was payable. Apart from this the plea taken that the suit is premature is technical and can be met by the equally technical reply that it should have been taken in the trial Court so as to enable the plaintiff to withdraw his suit or take such action as he thought right, and such a plea, when

first taken in the Court of Appeal, should not be entertained. We find, therefore, that the plaintiff is entitled to the full relief which has been awarded to him by the District Judge and we dismiss the appeal with costs.

A cross-appeal has been presented by the respondent asking for an item of Rs. 54 which has been charged against him on account of coal with which, it was found, he was supplied by the plaintiff. The finding on this point is a finding of fact come to after consideration of the evidence and cannot be gone into on second appeal. The cross-appeal is, therefore, dismissed.

Appeal dismissed.

1924 Lahore 329.

ABDUL RAOOF AND MOTI SAGAR, JJ.

Jhamman Lal—Appellant

v.

Daulat Ram and others—Respondents.

Mis. S. A. No. 8 of 1919, decided on 22nd November, 1922, from the order of District Judge, Lahore, dated 6th May, 1918.

**Limitation Act, Art. 182 (4)—Decree not executed for three years—Amendment after that period—Decree not revived.*

Where a decree is quite capable of execution as it stands, its amendment cannot entitle the decree-holder to a fresh period of limitation under Art. 182, Cl. (4). A decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment. (92 I.C. 744; 59 I. C. 186, *Foll.*). [P. 329, C. 2, and P. 330, C. 1.]

Sardha Ram—for Appellants.

Madan Gopal for Tirath Ram—for Respondents.

Judgment:—This is a second appeal arising out of proceedings in execution of a decree. The following facts will disclose the nature of the question which we have to decide in this appeal.

On the 22nd January, 1909, the Arbitrators made an award granting a decree in favour of the appellant in this case for Rs. 4,000. Two conditions were mentioned in the award, namely, (*a*) that the judgment-debtor might pay the amount in three years by equal instalments, the first instalment falling due on the 1st of January, 1910; and (*b*) that if the judgment-debtor paid Rs. 3,500 within seven months of the date of the award he would be allowed a remission of the remaining Rs. 500.

On the award being filed in Court, certain objections were raised which delayed the passing of a decree on the award. A decree was eventually passed on the 23rd May, 1910, for Rs. 4,000 without incorporating the clauses above-mentioned. A default in payment of the first instalment had already taken place and the judgment-debtor had also failed to pay Rs. 3,500 within seven months. Consequently, according to the terms of the award, the plaintiff had become entitled to realise the entire amount of Rs. 4,000 from the judgment-debtor and an unconditional decree for the amount was passed in his favour. An application for the execution of the decree was made on the 23rd June, 1913. In this application the decree-holder rightly stated that, owing to the failure on part of the judgment-debtor to fulfil the condition mentioned in the award, he had become entitled to recover the whole amount of Rs. 4,000 in a lump sum. An objection was taken to the execution of the decree on the score of limitation and the application for execution being clearly beyond three years from the date of the decree was held to be barred by time and was dismissed.

The decree-holder then applied on the 30th June, 1915, for the amendment of the decree, stating that all the terms of the award had not been incorporated in it. The decree was amended on the 25th of October, 1915, and the decree-holder put in a fresh application on the 18th June, 1917, for the execution of the amended decree within three years from the date of the amendment and relied upon clause (4) or article 182 of the Indian Limitation Act (IX of 1908).

Both the Courts below have dismissed the application, holding it to be barred by time on the ground that the decree had already become dead when its amendment was applied for and it could not be revived by being subsequently amended. They have correctly stated the law that where a decree is quite capable of execution, as it stands, its amendment cannot entitle the decree-holder to a fresh period of limitation under article 182, clause (4). In support of its decision the appellate Court has relied upon the case of *Anandram* v. *Nityananda Barham* (1). In our opinion, the decision

(1) (1916) 32 Ind. Cas. 744.

of the learned Judge of the Court below is fully supported by the ruling quoted by him. This ruling was followed in another case, namely, *Rabiuddin* v. *Ram Kanat Sen* (2), where it has been laid down that "a decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment." We are entirely in accord with the view expressed in these two rulings. We are, therefore, constrained to hold that the application for execution is clearly barred by time and has rightly been dismissed.

We accordingly dismiss the appeal, but having regard to the circumstances of the case we do so without costs.

Appeal dismissed.

(2) (1921) 59 Ind. Cas. 186.

1924 Lahore 330.

BROADWAY, J.

Mahbub Ali Khan and others—Petitioners

v.

Emperor—Respondent.

Cr. Rev. No. 219 of 1919, decided on 22nd September, 1919, from the order of Magistrate, F. C., Pind Dadan Khan District, Jhelum, dated 21st December, 1918.

*(a) *Penal Code, S. 498—Acquittal for abduction is no bar to trial for detention.*

Where a woman has been abducted and detained an acquittal on a charge of abduction is no bar to the trial of a charge of detention. [P. 331, C. 1.]

(b) *Penal Code, Ss. 345 and 498—Only husband can compound an offence under S. 498—Acquittal on compromise by any other person is illegal.*

Under S. 345 the only person who is authorised to compound an offence under S. 498 is the injured husband and hence an order of acquittal based on compromise entered into by any other person is erroneous. [P. 331, C. 1.]

Nand Lal—for Petitioners.

Hakumaj Rai—for Respondents.

ORDER OF REFERENCE.—The facts of this petition are as follows:—Fateh Muhammad Khan, a Naik in the 17th Cavalry, went on service leaving his wife in charge of his mother, Mt. Taliabi. During his absence it is alleged that his wife was abducted by Mahbub Ali Khan and others. The abduction is said to have taken place on the 26th December, 1916. Mt. Taliabi endeavoured to get her daughter-in-law back but failing in this she lodged a complaint under section 498, Indian Penal Code, on the 27th August, 1917. On the 16th October, 1917, she filed a deed of compromise and the Magistrate passed an order to this effect:—"Complainant does not now wish to proceed with her case. She presents a compromise which I accept as the case is compoundable and acquit the accused." Fateh Muhammad Khan was in Persia and any communication with him was difficult, if not impossible. On return from service he filed, on the 2nd September, 1918, a fresh complaint against the same persons charging them with having abducted his wife on the 26th December, 1916, and having detained her ever since. The persons accused, the present petitioners, pleaded that under section 403, Criminal Procedure Code, the fresh complaint could not proceed as they had already been acquitted. The learned Magistrate, however, apparently ignored this plea and framed charges against the petitioners who have now come up to this Court on the revision side through Mr. Nand Lal, and I have heard Lala Hakumat Rai on behalf of Fateh Muhammad Khan.

Mr. Nand Lal has referred me to *In the matter of Poona Churn Pal* (1), *Empress* v. *Miyaji Ahmed* (2), *Heera Bai* v. *Framji Bhikaji* (3) and *Thandavan* v. *Perrianna* (4) as authorities for the proposition that once a person has been acquitted he cannot be tried again on the same facts. He has also referred me to *Emperor* v. *Bishen Das* (5) and *In re Kuppusami Aiyar* (6), as authorities for the proposition that this Court had power to quash proceedings at this stage. Lala Hakumat Rai in reply has referred me to *Emperor* v. *Sultan Singh* (7), *Queen-Empress* v. *Balwant* (8) and *In re Narayanaswami Naidu* (9). The Madras case cited is to some extent similar to present matter.

(1) (1881) 7 Cal. 447.
(2) (1878) 3 Bom. 150
(3) (1891) 15 Bom. 349.
(4) (1891) 14 Mad. 363.
(5) (1910) 33 P.R. 1910 Cr. = 57 P.L.R. 1911 = 12 Cr. L.J. 50 = 8 I.C. 1161.
(6) (1915) 39 Mad. 561 = 28 M.L.J. 505 = 2 L.W. 463 = 17 M.L.T. 398 = (1915) M.W.N. 365 = 16 Cr. L.J. 477 = 29 I.C. 109.
(7) (1909) 31 All. 606 = 6 A.L.J. 882 = 10 Cr. L.J. 473 = 4 I.C. 24.
(8) (1887) 9 All. 134 = (1886) A.W.N. 322 (F.B.).
(9) (1909) 32 Mad. 220 = 5 M.L.T. 288 = 9 Cr. L.J. 192 = 19 M.L.J. 157 = 1 I.C. 228 (F.B.).

It has to be borne in mind that although there has been an acquittal, this acquittal was clearly based on an erroneous view of the law, for under section 345 the only person who is authorised to compound an offence under section 498, Indian Penal Code, is the injured husband although by virtue of section 199, Criminal Procedure Code, Mt. Taliabi was competent to lodge the complaint that she did. The order of acquittal, therefore, was clearly erroneous and before proceeding further with their present petition I issue notice under section 439, Criminal Procedure Code, to the petitioners to show cause why the order of acquittal passed on the 16th of October, 1917, should not be set aside. The office will fix as early a date as possible. The present petition will come up again on that day.

Judgment :—The material facts of this case are contained in my order of the 17th May, 1919, and need not be repeated.

Dr. Nand Lal objected to any interference with the order of acquittal on the ground that a High Court very rarely acts on the revision side in matters of this sort especially after such a lapse of time. Various authorities were cited in support of this contention; they, however, need no discussion as with the principles enunciated in them I am in complete accord. It is, however, by no means clear that the order acquitting the three accused was a legal one. After a careful consideration of the matter I have come to the conclusion that I ought not to interfere with it at this stage. There remains the question of quashing the present proceedings.

It was argued that as the petitioners have been acquitted of having abducted the woman they cannot be tried again for the same offence. Accepting the order as one of acquittal which is still in force, this contention is correct but the charge does not confine itself to the abduction of the woman but includes a subsequent detention. If it can be *proved* that the woman is now being detained by the petitioners, I do not think the case is barred. I would, therefore, direct that the Magistrate concerned do consider the question from this aspect of the case and if there is evidence which he believes to establish a present detention, to amend the charge accordingly; if there is no such evidence, the plea in bar must prevail. On the merits I myself express no opinion one way or the other. Let the records be returned to the Magistrate accordingly.

Order accordingly.

1924 Lahore 331.

LE-ROSSIGNOL AND ABDUL QADIR, JJ.

Pirthi Nath—Petitioner

v.

Basheshar Nath—Respondent.

Civ. Rev. No. 449 of 1919, decided on 8th March, 1922, from the order of District Judge, Delhi, dated 28th February, 1919.

Provincial Insolvency Act (1907), S. 37—Applications under, by a Receiver are not governed by Art. 181 of Limitation Act.

An application under S. 37 of Act III of 1907 is not governed by Art. 181 of the Limitation Act. According to the wording of S. 37, if the High Court chooses to take action itself under that section it is not bound by any period of limitation. Therefore the fact that the Court was moved to take action by the Receiver makes no difference. The Court, if it so desires can take action under S. 37, at any time during the pendency of the proceedings, when a transfer open to objection under the said section is brought to its notice and therefore there is no reason why the Receiver should be restricted by Art. 181 of the Limitation Act in moving the Court to take action. *Obiter*: even assuming Art. 181 to be applicable the right to move in the matter accrued to the Receiver from day to day as long as the proceedings continued. [P. 333, Cs. 1, and 2.]

Facts are given in the following order of Wilberforce, J., dated the 9th January 1922 :—

In this insolvency case an Official Receiver made an application under section 37, Provincial Insolvency Act, on the 20th August, 1918, to have a payment of Rs. 2,000 made by the insolvents to their creditors declared void on the ground of undue preference. The application for insolvency in the case was made on the 26th March, 1914, and the adjudication was dated 6th May, 1914.

The first Court held the application time-barred under article 181 of the Limitation Act. On appeal, however, the learned District Judge held that article 181 did not apply to such applications but that the applicant, namely, the Official Receiver, could invoke the aid of section 18 of the Limitation Act and that the application was, therefore, in time. The learned Judge also heard that in reality no question of limitation arose because the application was one made in a pending suit. Against this decision an application for revision has been preferred

by the creditor. Mr. Moti Sagar for the creditor began by pointing out that his client had two accounts with the insolvent, one was in the name of Pirthi Nath-Ajudhia Pershad and it was in this account that Rs. 2,000 was deposited in 1913. This money was withdrawn on the 15th March, 1914, eleven days before the application. After this withdrawal Rs. 282 were due to the insolvents. In the other account in Prithi Nath's name alone Rs. 222 were due from the insolvents. In August 1914, the Receiver gave applicant notice to pay Rs. 282. He, however, objected that Rs. 222 were due in the other account and asked for a set off. This objection was allowed. After this date until August 1918 no further action was taken against the applicant. In the petition of the Official Receiver there was no allegation that there had been any fraudulent concealment in the matter of the payment of Rs. 2,000. The Receiver, moreover, obviously had access not only to the books of the insolvents but also to those of the present applicant. Mr. Moti Sagar, therefore, urges with force that no question of invoking the aid of section 18 of the Limitation Act can arise. This argument appears to me unanswerable.

The real difficulty in the case is whether in the above circumstances the application of the Official Receiver was barred by time or not. Mr. Moti Sagar for the applicant argues that article 181 doubtless applies but that the right to apply accrued at the date of the adjudication and that the application is, therefore, time-barred. No one appeared for the respondent, but there is much force in the decision of the District Judge that as the proceedings were still pending an application under section 37 was competent at any time. It is apparently beyond dispute that article 181 applies to such applications.

The question is one which is not governed by any direct authority. The only authority cited indirectly in point was the judgment reported as *Parshadi Lal* v. *Chunni Lal* (1) which is in favour of the contentions of Mr. Moti Sagar. I am inclined to agree with his contentions but I think the point of sufficient difficulty and importance to refer to a Division Bench. I refer it accordingly. The Official Receiver should be asked to appear either personally or through Counsel.

Moti Sagar—for Petitioner.

(1) (1883) 6 All. 142=(1883) A.W.N. 264.

Judgment:—This judgment will dispose of two connected Civil Revisions Nos. 448 and 449 of 1919, as the points involved in both of them are the same. The cases have been referred to a Division Bench by Mr. Justice Wilberforce and his order of reference, dated the 9th January, 1922, in Revision No. 449 may be read in this connection. We have heard Mr. Moti Sagar and Lala Durga Dass on behalf of the petitioner. Lala Basheshar Nath Goela, the Receiver, though served, was unrepresented.

In Case No. 449 a firm Lachman Das Ram Kishore was declared insolvent on the 6th May, 1914. The application for insolvency was made on the 26th March, 1914. Eleven days before this Rs. 2,000 belonging to this firm deposited in Court, had been withdrawn by one of the creditors of the insolvent firm named Pirthi Nath. The Receiver who was appointed by the Insolvency Court applied on the 20th August, 1918, under section 37 of the Provincial Insolvency Act III of 1907, that the payment made by the insolvents to the firm represented by Pirthi Nath was made to give undue preference to him over other creditors, and as the payment was made within three months before the date of adjudication it should be deemed fraudulent and should be annulled by the Court as void against the Receiver. The Court held that article 181 of the Limitation Act applied to the case and as the application was made by the Receiver more than three years after the date of payment or the date of adjudication it was barred by time. The Receiver appealed against this order and the learned District Judge accepted the appeal holding that as the Receiver had not yet been discharged and the insolvency proceedings were still pending the right to apply accrued from day to day and was not barred. Pirthi Nath then preferred a second appeal to this Court against the decision.

The points for determination now are:—

(1) Whether article 181 applied to an application made, under section 37 of Act III of 1907, by the Receiver?

(2) If it does apply whether the insolvency proceedings were still pending and an application under section 37 should be made at any time during the pendency of those proceedings?

A number of authorities have been cited before us to show that certain articles of the Limitation Act do apply to proceedings

under the Insolvency Act in spite of the fact that it is a special law and in some cases article 181 has been held to be applicable to such proceedings. With this general proposition we have no quarrel but one doubts very much if an application under section 37 of Act III of 1907 can be said to be covered by article 181 of the Limitation Act. The language of the section makes it obligatory on the Court to annul every transfer of property or of any interest therein made by an insolvent in favour of any creditor if such person is adjudged an insolvent on a petition presented within three months after the date of such transfer, provided the Court comes to a finding that such transfer was made with a view to give that creditor a preference over other creditors. It does not appear from the wording of this section that if the Court chooses to take action itself under that section it is bound by any period of limitation. Therefore, the fact that it was in this case moved to take action by the Receiver should hardly make any difference. It seems to us that the Court, if it so desires, can take action under section 37 at any time during the pendency of the proceedings, when a transfer open to objection under the said section is brought to its notice. If so, there is no reason why the Receiver should be restricted by article 181 of the Limitation Act in moving the Court to take action. There is a ample authority for the view that the status of an Official Receiver is that of an officer of the Court. Riviere on the Law relating to Receivers says: (see page 8): "A Receiver appointed by the Court is an officer of the Court." He relies on *Gardner* v. *London. Chatham and Dower Railway Co.* (2) and several other English cases in support of this view. The same view is expressed by Woodroffe in his book on the law relating to Receivers. At page 70 he says: "A Receiver duly appointed is from the moment of his appointment an officer of the Court." We are of opinion, therefore, that the question raised by the application of the Receiver in this case was one that could be gone into by the Court at any time during the pendency of the insolvency proceedings, and, therefore, this application is not time-barred. As to whether insolvency proceedings were pending at the time this application was made there is a clear finding by the District Judge and the fact is not seriously disputed. We agree with the opinion expressed by the District Judge that even assuming article 181 to be applicable the right to move in the matter accrued to the Receiver from day to day as long as the proceedings continued. We, therefore, dismiss Petition No. 449 with costs.

As regards Revision No. 448 the respondent in that case is the same Official Receiver but the petitioner is one Kanwar Gopal Singh. The adjudication in his case took place on the 13th March, 1914, and the application under section 37 for annulling a sum of Rs. 3, 400 principal and Rs. 2, 870 interest was made on the same day, as in the other case, *viz.*, the 20th August, 1918.

For reasons given above in the connected case we hold that this application of the Receiver was also not barred by time. This revision too, is, therefore, dismissed with costs.

Petitions dismissed.

(2) [1867] 2 Ch. 201=36 L.J. Ch. 329=15 L.T. 552=15 W.R. 324.

1924 Lahore 333.

ABDUL RAOOF AND ABDUL QADIR, JJ.

Mt. Amir Nishan—Appellant

v.

Kanshi Ram and others—Respondents.

S. A. No. 1061 of 1919, decided on 7th June, 1922, from the decree of District Judge, Attock at Campbellpur, dated 12th February, 1919.

Punjab Pre-emption Act, S. 15—Vendor's widow cannot pre-empt—Sale of a portion of Shamilat *only gives right to pre-empt.*

A widow is not an heir and therefore she is not entitled to pre-empt. The mere fact that a portion of the *shamilat* land only has been sold cannot deprive a co-sharer of the right to maintain a suit for pre-emption as a co-sharer. [P. 334, Cs. 1 and 2 and P. 335, C. 1.]

Manohar Lal for *D. C. Ralli*—for Appellant.

M. I. Puri—for Respondent.

Judgment:—Mt. Amir Nishan, widow of Malik Ghulam Hussain, Paroha by caste, resident of Rawalpindi, brought this suit for possession of 10 *kanals* of land bearing *khasra* No. 847, situated at Mauza Murat, Tahsil Fatteh Jang, District Attock, by right of pre-emption on the ground that she was an heir of the vendor and would be entitled to inherit the land on

his death and that she was a co-sharer. The following pedigree will disclose the relationship between the plaintiff and the vendor :—

Badar Din and Ghulam Hussain were two brothers. Milak Muhammad Amin, the vendor, is the son of Badar Din. Mt. Amir Nisban, the plaintiff, is the widow of Ghulam Hussain. The sale was made in favour of defendants Nos. 2 and 3 in February, 1917. The suit was resisted on the grounds (1) that the plaintiff as a widow was debarred from suing and (2) that the vendees being also co-sharers the plaintiff had not a superior right of pre-emption as against them. On the pleading an issue was also raised as to the reality of the amount paid by the vendees as the price of the land, but this matter has been set at rest and we are not concerned with it in second appeal. As to the pre-emptive right of the defendants, the trial Court found that Ram Singh, the vendee, was not a *malik* in the village, and that, though Kanshi Ram, the vendee, was a *malik* he had forfeited his right of pre-emption by reason of the fact that he had joined Ram Singh in making the purchase. The question that requires decision is whether the plaintiff as an heir or a co-sharer is entitled to succeed. The trial Court held that the plaintiff was shown to be a co-sharer and was thus entitled to pre-empt under section 15, clause (*b*), fourthly. It also held that she was an heir of the vendor and as such was entitled to pre-empt under clause (*b*), thirdly. The lower appellate Court, relying on the decision in *Fateh Nishan* v. *Ahmad Shah* (1), has held that the plaintiff as a widow is not an heir and is not entitled to succeed. This view is clearly supported by the ruling quoted and, though this point was not directly in question in it, the reasoning therein given fully applies to the case of a widow also. In our opinion the view taken by the lower appellate Court upon this point was correct. As regards the appellant's right to succeed as a co-sharer also the decision of the lower appellate Court was against the appellant. The Court held that the property sold was *shamilat* and that, therefore, according to the rule laid down in *Jawala Singh* v. *Ladha* (2), no right of pre-emption could arise, for a co-sharer under the Pre-emption Act meant a co-sharer in proprietary land. It further held that as no proprietary land had been sold the question of being a co-sharer could not arise. The learned Judge of the Court below has also expressed an opinion that Ram Singh being a co-sharer in the *shamilat* is entitled to his half share which he purchased under the sale. We may at once remark that this last ground is quite opposed to many decided cases and cannot be entertained. The only question, therefore, requiring decision is whether a right of pre-emption can arise with regard to the sale of a share in a *shamilat* land under the ruling relied upon by the lower appellate Court. The decision in the above reported case is based on the decision in Civil Appeal No. 141 of 1911 reported as *Khair Din* v. *Ghulam Mohi-ud-Din* (3) and we have to see whether the present case comes within the rule laid down in the last mentioned ruling. In that case a share in the proprietary land was sold together with a share in the *shamilat* land. The plaintiff pre-emptor, who was a co-sharer in the proprietary land, claimed pre-emption. The vendor set up the plea that he being himself a co-sharer in the *shamilat* land the plaintiff had no preferential right to maintain his suit *qua* the *shamilat* land. The learned Judges made the following pertinent remark in the judgment :—

"In our opinion, this contention has no force. Plaintiff claims to pre-empt the land actually sold, and with that land necessarily goes a share in the common land of the village. When partition takes place, the person, for the time being the owner of the *khatas* sold, will necessarily be allotted his proportionate share in the common land. And to hold that the vendee, though obliged to give up the actual *khatas*, can, nevertheless, assert a right to take the *shamilat* appurtenant to these *khatas* would be a proposition both novel and subversive of all customary ideas with regard to the tenure of land in villages."

We entirely agree in the view taken in that case, but this view rather supports the plaintiff's claim in this case. The plaintiff is found to be a co-sharer in the proprietary land and the mere fact that a portion of the *shamilat* land only has been sold

(1) (1914) 46 P.R. 1914=103 P.W.R. 1914=55 P.L.R. 1914=23 I.C. 532.

(2) (1915) 173 P.L.R. 1915=114 P.W.R. 1915=31 I.C. 272.

(3) (1914) 52 P.L.R. 1914=43 P.R. 1914=142 P.W.R. 1914=22 I.C. 401.

cannot deprive her of her right to maintain the suit as a co-sharer.

We accordingly accept the appeal and, setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs. We extend the time for payment to 8th of August 1922.

Appeal accepted.

1924 Lahore 335 (1).

SCOTT-SMITH, J.

Abdul Aziz and others—Appellants

v.

Sarbdayal and others—Respondents.

Mis. F. A. No. 1137 of 1919, decided on 21st June, 1922, from the order of District Judge, Lyallpur, dated 26th February, 1919.

Civ. Pro. Code, S. 60—Crops grown by heir after tenant's death cannot be attached.

Crops grown on a tenancy by the heir of a deceased tenant after his death, are not the crops of the deceased tenant and cannot as such be liable to attachment and sale in the hands of the heir under S. 60. (84 P. W. R. 1916, *Foll.*)

Niaz Muhammad—for Appellants.

Judgment:—The learned District Judge has ordered that the produce of the land of which the deceased insolvent's sons are tenants can be attached so long as they do not acquire proprietary rights.

This is contrary to the decision of a Division Bench of the Chief Court reported as *Kidar Nath* v. *Ganesha Mal* (1) which held that the crops grown on a tenancy by the heir of a deceased tenant after his death cannot be said to be his crops and cannot as such be liable to attachment and sale in the hands of the heir under section 60 of the Civil Procedure Code. I, therefore, accept the appeal and set aside the order of the District Judge and hold that the produce of the land accruing after the death of Dit cannot be attached. No order as to costs.

Appeal accepted.

(1) (1916) 84 P.W.R. 1916=33 I.C. 741.

1924 Lahore 335 (2).

SHADI LAL, C.J., AND BRASHER, J.

Nagina Singh—Appellant

v.

Mota Singh and others—Respondents.

S. A. No. 1356 of 1919, decided on 1st June, 1922, from the decree of District Judge, Jullundur, dated 17th March, 1919.

(a) *Custom (Punjab)—Alienation—Exchange of ancestral land—Onus on transferee to support exchange.*

In the case of an exchange of ancestral land it lies on the transferee to show that the transaction was an act of good management but the initial onus may easily be shifted where the exchange is beneficial.

(b) *Civ. Pro. Code, S. 100—Onus wrongly placed.*

Where the plaintiff has not been prejudiced in any way owing to the fact that the initial onus was wrongly placed upon him, *held* that no reason for interference is made out.

Beni Pershad Koshla—for Appellants.

H. D. Bholla—for Respondents.

Judgment:—The plaintiff sued as a reversioner of Mota Singh to contest a transaction by which Mota Singh gave some ancestral land in exchange for other land. The Courts below held that it lay on the plaintiff to prove that the transaction was injurious to him, and the only ground taken in this appeal is that the burden of proof was wrongly placed.

In the case of an exchange of ancestral land it lies on the transferee to show that the transaction was an act of good management, but the initial *onus* is not a heavy one and may easily be shifted where the circumstances make it appear that the exchange was beneficial. In the present case the plaintiff has not been prejudiced in any way owing to the fact that the initial *onus* was placed upon him, and the evidence shows that the land received by Mota Singh was more valuable than the land which he gave in exchange. We can see no reason for interference and we dismiss this appeal with costs.

Appeal dismissed.

1924 Lahore 335 (3).

HARRISON AND MARTINEAU, JJ.

Allah Din—Appellant

v.

Shankar Shah and others—Respondents.

S. A. No. 1430 of 1919, decided on 30th June, 1922, from the order of District Judge, Lahore, dated 16th April, 1919.

(a) *Pre-emption—Custom existing in a sub-division applies to whole sub-division—Custom exists in Chuni Mandi, Lahore.*

If in a definite Mohalla or sub-division of a town the custom of pre-emption exists, it must be treated as existing throughout the whole of the sub-division.

Chuni Mandi is a part of Multani Mohalla where the custom of pre-emption exists.

(b) *Pre-emption—Sale of site—Owner of building thereon can pre-empt.*

A mortgagee of a site had built upon it on the strength of a prior lease. The site was subsequently sold. *Held* that the mortgagee had a right to pre-empt the sale of site by virtue of his being owner of the building thereon.

D. R. Sawhney—for Appellant.

Moti Sagar—for Respondents.

Judgment:—The facts of this case are that on the 10th September, 1910, one Karim Bakhsh executed a mortgage in favour of Allah Din of two portions of land adjoining each other, which may be described as *A* and *B*. They are situated in the Chuni Mandi of the Multani Mohalla of Lahore City. *A* was vacant and the term of the mortgage was a period of six years, after which it could be redeemed on payment of Rs. 400. Regarding *B* the deed recited that the plaintiff had erected a building upon it apparently during an earlier lease and that this portion could be redeemed at any time on payment of the mortgage charge provided three months' notice had been given to the mortgagee, Allah Din, to enable him to remove his materials.

The sites both *A* and *B* were sold by the sons of Karim Bakhsh to one Shankar Shah, and on the 2nd April, 1918, he served the plaintiff with notice to remove his *amla*. In May, 1918, he brought a suit for redemption of portion *A*, that on which no building was standing. On the 6th June, 1918, Allah Din brought this suit for pre-emption of the whole plot. On the 24th June, 1918, a decree was given for the redemption of *A*. On the 15th August, 1918, a suit was instituted for the redemption of *B* which was decreed on the 9th December, 1919. On the 15th January, 1919, an appeal was presented from that decree. On the 18th January, 1919, the suit for pre-emption was decreed by the trial Court. On the 4th June, 1919, a compromise regarding the plot *B* was made by which Allah Din agreed to remove the materials in three months. In the meantime on the 16th April, 1919, the District Judge of Lahore accepted an appeal in the pre-emption case, and a second appeal was presented to this Court. The suit was dismissed by the District Judge on the ground that the custom of pre-emption does not exist in the Chuni Mandi, although it does exist in the *Mohalla* of which it forms a part, and that, in spite of the clear wording of the deed to the contrary, the property sold included a shop.

The whole of the plaintiff's claim for pre-emption depends on the existence of his building, inasmuch as he depends on section 16 (2) and not on section 16 (4) of the Pre-emption Act. On this ground he obtained an injunction restraining the vendee-decree-holder in the redemption case from executing his compromise decree. The findings of the learned District Judge are to be found on page 11 of the printed book and are as follows:—

(*a*) that the Chuni Mandi is a part of the Multani Mohalla:

(*b*) that the Multani Mohalla is a recognised sub-division of the town of Lahore, and

(*c*) that the custom of pre-emption existed in the Multani Mohalla at the time when the Act came into force.

The site in question is bounded on one side by Chuni Mandi, as is shown by the map, but, in spite of finding that the Chuni Mandi is not only a part of the Multani Mohalla but is the main street in the Multani Mohalla, and although the learned District Judge concedes as a "sound proposition of law" that one street of a *Mohalla* cannot be taken into consideration or excluded where a custom of pre-emption is held to prevail throughout the *Mohalla* in which it is situated, still because or in spite of the fact that this street (the Chuni Mandi) is by far the largest, most important and most homogeneous part of the *Mohalla* and "seems to be in the nature of an enclosure, he excludes it, makes it into a sub-division and holds that the custom of pre-emption does not exist within it. To the rulings quoted by the learned District Judge and opposed to this finding may be added *Muhammad Nawaz Khan* v. *Bobo Sahib* (1), *Sohava Mal* v. *Chattu Mal* (2) and *Ali Baksh* v. *Mahya* (3), and if there is one thing which is clearly established in pre-emption law it is that if in a definite *Mohalla* or sub-division of a town the custom of pre-emption exists, it must be treated as existing throughout the whole of the sub-division. Here the learned District Judge has not held that in an outlying portion but that in the main artery the custom does not exist. He has pointed out earlier in his judgment

(1) (1903) 44 P.R. 1903=75 P.L.R. 1903.
(2) (1882) 154 P.R. 1882.
(3) (1903) 52 P.R. 1903=169 P.L.R. 1903.

that there are a great number of houses in this portion of the city of which it would be very difficult to say definitely that they are or are not in the *Mohalla*, and in dealing with such houses on the irregular fringes of this *Mohalla*, it would be hard to lay down whether the custom exists or not. There is, however, one definite area concerning the whole of which there is no shadow of doubt that it lies within the *Mohalla*. This is the Chuni Mandi and because it is an enclave—in what sense exactly is not explained nor indeed is there any evidence on the subject—it is held that this street is to be treated as a separate sub-division in flat contradiction of all the authorities and against all the principles which the District Judge has himself laid down. We find that inasmuch as the property in suit is in the Chuni Mandi and the Chuni Mandi is a part of Multani Mohalla where the custom of pre-emption exists, the custom of pre-emption applies to the land in dispute.

The next point to be decided is, whether the land is or is not a shop, the finding of the District Judge being that it is. The house of the plaintiff adjoins the site, and what is proved is that he has built an oven on a portion of the land and that his wife there cooks food of the neighbours on payment in cash or in kind. It has been held that *Bhamba Ram* v. *Allah Baksh* (4) does not govern this case and that, although the deed recites the sale of land only, a shop also was included. The plaintiff seeks to pre-empt in virtue of owning the building, whatever the nature of it may be, which exists upon the land, and there can be no doubt that if he can establish under section 16 (2) that he is the owner of the building, he has the first and the best right to enforce his right to purchase the land on which it stands and it matters not at all what the nature of that building may be. But, it is contended for the respondents, he must retain the statutory qualification unimpaired until he gets his decree, and because the suit for redemption had been decreed before the suit for pre-emption, although the decree had not been executed, it is urged that he must be held to have lost his right in the buildings on which his suit depends. His rights in the house exist until such time as the materials have not been removed and as the materials are still standing his rights still subsist. Counsel has put the matter in the form of a dilemma; he says the land is not a shop but the property which it is sought to pre-empt is equal to a shop if the materials can be maintained; and, if they cannot be maintained, the plaintiff has no right of pre-emption. The answer to this position is that the plaintiff has a right of pre-emption of the site so long as the buildings subsist and when he has established his right to pre-emption, the right of the defendants to redeem and to insist on the removal of the building will disappear, inasmuch as he, the mortgagee, having taken the place of the vendee, will in fact become his own mortgagor. The learned District Judge has held that, although he owns the materials which he himself placed upon this site, he does not own the building because he does not own the site. There is no force in this view and Counsel has not seriously attempted to defend it.

We, therefore, accept the appeal and restore the decree of the Trial Court. The costs of the plaintiff will be paid by the defendants throughout.

Appeal allowed.

(4) (1915) 69 P.R. 1915=156 P.W.R. 1915=31 I.C. 191.

1924 Lahore 337.

BROADWAY AND HARRISON, JJ.

Inder Singh—Appellant

v.

Dyal Singh—Respondent.

F. A. No. 2528 of 1919, decided on 28th March, 1923, from the decree of Senior Sub-Judge, Lyallpur, dated 28th October, 1919.

(a) *Registration Act, S. 17—Deed must be read as a whole.*

The concluding words of the main portion of a deed ran as follows:—"The land has at any rate been sold and the vendee has become entitled to it. I am simply entitled to receive Rs. 9,000". But as against these two sentences, the deed throughout was an agreement to sell. *Held* that the deed was merely an agreement to sell and did not require registration. (184 P. R. 1889, *Foll.*) [P. 339, C. 1]

(b) *Contract Act. S. 16—Distressed state of mind raises no inference of undue influence.*

The mere facts that the defendant was in a distressed state of mind and was anxious to dispose of a portion of his property, raise no inference of the exercise of any undue influence. [P. 339, C. 1.]

(c) *Punjab Colonisation of Land Act (V of 1912), S. 19—Agreement to transfer not invalid.*

A present agreement to transfer the proprietary rights as soon as acquired does not contravene the provisions of S. 19. (3 Lah. 92 and 58 P.R. 1913, *Foll.*) [P. 329, C. 2.]

Ram Chand Manchanda—for Appellant.

Tek Chand—for Respondent.

Judgment:—The plaintiff in this case sued for specific performance of an agreement to sell $2\frac{3}{4}$ squares of land together with certain rights for Rs. 10,760. The defendant pleaded that this agreement on which the plaintiff relied was inadmissible in evidence for want of registration; that it had been obtained by the exercise of undue influence; that even if it was a valid agreement the subject-matter was a right in the tenancy of which the transfer was void by section 19 of Act V of 1912 and, finally, that this was not a case where specific performance of the contract should be decreed. The Senior Sub-Judge came to the conclusion that the document in question was admissible in evidence as it was an agreement to sell and not a sale and did not transfer or create any rights in immoveable property. He further held that there had been no exercise of undue influence but that the circumstances of the case together with the price fixed for the land which he held to be inadequate though not "grossly inadequate," showed that the parties to the agreement were not on an equal footing and that an unfair advantage had been taken of the defendant. He, therefore, refused to give a decree for specific performance and awarded Rs. 2,000 as damages. From this decision the plaintiff has appealed and the defendant has presented cross-objections contending that the agreement was inadmissible in evidence; that undue influence had been exercised; that the amount allowed for damages is excessive; and that section 19 of Act V of 1912 bars the suit. The plaintiff, on the other hand, asks for specific performance and in addition for the sum of Rs. 2,000 fixed as a penalty in case of failure to carry out the terms of the agreement. The points for decision are, therefore, (1) whether the document in question is a sale or merely an agreement to sell; (2) whether undue influence has been proved; (3) if not, whether the circumstances surrounding the bargain are such as to justify the withholding of a decree for specific performance and if not, what damages, if any, should be allowed, and (4) whether the suit is barred by section 19 of Act V of 1912.

On the first point we have been referred to many authorities and more especially *Hardit Singh* v. *Behari Lal* (1), *Sardar Partab Singh* v. *Lala Karm Chand* (2) and *Mangamma* v. *Ramamma* (3) and as against these, to *Jat Mal* v. *Beli Ram* (4). The question, however, depends on the interpretation which we place on the actual words used in the document and more especially the concluding words of the main portion of the deed which run as follows:—"The land has, at any rate, been sold and the vendee has become entitled to it. I am simply entitled to receive Rs. 9,000." As against these two sentences the deed throughout speaks of an agreement to sell, for instance, "I have agreed to sell the above mentioned property for Rs. 10,000 and the sum of interest, etc.—to Inder Singh—who has agreed to purchase this land—I have at present received Rs. 1,000 by way of earnest money. Rs. 9,000 is agreed to be received before the Sub-Registrar, Lyallpur, at the time of the completion of the sale and registration." And again, "I shall complete the sale in favour of the vendee." The execution, therefore, of a further deed was clearly contemplated but this is immaterial if the present deed actually did transfer any rights. The following sentence also occurs: "The vendee has been put in possession of the land sold" though it is admitted that, as a matter of fact, this has not occurred; and in conclusion the final paragraph runs: "I have, therefore, executed this agreement in favour of Inder Singh, vendee, so that it may serve as an authority. I have secured an agreement to the same effect from Inder Singh, vendee." We have considered the document as a whole and have given due weight to the general tenor of the terms recited, and we are of opinion that the use of the words "the land has, at any rate, been sold" when read together with the remainder of the document, the concluding paragraph of which shows that the document was bilateral, and after taking

(1) (1915) 104 P.W.R. 1915=9 P.L.R. 1916=29 I.C. 805.
(2) (1889) 84 P.R. 1889.
(3) (1914) 37 Mad. 480=12 M.L.T. 262=(1912) M.W.N. 917=16 I.C. 587.
(4) (1916) 86 P.R. 1916=52 P.W.R. 1916=33 I.C. 948.

every thing into account, we find, agreeing with the trial Court and on the same reasoning as is to be found in *Sardar Partab Singh* v. *Lala Karm Chand* (2), that the general sense of the document is that it is an agreement to sell and does not create or declare any rights in the immoveable property.

On the point of undue influence, Counsel has laid stress on the fact that the defendant had lost his wife and that there is some oral evidence to the effect that he had lost his head as a result and that he was in a position to be dominated by the will of the plaintiff. It is in evidence that, soon after the death of the defendant's wife, he found it impossible to carry on the cultivation of the land in suit as well as his other land on the Jhang Branch, which was at some distance, and that he had failed to reclaim one half of the land in suit. It is also in evidence that in October 1918, the defendant had obtained the necessary *Fards* and made the same over to Narinjan Das with the request that he should find a purchaser for the land and it was in accordance with this request that Narinjan Das brought the plaintiff and defendant together in order to enter into this contract. All, therefore, that can be said to have been shown by the evidence led on the subject is, that the defendant was in a distressed state of mind and was anxious to dispose of this portion of his property. From these facts it is impossible to infer the exercise of any undue influence. As showing that the circumstances were such that the plaintiff, while not exerting any undue influence, took unfair advantage of the defendant's position, the Senior Sub-Judge has relied on the inadequacy of the price paid as found by him and the presence of the petition-writer at the time the bargain was struck. So far as the adequacy of the price goes, the evidence on the record is practically of no value. It is shown that two squares of land were sold in the same *Chak* at about the same time for Rs. 12,000, but it is clear from the sale-deed that the full condition had been fulfilled. The whole of the land had been reclaimed, a well and 8 *kothas* had been constructed while the land in suit had not been fully reclaimed and the buildings had not been completed. Under the circumstances, it is wholly impossible to come at a clear finding as to which property fetched the better price and even if the two squares realized a little more it is impossible in our opinion to hold that the price was not adequate. Five years before the defendant had paid Rs. 133 an acre and the present price is Rs. 165 per acre. Undue importance has been attached to the presence of the petition-writer or rather a presumption has been drawn by the Senior Sub-Judge from his presence, and even if he was unduly acting and arrogated to himself the duties of a broker as opposed to a petition-writer it is not shown that he acted in favour of the plaintiff rather than in favour of the defendant who apparently engaged him in the first instance. Having regard more especially to the explanation to section 12 and sub-clause (3) of section 20 of the Specific Relief Act we find that no sort of reason has been shown in this case why specific performance should not be declared as to what was actually sold and whether section 19 of Act V of 1912 acts as bar to this suit. We follow *Nathu* v. *Allah Ditta* (5) and *Hussain Khan* v. *Jhan Khan* (6) and hold that the present agreement to transfer the proprietary rights as soon as acquired was in no way illegal. The sale-deed provides for a penalty of Rs. 2,000 which, under the circumstances, is most excessive and we allow Rs 50 as damages for the breach which we consider as reasonable. We, therefore, accept this appeal so far as to decree the specific performance of the contract to sell and allow Rs. 50 damages for the breach. The cross-objections are dismissed, and as to the costs the successful plaintiff will recover ¾ths of his costs throughout the litigation from the defendant.

Appeal allowed in part.

(5) 1922 Lah. 287=3 Lah. 92=3 L.L.J. 505=64 I.C. 18.

(6) (1913) 58 P.R. 1913=48 P.L.R. 1913=36 P.W.R. 1913=18 I.C. 5.

1924 Lahore 339.

BROADWAY AND ABDUL QUDIR, JJ.

Gopi Mal and another—Appellants

v.

Pannalal and others—Respondents.

S. A. No. 1314 of 1920, decided on 8th June, 1922, from the decree of District Judge, Amritsar, dated 29th April, 1920.

(a) *Hindu Law—Adoption—Jains may adopt in dattaka form.*

There is no authority to show that Jains cannot adopt in the Dattaka form or that an adopted son

among Jains can, in no case, become a member of the family of his adoption. [P. 341, C. 2.]

(b) *Civ. Pro. Code, O. 22, r. 3—Court exercising its discretion to extend time—Appellate Court will not interfere.*

Where in its discretion a Court has substituted the representative of deceased plaintiff by extending the time for substitution, the appellate Court will not interfere with the discretion so exercised. [P. 342, C. 1.]

(c) *Guardian and ward—Guardian of a minor is not trustee.*

A guardian of a minor may be a *quasi* trustee for certain purposes, *e g.*, for money received by him on behalf of his ward, but it is not clear that he can incur expenses to any extent he likes without seeking the intervention of any Court in the hope that he would be allowed to create a charge on the property of the minor to that extent. [P. 342, C. 1.]

Moti Sagar and *Faqir Chand*—for Appellants.

Badri Das—for Respondents.

Judgment:—The parties in the suit, out of which this second appeal arises, are Jains belonging to Amritsar. The property in dispute is a house and a half share in a shop, which belonged to one Kanshi Ram and after his death came into the possession of his widow, Mt. Uttam Devi. She adopted a boy, named Amin Chand, son of Gopi Mal, and executed a deed of adoption, Ex. D 5, dated the 29th April, 1907, adopting him as a son to her husband and herself. She died in May 1907, and shortly before her death she executed a will, Ex. D-6, dated the 10th of May, 1907, by which she appointed Gopi Mal, father of Amin Chand, to act as a guardian of his person and property in her place. The boy then remained under the care of his natural father but died as a minor in November, 1913, after having been ill for a considerable period. The property was at that time in the possession of Gopi Mal in his capacity as a guardian of the deceased minor. Certain persons, including Ishar Das, plaintiff in the present case, claimed shares in the property as collaterals of Kanshi Ram, deceased. This matter was referred to arbitration by both the parties and the arbitrators gave an award treating Ishar Das, etc., as collaterals and giving them certain specified shares. This award was not, however, accepted, for one reason or other, by the parties, and was not acted upon. On the 19th December, 1913, the plaintiff Ishar Das brought the present suit against Gopi Mal and others for possession of one-fourth share of the property left by Kanshi Ram. Some of the defendants were collaterals other than the plaintiff, who were made *pro forma* defendants, because they did not join him in bringing the suit. Gopi Mal, the contesting defendant, denied the alleged relationship between the plaintiff and Kanshi Ram and further pleaded that the widow was the sole owner and had passed a complete title to Amin Chand and that he was now entitled to succeed Amin Chand as his heir. He also pleaded that he had spent Rs. 3,261-0-0 on the minor and this amount was a charge on the property and no one could get any part of the property without paying the above sum. The trial Court held that the plaintiff was a reversioner of Kanshi Ram, but he was not entitled to succeed to the property left by Amin Chand, because the property would now pass on to the natural heirs of the latter. It, therefore, dismissed the plaintiff's suit who appealed against this decision. The learned District Judge agreed with the trial Court in holding that the plaintiff was a collateral of Kanshi Ram and also came to the conclusion that the collaterals of Kanshi Ram were entitled to succeed to the property and not the natural heirs of Amin Chand. It remanded the case, therefore, under Order 46, rule 25, Civil Procedure Code, for a decision on issues Nos. 5 and 6, which ran as follows and had not been decided by the Court of first instance.

5. What is plaintiff's share in the properties in question? On plaintiff. 6. Whether (Gopi Mal and Kheman Mal) defendants Nos. 1 and 2 spent any monies for Mt. Uttam Devi or Amin Chand, and if so whether these create a first lien on the property in dispute? On defendants Nos. 1 and 2. The report of the learned Subordinate Judge on these issues was made on 6th April, 1920, to the effect that the share of the plaintiff amounted to one-fourth according to the pedigree-table, Exhibit P-1 relied on by him, and that Gopi Mal was not entitled to the money claimed by him on account of expenses incurred, as such expenses were not a charge on the property. The learned District Judge has agreed with the view taken by the Subordinate Judge and has accepted the appeal of the plaintiff and passed a decree as prayed for in the plaint. Defendant Gopi Mal and Kheman Mal have come up to this Court in second appeal and we have heard Mr. Moti Sagar on behalf of the appellants, whose

arguments may be divided in the following four heads :—

1. It is not proved that the plaintiff was a collateral of Kanshi Ram as the pedigree-table relied upon by the plaintiff has not been properly proved.

2. That by virtue of the adoption of Amin Chand by Mt. Uttam Devi under the Jain Law the property must pass on to the heirs of Amin Chand instead of going to the collaterals of Kanshi Ram.

3. That the appeal of the plaintiff in the lower appellate Court had really abated for want of substitution of any one as the representative of the plaintiff in time after his death during the pendency of the appeal and, therefore, the learned District Judge has erred in not dismissing it.

4. That in any case Gopi Mal was entitled to be reimbursed for money spent out of his pocket in his capacity as a trustee and the Court below had erred in simply declaring that the money was not a charge on the property and giving no finding as to the amount actually due.

We will take up the above points *seriatim*. As regards the first point it is urged that the oral evidence adduced to prove the relationship consisted of the statements of P.W. No. 1, P.W. No. 3 and P. W. No. 4, who had very little first hand knowledge and whose evidence was of no value. It is added that the inference drawn by the Courts below from the facts that there was an admission of the status of Ishar Das and other collaterals as such in the reference to abitration made by the parties is not a reasonable inference and cannot at any rate prove the pedigree table as propounded by the plaintiff. We think, however, that the finding of the relationship between Ishar Das and Kanshi Ram must be treated as a finding of fact which cannot now be questioned. The following remarks were made on this point by the learned District Judge in his order dated the 5th January, 1918, remanding the suit for decision on the fifth and sixth issues :—

" The evidence produced by the plaintiff in support of the pedigree-table is certainly somewhat scanty, but in 1907 the dispute was referred to abitration though the award was never acted upon, and the arbitration proceedings amount to an admission of the plaintiff's relationship on the part of the defendants."

The relationship has been held to be established on the material above alluded to, by the Courts below. Meagre though the material may be, it is not open to us to interfere with this finding and we may add that the inference that they drew from the reference to arbitration is reasonable and legitimate. We, therefore, agree with the Courts below that it has been proved that Ishar Das was a collateral of Kanshi Ram and was entitled to one-fourth share of the latter's property, according to the pedigree-table attached to the plaint.

Concerning point No. 2, emphasis is laid on the fact that the parties are Jains and their law differs in many respects from Hindu Law and that an adoption among them is a purely secular matter devoid of religious significance and that, therefore, Mt. Uttam Devi, who is a Jain widow, and, as such, was an absolute owner, passed such a title to Amin Chand when she adopted him, that after him his property should go to his father or other natural heirs of his. Mr. Moti Sagar refers to *Manak Chand* v. *Munna Lal* (1) where it is laid down that an adoption among Jains is more akin to the *Kritrima* than to the *Dattaka* form of adoption, and that a person adopted under the *Kritrima* form is not transferred completely from his natural family to the family adopting him but can retain his ties with his natural relations. We are not very favourably impressed by this argument of the learned Counsel. There is nothing in *Manak Chand* v. *Munna Lal* (1) to show that Jains cannot adopt in the *Dattaka* form or that an adopted son among Jains can, in no case, become a member of the family of his adoption. In this particular case there can be no doubt so far as the intention of Mt. Uttam Devi was concerned that she wanted to make the adoption as complete as possible and to bring Amin Chand into the family of her husband. She mentions in the deed of adoption that Gopi Mal has two other sons and has given his son Amin Chand to her and that she has adopted him as a son to her husband and to herself and that the boy should henceforth be treated like a son born to them. Under these circumstances, we think that the learned District Judge has rightly held that in the present case collaterals of Amin Chand were entitled to succeed to the property.

Coming to the question of abatement, we think there is no force in the contention.

(1) (1909) 95 P.R. 1909=168 P.W.R. 1909=212 P.L.R. 1910=4 I. C. 844.

Ishar Das died after the case had been remanded by the District Judge under Order 41, rule 25. On the 21st November, 1918, an application was made to the Sub-Judge stating that the plaintiff died about 11 days back and praying that his legal representatives may be brought on the record. It is contended that this application should have been made to the District Judge, who was really seized of the case, and who actually proceeded to decide this application on 10th October, 1919, but by that time the period within which the substitution could legally be made had elapsed and, therefore, there was no proper substitution. We do not see, however, that now that the learned District Judge has substituted Panna Lal and Khairati Ram as the representatives of Ishar Das, and it was open to him to extend the time for substitution of representatives, that we can or should interfere with his discretion in second appeal.

The only point that remains to be considered is that of expenses incurred by Gopi Mal. It is argued that he was appointed guardian of the person and property of the minor and thus stood in a fiduciary relation to the minor and should be regarded as a trustee and, under section 32 of the Indian Trusts Act II of 1882, is entitled to reimbursement of expenses. There is no doubt that he would be entitled to such reimbursement if it was established that he was a trustee, but, we are not satisfied that the position of trustee was created by the Will, dated 10th May, 1907, appointing him as guardian of the minor. Mr. Badri Das, who appears for the respondents, argues that Gopi Mal would be governed by the Guardians and Wards Act, as a guardian appointed under a Will, and there is no provision in the said Act entitling him to any such position as to claim reimbursement as a trustee. We have very carefully considered the arguments on this point advanced by Counsel on both sides, but think that it is open to serious doubt that a trust was created by the Will above referred to, or that a guardian of a minor does in effect become a trustee. He may be a *quasi* trustee for certain purposes, *e.g.*, for money received by him on behalf of his ward, but it is not clear that he can incur expenses, to any extent he likes without seeking the intervention of any Court in the hope that he would be allowed to create a charge on the property of the minor to that extent. In this particular case the greater part of the expenses is said to have been incurred owing to the illness of the minor and it is difficult to say whether all that expense was incurred by Gopi Mal in his capacity as a guardian or on account of natural filial affection. Moreover, he has admittedly been in possession of the property for many years and, has appropriated the mesne profits, and, according to the terms of his written statement, appears to have made no allowance for the sums so received by him. We think that, under the circumstances, it cannot be said that the expense incurred by him was a charge on the property of which a proportionate share must be paid by the representatives of Ishar Das before they get possession of his share under the decree. If Gopi Mal has an equitable claim he can enforce it by a separate suit against the representatives of Ishar Das and against the other heirs of Kanshi Ram deceased.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

1924 Lahore 342.

BROADWAY, J.

Banarsi Das—Appellant

v.

Ramzan and another—Respondents.

Civ. App. No. 2030 of 1920, decided on 16th May, 1922, from the order of District Judge, Ferozepore, dated 21st April, 1920.

Civ Pro. Code, O. 20, r. 10—Compromise filed in execution—Payment postponed—Time for executing decree not extended.

In execution of a decree the parties filed a compromise whereby the decretal amount was to be paid by half yearly instalments and on default of 4 instalments the decree-holder was to be at liberty to execute the decree for the full amount. The Executing Court thereupon passed the following order "In accordance with the compromise the proceedings be filed as unsatisfied as the decree-holder says that he will now act on the new contract." *Held* that by the filing of this compromise the time for execution of the decree was not in any way extended. Before any order could be passed under S. 210 (now O. 20, r. 11) the application on which such an order is made must be within time. (26 P.R. 1894, *Foll.*) [P. 344, C. 1.]

(b) *Pleadings—Construction should be liberal.*

In construing pleadings, judgments and decrees in this country the most liberal construction must always be accepted. (5 C.L.J. 25, *Ref.*) [P. 343, C. 2.]

Fakir Chand—for Appellant.

S. A. Razaq—for Respondents.

Judgment :—On the 20th of March, 1906, one Banarsi Das obtained a decree against Ramzan, etc., for Rs. 796-14-3 and costs. On the 7th of August, 1907, Banarsi Das proceeded to execute this decree and applied to the Court for the attachment and sale of certain lands belonging to the judgment-debtors. Notice was issued to them and on the 28th of August, 1907, they asked for and obtained time in order to come to a settlement.

On the 18th of November, 1907, a compromise was filed in Court by the decree-holder and the judgment-debtors according to which it was agreed that the decretal sum should be paid in half-yearly instalments of Rs. 50, the first payment to be made in *Hari* 1965. It was also provided that, in the event of there being a default in four payments, the whole sum would be recoverable at once.

The parties' statements were recorded and the following order passed :—

"In accordance with the compromise the proceedings be filed as unsatisfied, as the decree-holder says, that he will now act on the new contract."

On the 29th of May, 1912, the decree-holder applied for execution of the decree alleging that there had been default in the payment of four instalments which gave him the right to recover the whole amount at once. Before notice was issued the Court, on the 5th of July, 1912, passed an order to the effect that the application was within time having regard to the instalments agreed on as well as having regard to the decree itself. It was also held that the decree-holder was bound by the terms of the compromise and that default had not then been made of the necessary four instalments. The proceedings were finally filed on the 25th of July, 1912.

On the 10th of February, 1919, the decree-holder filed the present application for execution which the Courts below have held to be barred by limitation as having been made more than 12 years from the date of the decree, *i.e.*, 20th March, 1906. Against this decision Banarsi Das has come up to this Court in second appeal through Mr. Fakir Chand and I have heard Mr. Abdul Razaq for the judgment-debtors-respondents. The amount alleged to be due was Rs. 468-14-3.

For the appellant it has been urged that the order of the Court, dated 18th November, 1907, amounted to a subsequent order "directing payment of the decretal amount on certain dates in accordance with the compromise that had been sanctioned and that such an order was covered by section 48 (*b*), Civil Procedure Code. It was also contended that a compromise was not barred by Order 23, rule, 4, Civil Procedure Code. In the latter contention I am unable to agree, as Order 23, rule 4, Civil Procedure Code, corresponding to section 375 (*a*) of the Code of 1882, is explicit in its terms and specially declares Order 23, to be inapplicable to any proceedings in execution of a decree or order.

It remains to be seen how far the order of the 18th November, 1907, can be regarded as extending the period of limitation. Section 48 of the present Code is similar in terms to section 230, paragraphs 3 and 4 of the Code of 1882. To render section 48 (*b*) applicable, there must be an order directing the payment of money on a certain date and such an order could in this case have only been passed under section 210 of the old Code. It has been urged that although the order passed on the 18th November, 1907, is not explicit in its terms, nevertheless it should be regarded as one having been made under section 210. Mr. Fakir Chand referred to *Kedar Nath Banerjee* v. *Kulman Sardar* (1), in which it was laid down that in construing pleadings, judgments and decrees in this country, the most liberal construction must always be accepted. With this dictum I have no quarrel, but it seems to me that before any order could be passed under section 210 (now Order 20, rule 11) the application on which such an order is made must be within time. It is true that in *Jhoti Sahu* v. *Bhubun Gir* (2), a very liberal construction was placed on an order under section 210 and that ruling was cited with approval in *Perumal Naicker* v. *Davood Rowther* (3). It was, however, pointed out in the later ruling that the learned Judges responsible for *Jhoti Sahu* v. *Bhubun Gir* (2) had apparently lost sight of the provisions of article 175 of the Limitation Act. While I would be quite prepared to give the widest possible construction to the order in this case, (dated 18th November, 1907), it seems to me that it cannot be regarded as an order passed under section 210, Civil Procedure Code, inasmuch as the Court on that

(1) (1907) 5 C.L.J. 25.
(2) (1885) 11 Cal. 143.
(3) (1916) 34 I. C. 393.

date had no jurisdiction to pass an order under that section more than six months having elapsed from the date of decree.

It was next contended by Mr. Fakir Chand that inasmuch as the compromise had been acted on, the judgment-debtors were estopped from denying their liability, and reliance was placed on *Bunwari Lal* v. *Abdul Ghafur Khan* (4). That decision, however, does not appear to me to afford the appellant any assistance, for it appears that the agreement in that case was accepted by the Court and *embodied in the decree*, although from the report of the case all the facts are not ascertainable. I am, therefore, unable to hold that by the filing of this compromise the time for execution of the decree was in any way extended.

Finally, it was argued that the order passed in 1912 referred to above must be regarded as *res judicata* although it was passed *ex parte*, and in support of this contention my attention was drawn to *Periakaruppan Chetty* v. *Chidambara Tambiran* (5). Doubtless there are instances where an *ex parte* order may operate as *res judicata*, but I am unable to see that in 1912 any order was passed which can be regarded as extending the time. All that that order as I read it, amounts to is that the parties are bound by the compromise arrived at, and it is not denied by the judgment-debtors-respondents, that they are not bound by the terms of the settlement of the 18th November, 1907.

It seems to me that the question is really concluded by a decision of this Court reported as *Nanak Chand* v. *Anant Ram* (6). As pointed out by the learned District Judge the facts in that case and in the present one are almost identical and following that decision I dismiss this appeal with costs.

Appeal dismissed.

(4) (1909) 5 P.L.R. 1909=4 P.W.R. 1909=1 I.C. 48.
(5) (1916) 3 L.W. 339=(1916) 2 M.W.N. 64=33 I.C. 443.
(6) (1894) 6 P.R. 1894.

1924 Lahore 344.

ABDUL RAOOF, J.

Bindraban—Appellant

v.

Bodh Raj and another—Respondents.

S.A. No. 110 of 1921, decided on 22nd December, 1922, from the decree of District Judge, Jhelum, dated 7th February, 1921.

Specific Relief Act, S. 27, Cl. (b)—Defendant must prove that his case falls under the exception.

In a case of specific performance of a contract, the burden lies on the defendant (the transferee after the argeement) to prove that his case falls under the exception in Cl. (2). (36 Bom. 446; 9 M.I.A. 303, *Ref.*) [P. 346, C. 1.]

Durga Das—for Appellant.

Kunwar Dalip Singh for *Harcharan Das Kumar*—for Respondents.

Judgment:—This second appeal has arisen out of a suit for the specific performance of a contract for sale of a vacant site measuring 4 *marlas* and 187 feet and for possession thereof. There was a further prayer for an injunction and removal of a certain building erected on it. The facts are as follows:—

The plaintiff, Bindraban, is a Vakil of the Lahore High Court. The defendant No. 1, Fateh Chand, is a teacher in a Primary School. Bodh Raj, defendant No. 2, is an Arora, all being the residents of the village Dhulial. The allegations in the plaint are that the defendant No. 1, the owner of the site in suit, entered into an agreement to sell the land to the plaintiff at Rs. 125 per *marla*, and received Rs. 40 as earnest money; that the plaintiff asked the defendant orally and in writing several times to complete the sale and hand over the possession of the site on receipt of price but the latter paid no heed, that later on the plaintiff came to know that the defendant Bodh Raj was erecting a building on the land, and that thereupon the plaintiff sent a notice to Bodh Raj telling him that Fateh Chand had already contracted to sell the land to him (plaintiff). As the defendant No. 1 failed to perform the contract the present suit was instituted. The defendant No. 1 at first denied totally the alleged agreement and the receipt of the earnest money. Bodh Raj, the defendant No. 2, pleaded that he had got the land in exchange and that he was a *bona fide* purchaser for value without notice of any prior

contract between the plaintiff and Fateh Chand and that he had spent Rs. 100, in constructing building on the land.

The following issues were framed by the Trial Court.

1. Did defendant No. 1 agree to sell the vacant site in suit to the plaintiff at Rs. 125 per *marla? Onus probandi* on plaintiff.

2. Had defendant No. knowledge of the prior contract (in respect of this site) between the plaintiff and defendant No. 1, and, if so, what is the effect? *Onus probandi* on plaintiff.

3. What improvements has the defendant No. 2, made on the site in suit and is he entitled to compensation in respect of the improvements and up to what extent? *Onus probandi* on defendant No. 2.

The Trial Court after a detailed consideration of the evidence, both oral and documentary, decided the first issue in favour of the plaintiff and held that the plaintiff had been keen on getting the contract completed and that the defendant No. 1 had been putting it off on one pretext or another and that eventually after receiving a notice, dated the 5th July, 1919, he had effected an exchange of the land in dispute with the defendant No. 2 by a registered deed, dated the 16th August, 1919. On the second issue also the Trial Court found in favour of the plaintiff and held that the defendant No. 2, had knowledge of the previous contract in favour of the plaintiff. On the third issue relating to compensation also after referring to a number of rulings it came to the conclusion adverse to the defendant No. 2 and decreed the suit granting to the plaintiff a decree for the specific performance of the contract directing the defendant No. 1 to execute a registered sale-deed on receipt of Rs. 546-8 0 and ordered the defendant No. 2 to remove the materials of his building and to hand over possession to the plaintiff. It further restrained the said defendant permanently from erecting any building on the site in dispute.

Bodh Raj, the defendant No. 2, preferred an appeal to the Court of the District Judge of Jhelum making the plaintiff Bindraban and the defendant No. 1, Fateh Chand, as respondents. The lower appellate Court agreed with the decision of the first Court on the first issue, but differed from it as regards the finding on the second issue. On the first issue it recorded the following finding :—

"It is, in my opinion, proved that defendant No. 1 definitely agreed to sell and plaintiff to buy the site in suit, and that the agreement amounted to a contract, which was subsequently broken by defendant No. 1 when he transferred the site to Bodh Raj, defendant No. 2, by deed, dated the 16th August, 1919, just after plaintiff had sent a notice to defendant No. 1, dated the 5th July, 1919, threatening to sue for possession of the site."

The finding of the lower appellate Court on the second issue is not very clear and is scattered over several portions of the judgment. It may be summarised as below. In one place the following finding is recorded.

"The plaintiff admits that he sent no written notice to Bodh Raj till the 4th February, 1920, after he had heard that Bodh Raj was building on the site in suit, but he says that some 2½ years back, he had been asked by Bodh Raj why he was not building on the site and replied that he intended to do so. There is also the oral evidence of Pandit Vishwa Nath (P. W. No. 1), to show that Bodh Raj knew that the site was to be sold to plaintiff. Now it was for plaintiff to prove that Bodh Raj had knowledge of a definite contract of sale when he acquired the site and built on it. What plaintiff has proved, at most, is that Bodh Raj knew that plaintiff had some idea of buying the site. It is not proved that Bodh Raj knew that there was any binding contract and the fact that plaintiff seemed to be taking no steps to obtain possession of the site pointed to the contrary."

In another place the learned District Judge remarks as follows :—

"The plaintiff has not proved that Bodh Raj bought the site with the knowledge that the plaintiff was already its potential owner."

In the third place towards the end of the judgment the following remark is to be found :—

"The plaintiff has failed to prove that Bodh Raj had knowledge of a definite contract between plaintiff and Fateh Chand, at the time when he bought the site, and it would, therefore, be unduly hard on Bodh Raj to compel him to give it up, plaintiff not having proved that he bought and built upon it in bad faith."

On these findings the learned District Judge accepted the appeal and dismissed the suit against the defendant No. 2, but

passed a decree for Rs. 160, as damages, and Rs. 40, the earnest-money, total Rs. 200, against Fateh Chand, defendant No. 1.

The plaintiff has come up in second appeal to this Court and the main ground argued on his behalf by Mr. Durga Das is that the burden of proof lay upon the defendant No. 2 to prove that he was a transferee for value and had obtained the land by exchange in good faith and without notice of the original contract. In support of his contention he has relied on the provisions of section 27, clause (*b*) of the Specific Relief Act. Section 27 provides that "Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against:—

(*a*) either party thereto;

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

In my opinion, there is force in this contention. The defendant No. 2 claims under the defendant No. 1 and the specific performance of the contract, entered into by the defendant No. 1, may be enforced against the defendant No. 2 unless he proves that his case came under the exception mentioned therein.

In the case of *Himatlal* v. *Vasudeo Ganesh* (1) the facts of the case stated in the head note were as follows:—

"Defendants Nos. 1 and 2 having agreed to sell their property to the plaintiff, they subsequently sold the same property to defendants Nos. 3 and 4 in a suit brought by the plaintiff for an order to execute a deed of sale and also for recovery of possession of the property." A Division Bench held "that defendants Nos. 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff, defendants Nos. 3 and 4 were bound to show three things, namely, that (1) they were purchasers for value and (2) *bona fide*, and (3) without notice. The plaintiff under his contract having a prior equity was entitled to succeed." This decision of the Bombay High Court was mainly based upon the decision of their Lordships of the Privy Council in the case of *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (2).

In the case of *Tiruvenkatachariar* v. *Venkatachariar* (3) a similar rule was laid down and is thus stated in the head-note;

"In a suit for specific performance of a contract for the sale of immoveable property, it is not for the plaintiff to show that a subsequent purchaser had notice of the contract but it lies on the latter to make out that he is a *bona fide* purchaser for value without notice."

There is a decision of a single Judge of the Punjab Chief Court also which lays down a similar rule. It is reported as *Hamid Husain* v. *Bishen Sarup* (4). Mr. Justice LeRossignol, after referring to section 27 of the Specific Relief Act, stated the law in the following words:—

"When the prior contract of which plaintiff seeks specific performance is proved, the subsequent transferee from the principal defendant must prove that he is a transferee for value in good faith and, further, that he had no notice of the plaintiff's contract."

The Courts below, therefore, were wrong in holding that it was for the plaintiff to prove that the defendant No. 2 in this case had notice of the previous contract in favour of the plaintiff. The defendant No. 2 practically gave no evidence to prove that his case came within the Exception mentioned in clause (*b*) of section 27 of the Specific Relief Act. The suit of the plaintiff, therefore, ought to have been decreed, but I am further of opinion that even on the hypothesis of the burden of proof being on the plaintiff appellant the lower appellate Court ought to have held that the plaintiff had discharged the onus. The plaintiff went into the witness-box himself and clearly stated on oath that two or two and half years ago Bodh Raj put the following question to him.

"*Apne Fateh Chand se Jagah le li hai makan keon nahin banwate*, *i.e.*, you have taken the place from Fateh Chand, why don't you construct a house," to which the plaintiff replied: "I shall build." Pandit Wishwa Nath also stated on oath that the defendant No. 2, Bodh Raj, knew of the previous contract in favour of the plaintiff before he took the land by

(1) (1912) 36 Bom. 446=14 Bom. L.R. 634=16 I.C. 680.

(2) (1861) 9 M.I.A. 303=1 Suther 480=1 Sar. 857 (P.C.).

(3) (1914) 26 M.L.J. 218=23 I.C. 621.

(4) (1918) 137 P.W.R. 1918=46 I.C. 659.

exchange. The learned Judge of the Appellate Court has referred to the evidence of these two witnesses and apparently has believed it, but does not give full effect to it. Apparently he has misread the deposition. In the findings above stated the learned Judge says that what plaintiff has proved at most is that Bodh Raj knew that the plaintiff had some idea of buying the site. This is not the statement of the plaintiff. If the statement of the plaintiff has any meaning at all, it means that Bodh Raj knew that the plaintiff had taken the land, not that he had only an idea of buying the site. Even taking the finding of the learned Judge to be correct, was it not the duty of the defendant No. 2 to have made further enquiries and to have satisfied himself as to the real state of affairs. If he had taken the trouble of making enquiries he would have come to know that a complete contract for sale had been entered into between the plaintiff and the defendant No. 1 and that the latter occupied the position of a trustee and was not free to give the land to the defendant No 2.

The equitable rule relating to notice is thus stated in section 3 of the Transfer of Property Act IV of 1882

"A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it."

On the facts found by the learned District Judge the defendant No. 2 certainly would have known that defendant No. 1 had contracted to sell the land to plaintiff if he had not wilfully abstained from making an inquiry. In the first place I hold that on the statement of the plaintiff it is proved that the defendant No. 2 had actual notice and in the second place I am of opinion that even upon the view taken by the learned Judge the defendant No. 2 ought to have been held to have had constructive notice. In any view of the case the plaintiff was entitled to succeed and the suit was rightly decreed by the Court of first instance. The conduct of the defendant No. 2 clearly shows want of *bona fides* on his part. Counsel for the appellant has stated that his client is willing to pay the cost of the building. This will be determined in execution proceedings.

On behalf of Fateh Chand, the defendant-respondent, cross-objections are filed objecting to the award of damages to the plaintiff against him. The correctness of the objection is not seriously contested by the learned Vakil for the appellant. I, therefore, set aside the decree awarding compensation to the extent of Rs. 160 to the plaintiff. The result is that the appeal is accepted with costs and the decree of the first Court is restored with the above modification as to the cost of the building.

Appeal accepted.

1924 Lahore 347.

SCOTT-SMITH, J.

Mt. Mahommadi and others—Appellants

v.

Karam Bakhsh and another—Respondents.

S. A. No. 141 of 1921, decided on 12th June, 1922, from the decree of District Judge, Ambala, dated 15th October, 1920.

Deed—Construction—"Malik" implies absolute estate—Deed in favour of females—No special rule.

Deeds in favour of females must be interpreted in the same way as any other deed. The words "Malik" and "Malkiyat" in a formal document imply an absolute estate unless there is something in the context to qualify it. Where the husband in a deed purporting to be a sale-deed in favour of his wife in consideration of her dower clearly stated that he had given proprietary possession to her and also that she had the full power of a proprietor to alienate the house sold, *held* that the husband's intention was to confer an absolute estate upon the wife. [P. 348, Cs. 1 and 2.]

Tirath Ram—for Appellants.

M. Obedullah—for Respondents.

Judgment:—Shadi, a *Kahar* by caste, and tailor by occupation, living in the town of Ambala, was the proprietor of the house in dispute and died in 1909. On the 28th July, 1904, he conveyed the house to his wife, Mt. Muhammadi, by a registered deed in lieu of Rs. 400 prompt and deferred dower. She gifted the house to Karam Ilahi whom she alleged to be Shadi's adopted son. It has been held that the adoption was not proved. The first Court held that the deed of the 28th July, 1904, was a deed of sale by Shadi in favour of his wife and that by it she became a full owner and had, therefore, a right to alienate it in any way she pleased. It, therefore, dismissed the suit of the plaintiffs-respondents, who are reversioners of Shadi, for a declaration that the gif

should not affect their reversionary rights. The plaintiffs appealed to the District Judge who held that Mt. Muhammadi had only limited rights in the house and had no power to make a gift. He, therefore, reversed the lower Court's decision and gave the plaintiffs a decree for a declaration as prayed. Mt. Muhammadi and Karam Ilahi have filed a second appeal to this Court.

The Courts below have held that the parties are governed by custom and not by Muhammadan Law and the learned District Judge referred to the decision of Wilberforce, J., in Civil Appeal No. 863 of 1920, dated the 14th July, 1920, wherein it was held that these Muhammadan *Kahars* of Ambala City were not bound by the strict Muhammadan Law as regards succession and that amongst them a widow did not get a definite share of her husband's property. Counsel for the respondents urges that this finding cannot be questioned without a certificate, but there does not appear to be any necessity for the defendants to question it. Their main point is that the deed of sale of 1904 shows that Shadi intended to confer full proprietary rights upon Mt. Muhammadi. The learned District Judge has not come to any clear finding as to what the intention of Shadi was, but he referred to the case reported as *Rallia Ram* v. *Mussammat Ved Kaur* (1) in which it was held that the word "*mailk*" in a Will does not necessarily imply an absolute estate. Now, as pointed out in *Gurmukh Singh* v. *Makhan Singh* (2), the decision of their Lordships of the Privy Council in the case of *Surajmani* v. *Rabi Nath Ojha* (3) might be taken as rendering obsolete the main principle on which the ruling in *Rallia Ram* v. *Mussammat Ved Kaur* (1) was based. *Surajmani* v. *Rabi Nath Ojha* (3) together with *Gurmukh Singh* v. *Makhan Singh* (2) and *Wazir Devi* v. *Ram Chand* (4) are authority for the proposition that the words "*malik*" and "*malkiyat*" in a formal document imply an absolute estate unless there is something in the context to qualify it, and it was also laid down that deeds in favour of females must be interpreted in the same way as any other deed. Now, in the deed in question in the present suit Shadi clearly states that he has given proprietary possession (*gabza malikana*) to Mt. Muhammadi and also that she has the full power of a proprietor (*malikana ikhtiyar*) to alienate the house sold. Under these circumstances, I think it must be held that Shadi's intention was to confer an absolute estate upon Mt. Muhammadi. She had, therefore, full power to make the gift in favour of Karam Ilahi and the collaterals cannot question it.

I, therefore, accept the appeal and setting aside the order of the lower appellate Court restore that of the first Court dismissing the plaintiff's suit with costs throughout.

Appeal accepted.

(1) (1898) 27 P.R. 1898.
(2) (1911) 61 P.R. 1911=147 P.W.R. 1911=11 I.C. 846.
(3) (1909) 30 All. 84=35 I.A. 17=5 A.L.J. 67=12 C.W.N. 231=18 M.L.J. 7=10 Bom. L.R. 59=7 C.L.J. 139=3 M.L.T. 144, (P.C.).
(4) (1920) 1 Lah. 415=75 P.W.R. 1920=58 I.C. 988.

1924 Lahore 348.

CAMPBELL, J.

Mt. Phillo and others—Petitioners

v.

Gopi and others—Respondents.

Civ. Rev. No. 754 of 1921, decided on 28th July, 1922, from the decree of District Judge, Hoshiarpur, and Kangra District, dated 18th June, 1921.

Civ. Pro. Code, O. 22, r. 4—Death of one of several defendants at the date of suit, in a suit for damages—Suit continues against others.

Liability of wrong-doers in tort is joint and several. Where in a suit for damages it was discovered that one of the several defendants was not alive when the suit was brought, the Court should strike his name out and allow the suit to proceed against the others, but should not dismiss the suit *in toto* [P. 349, C. 1.]

M. C. Mahajan—for Petitioners.

Badruddin Kureshi—for Respondents.

Judgment:—The plaintiffs brought a suit in the Court of the Munsif, Kangra, for damages against several defendants on the allegation that they had stopped the working of a water-mill belonging to the plaintiffs for a considerable period. One of the defendants entered in the plaint was dead before the plaint was filed. On this account the Munsif dismissed the suit *in toto*, and the order was upheld by the learned District Judge for reasons which it is difficult to follow.

The authorities quoted by the learned District Judge are in no way applicable and

it is a trite proposition that the liability of a wrong-doer in tort is joint and several. Counsel for the respondents can show me no other authority for the action of the lower Courts. If one of the several defendants was not alive when the suit was brought, it was perfectly simple to strike his name out and allow the suit to proceed against the others. It would have been quite a different matter if the suit had been filed against a single dead man or against a number of persons bound jointly by an obligation to perform some contract as was the case in *Rao Ghulam Muhammad Khan* v. *Nuhar Ali* (1), a ruling referred to by the learned District Judge.

The Courts below have clearly failed to exercise the jurisdiction which they possessed to try the suit against the other defendants. I accept the petition, set aside the order dismissing the suit and direct that it shall proceed against those defendants (or their representatives) who were alive when it was filed.

Petition accepted.

(1) (1896) 53 P.R. 1896.

1924 Lahore 349.

SCOTT-SMITH, J.

The Firm Jagan Nath Diwan Chand of Gujranwala—Petitioner

v.

The Firm Jagal Nath Moti Lal of Calcutta—Respondent.

Civ. Rev. No. 817 of 1921, decided on 16th June, 1922, from the order of District Judge, Gujranwala, dated 19th July, 1921.

(a) *Civ. Pro. Code, S. 115—Order returning plaint for want of jurisdiction—Order upheld in appeal—Revision ordinarily does not lie.*

Interference in revision is ordinarily inadvisable from an appellate order upholding an order of the trial Court returning plaint for want of jurisdiction and should only be exercised in exceptional cases to remedy an injustice. (77 P R. 1909, *Ref*.) [P. 350, C. 1.]

(b) *Civ. Pro. Code, S. 20—Cause of action for return of price for non-delivery of goods arises where delivery was to take place.*

Plaintiff firm residing at Gujranwala ordered goods from defendant firm residing at Calcutta. Latter firm consigned the goods to itself in Gujranwala and sent the Railway receipt to plaintiff firm per V P.P. for the balance of the price. The plaintiff firm refused the V P P. but sent the balance to the defendant and asked the defendant firm to advise the railway to delivery goods. The goods were lost by the Railway. Plaintiff firm thereupon sued the defendant at Gujranwala for return of the price paid by him. *Held* the goods remained throughout under the control of the defendant and they had to be delivered at Gujranwala. The failure to deliver the goods was a part of the cause of action, and therefore the Gujranwala Court had jurisdiction to entertain the suit. [P. 350, C. 1]

Jagan Nath—for Petitioner.

Amar Nath Chona for *B. N. Kapur*—for Respondent.

Judgment:—The plaintiff-firm residing in Gujranwala arranged with the defendant-firm residing in Calcutta to purchase certain goods and send them to Gujranwala, the plaintiff-firm was to send the money to the defendant-firm in Calcutta. The plaintiff remitted Rs. 800 to the defendant and the latter consigned the goods to itself in Gujranwala sending the Railway receipt by value payable post against a sum of Rs. 314, which was the balance due for the goods purchased. The plaintiff refused to take delivery of the Railway receipt through the value payable post and it was returned to the defendant. The plaintiff then sent the balance of Rs. 314 to the defendant and asked the latter to instruct the Railway Authorities at Gujranwala to deliver the goods to the plaintiff. Correspondence shows that frequent requests were made to the Railway Authorities to deliver the goods but without success and it appears that the goods have been lost. The plaintiff, therefore, sued the defendant for return of Rs. 1,114 remitted to the defendant. The suit was instituted in the Court of a Subordinate Judge at Gujranwala, who held that he had no jurisdiction, no part of the cause of action having arisen at Gujranwala. The lower appellate Court upheld the order in appeal and the plaintiff has, therefore, come to this Court on the Revision Side.

Counsel for the respondent refers to *Chandu Lal* v. *Kokomal* (1), in which it was held that an order of this sort could not be the subject of revision. A different view was taken by a majority of the Judges in a Madras case reported as *Vuppuluri Atchayya* v. *Sri Kanchumarti Venkata Seetarama Chandra Rao* (2), and also in *Ram Labhaya* v. *Bishan Das* (3), and in a single Bench judgment of this Court reported as

(1) (1921) 43 All. 334=19 A.L.J. 110=61 I C. 86.
(2) (1916) 39 Mad. 195=24 M L J. 112=13 M.L.T. 60=18 I.C. 655 (F.B.).
(3) (1909) 77 P.R. 1909=125 P.W.R. 1909=124 P.L.R. 1909=3 I.C. 607.

Durga Parshad-Mutsaddi Lal v. *Rulia Mal-Dogar Mal* (4). In my opinion interference in revision is ordinarily inadvisable in a case of this sort and should only be exercised in exceptional cases to remedy an injustice; see in this connection *Ram Labhaya* v. *Bishan Das* (3). Now, if the plaintiff is by law entitled to institute this case in Gujranwala it would be a grave injustice to him to insist on its trial in Calcutta which would put him to very great expense, merely because the lower Courts have erroneously held that the Gujranwala Court has no jurisdiction. I will, therefore, proceed to dispose of the application on the merits.

Both the Courts below have omitted to notice that the Railway receipt was originally sent by the defendant to the plaintiff in Gujranwala through the medium of value payable post. They have also omitted to notice that the goods were consigned by the defendant-firm to itself in Gujranwala. It is, therefore, clear that the goods at Gujranwala were in possession of the Railway Authorities as agents of the defendant-firm and that the latter still had control over them and that the plaintiff had no control over them. Whatever the original contract may have been it was modified by what subsequently occurred. It does not appear that the parties ever agreed that the value payable post should be used for the purpose of recovering the whole or part of the money due from the plaintiff to the defendant, and this was why the plaintiff did not take delivery of the Railway Receipt upon payment of Rs. 314. Instead of that, the plaintiff sent the money remaining due to the firm in Calcutta and asked that firm to give the necessary directions to the Railway for the goods to be delivered. The goods, therefore, had to be delivered to the plaintiff in Gujranwala, and the non-delivery of the goods is certainly a part of the cause of action. I, therefore, hold that the Gujranwala Courts have jurisdiction to try this case.

I allow the revision and, setting aside the orders of the lower Courts, remand the case to the Subordinate Judge at Gujranwala for disposal in accordance with law. Costs in this Court shall be costs in the case.

Revision allowed.

(4) 1922 Lah. 100=4 L.L.J. 176=29 P.L.R. 1922=65 I.C. 282.

1924 Lahore 350.

SCOTT-SMITH, J.

Abdul Karim and others—Appellants.

v.

Ram Singh and another—Respondents.

Mis. F.A. No. 896 of 1921, decided on 21st June, 1922, from an order of Senior Sub-Judge, Rawalpindi, dated 15th March, 1921.

Civ. Pro Code, S. 151—Applies to restore execution application dismissed for default.

A Court can under S. 151 restore an application for execution after it has been dismissed for default, and should do so if the applicant satisfies the Court that it should exercise its inherent jurisdiction for the ends of justice and no notice is necessary to the opposite party before setting aside the dismissal. (2 Lah. 66, *Foll.*) [P. 351, C. 2.]

Badruddin Kureshi—for Appellants.

M. S. Bhagat—for Respondents.

Judgment:—This is an appeal by a judgment-debtor from an order of the Senior Subordinate Judge, Rawalpindi setting aside an order dismissing an application for execution in default. The order dismissing the application for execution in default was made on the 19th January, 1921, and the application to have that order set aside was made on the 22nd January, the grounds put forward being that the decree-holders' agent was present outside the Court room and that he had gone to answer the calls of nature when the case was called on for hearing.

Mr. Bhagat, on behalf of the respondents, refers to *Bholu* v. *Ram Lal* (1) in which it was held that section 151 of the Code of Civil Procedure, 1908, does not apply to a proceeding for execution. It was also held that in the exercise of its inherent power expressly recognised by section 151 of the Code a Court can restore an application for execution after it has been dismissed for default and should do so if the applicant satisfies the Court that it should exercise its inherent jurisdiction for the ends of justice. Having regard to this authority it is clear that the Senior Subordinate Judge had inherent jurisdiction to restore the application for execution which he had dismissed in default. Mr. Bhagat further contends that an order passed by a Court in exercise of its inherent jurisdiction under section 151 is not

(1) (1921) 2 Lah. 66=60 I.C. 720.

appealable and in support of this proposition he refers to two decisions of the Patna High Court reported as *Sukhdeo Dass* v. *Rito Singh* (2) and *Raghunandan Singh* v. *Jadunandan Singh* (3).

Mr. Kureshi, on behalf of the appellant, urges that the decree-holders' application was one for review and that under Order 47, rule 9, Civil Procedure Code, the Court was bound before granting the application to issue a notice to the opposite party and that as it did not do so its order is liable to be set aside in appeal. In answer to this Mr. Bhagat refers to Order 47, rule 7, (1) which lays down that an order of the Court granting an application may be objected to on certain grounds specified and on those grounds only. He says that it cannot be said that the application for review was in contravention of the provisions of rule 4, merely because the Court omitted to issue notice to the opposite party. He also refers to *Janaki Nath Hore* v. *Prabhasini Dasi* (4) in which a Division Bench held that where an appeal was summarily dismissed by a Division Bench of the Court, and such order was ultimately set aside on review by the said Bench on an *ex parte* application without notice to the respondents, the last order was valid even in the absence of such notice. The *ratio decidendi* was that as the appeal was dismissed summarily by an *ex parte* order there was really no opposite party to whom it was necessary to give notice, within the meaning of Order 47, rule 4 (2), proviso (*a*). At the time when the order of dismissal in default was made on the 19th January, 1921, efforts were being made to serve a warrant on the judgment-debtor but up to that time the warrants had issued without success. The hearing of the case was going on in the absence of the judgment-debtor and I think it cannot be said, following the reasoning of the Calcutta High Court in the case above referred to, that there was any opposite party to whom it was necessary to issue the notice. In my opinion then it cannot be said that the order of the Senior Subordinate Judge appealed against was passed without jurisdiction. It should also be noted, as urged by Mr. Bhaghat, that neither in the application nor in the order was it stated under what provisions of law the application was made or the order passed. The order could certainly have been passed under section 151, Civil Procedure Code, and I am not prepared to say that, under the circumstances of the case, there would have been any necessity to issue notice to the judgment-debtor beforehand. Mr. Kureshi is unable to show any substantial reason why the order of dismissal in default should not have been set aside by the Court either in review or in exercise of its inherent jurisdiction.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(2) (1917) 1 Pat. L.W. 551=2 Pat. L.J. 361=39 I.C. 768.

(3) (1918) 3 Pat. L.J. 253=4 Pat. L.W. 450=43 I.C. 959.

(4) (1916) 43 Cal. 178=19 C.W.N. 1077=22 C.L.J. 99=30 I.C. 898.

1924 Lahore 351.

ABDUL QADIR, J.

Lazarus Megh Nath—Appellant

v.

Emperor.

Cr. Rev. No. 1019 of 1921, decided on 15th July, 1922, from the Sessions Judge, Ferozepore, with his letter No. 23 of 21st June, 1921.

Crim Pro Code, S. 183—Theft from running train—Any Court through whose jurisdiction the train passed during its journey can try.

Where a theft is committed from a running train, any Court through whose jurisdiction the train passes during the journey may try the offence, no matter in whose jurisdiction the offence was committed. [P. 352, C. 1.]

D. R. Sawheny—for Petitioner.

D. C. Ralli—for Respondent.

Judgment:—The petitioner in this case, Mr. Lazarus, was a Guard on the North-Western Railway. He was with the train coming from Delhi to Ferozepore on the 22nd of December, 1920, when some hats were stolen from a hat-box, belonging to a passenger, which was deposited in the brakevan. He was suspected of having stolen them and later on, after he was accused of the theft, he produced four hats from two different places. He was convicted on the 13th June, 1921, by a Magistrate, First Class, at Ferozepore, The theft was said to have occurred somewhere between Delhi and Bhatinda. As a

considerable part of that line passes through the territory of Patiala State, a doubt was felt, on his appeal being filed in the Sessions Court at Ferozepore, whether the Sessions Judge of Ferozepore had jurisdiction to try that appeal or should it have gone to the Political Agent, Phulkian State, who has the powers of a Sessions Judge for hearing appeals in criminal cases with regard to the offences committed in any part of the State territory (*vide* Notifications Nos. 515 and 516-I. B., dated the 17th March, 1913).

The Sessions Judge referred this matter to the High Court. On the 9th December, 1921, Mr. Justice Abdul Raoof passed an order, calling upon the learned Sessions Judge to enquire and let this Court know whether during its journey from Delhi to Bhatinda the Railway in question at any time passed through the Ferozepore District. A report, dated 16th May, 1922, has now been received, showing that the main line between Delhi and Bhatinda does pass, for about two miles, through a portion of the Moga Tahsil of the Ferozepore District. On this report it is clear that the appeal can be heard by the learned Sessions Judge of Ferozepore, under the provisions of section 183, Criminal Procedure Code, as the offence is said to have been committed during a journey and the train in question passed through Ferozepore territory during a part of that journey. Thus, the Court at Ferozepore has as much jurisdiction as the Court of the Political Agent, no matter at what point in the course of that journey the said offence was committed.

It is directed, therefore, that the appeal may be heard and decided according to law by the Sessions Judge of Ferozepore, to whom the records will be returned.

Ordered accordingly.

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* 1924 Lahore 352.

HARRISON, J.

Sher Muhammad—Appellant

v.

Muhammad Khan and another—Respondents.

S. A. No. 1625 of 1921, decided on 26th June, 1922, from the decree of District Judge, Gujranwala, dated 1st April, 1921.

Civ. Pro. Code, O. 41, r. 1—Decree not prepared by trial Court—Appeal heard and decided—Decision is nullity.

Plaintiff's suit was dismissed by the trial Court but no decree was prepared. Plaintiff appealed to the District Judge who accepted the appeal and granted the plaintiff a decree. *Held*, that the proper course for the District Judge to have adopted was to grant an adjournment to enable the plaintiff to get a decree prepared and therefore the decree granted by him was a nullity. (66 P. R. 1919; 19 P. R. 1919, *Foll.*)

Zafrulla Khan—for Appellant.

Ferozuddin Ahmed—for Respondents.

Judgment:—This case was decided by the Munsif in favour of defendants and the suit was dismissed; but no decree was prepared. An appeal was presented from the judgment to the District Judge and was accepted by him and the plaintiff was given a decree. The defendant now appeals urging in the first place that there was no decree in the First Court, and therefore, no appeal before the District Judge. Counsel for the respondent contends that the District Judge was fully competent to try the case himself and that his hearing of what he believed to be an appeal and his decision thereon should be taken as tantamount to the judgment and decree of a trial Court and that the present appeal now before me should be treated as a first appeal. This is, I think, an impossible way of treating the case, for the District Judge was certainly under the impression that he was hearing an appeal and his decree is the decree of an appellate Court drawn up in that form. As laid down in *Mangal Singh* v. *Hirda Ram* (1) and *Manohar Lal* v. *Nanak Chand* (2) the proper course for the lower appellate Court was to give an adjournment to enable the appellant to get a decree sheet prepared.

I, therefore, accepted this appeal so far as to return the record to the trial Court and direct that a decree be prepared in accordance with the judgment. It will then be for the plaintiff to prefer an appeal with a copy of the decree to the District Judge, and the judgment and the decree already passed by him must be treated as a nullity.

Appeal allowed.

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(1) (1919) 19 P. R. 1919=49 I.C. 673.
(2) (1919) 66 P. R. 1919=51 P.L.R. 1920=73 P.W.R. 1919=52 I.C. 479.

✱ 1924 LAHORE 353

SHADI LAL, C. J.

Abdul Haq—Petitioner.

v.

Emperor—Opposite Party.

Cr. Rev. No. 1574 of 1921, Decided on 11th March 1922, from Addl. D. Magistrate, Delhi, D/- 3rd December 1921.

(a) Criminal P. Code, Ss. 179 and 181—Goods held in trust at Calcutta fraudulently sold in Calcutta—Calcutta Courts alone have jurisdiction—Penal Code, S. 406.

The accused who was carrying on business at Calcutta ordered certain goods through complainant, a commission agent at Delhi. The goods were to be delivered at Calcutta and payment was to be made at Delhi. The goods arrived in Calcutta and the accused was allowed to take delivery on condition that he would hold them in trust till payment but he disposed of them before making the payment.

Held: that the offence was complete as soon as he misappropriated the goods by selling them without authority at Calcutta. And the fact that he did not first pay at Delhi as agreed upon did not affect the case. The loss at Delhi was not a "consequence" such as is referred to in S. 179 of the Code. 7 P. R. 1910 Cr.; 34 A. 487 Ref. [P 354 C 1]

✱ *(b) Penal Code, S. 406—Loss is not an ingredient of an offence under S. 406—Penal Code, S. 24.*

Loss is not an ingredient of the offence under S. 406 as the intention to cause wrongful loss by itself amounts to dishonesty. 28 P. R. 1916 Cr. Ref. [P 354 C 1]

Nur Ahmad—for Petitioner.

Sardha Ram—for Complainant.

Facts.—Zamirul Haq was a commission agent having Delhi for his place of business. Abdul Haq had firms in Sadar Bazar and Fatehpuri, Delhi and Calcutta.

Abdul Haq on the 29th October sent an indent for supply of four cases of soap to Zamirul Haq. The goods were to be supplied at Calcutta but the payment was to be made at Delhi.

"Two drafts for £ 113 and odd were sent to Calcutta with instructions to the National Bank of India, Ltd., to deliver relative documents to S. Abdul Haq against payment.

But an arrangement was come to between Zamirul Haq and Abdul Haq whereby the drafts were converted into D. A. (*i.e.*, the documents to be delivered against acceptance), on the condition that the goods were to be kept by the accused in trust till the amounts of the bills were paid to the Bank or the complainant. In pursuance of this arrangement the complainant wrote a letter to the National Bank of India, Delhi, advising them of the fact.

"The accused signified his acceptance of the drafts to the Bank and received the documents but after taking delivery of the goods disposed of them at Calcutta before making payment. A complaint was filed by Zamirul Haq under S. 406 Penal Code against Abdul Haq. The accused admitted the facts and therefore the question was whether Delhi Courts had jurisdiction to try the case of the alleged breach of trust on the part o accused, the goods having been receiv ed and misappropriated by him a Calcutta.

The Trial Magistrate held that the consequence was that the complainant lost his lien on the goods and this ensued at Delhi and S. 179, Criminal Prodedure Code applied. He therefore held that the trial could be heid at Delhi. Abdul Haq filed a petition for the revision of this order.

After stating facts the report of the Addl. Dist. Magistrate continued:—"I have been referred to the following rulings:—

Gokal Chand v. *Phul Chand* (1) and *Ganeshi Lal* v. *Nand Kishore* (2) and *Sheo Shankar* v. *Mohan Sarup* (3). The first two rulings support the petition and the third referred to by the respondent, is clearly distinguishable.

In the Punjab ruling it was stated that "the offence was complete as soon as the money had been misappropriated and the fact that the money should have been and was not sent to Delhi did not give the Delhi Court jurisdiction, the accused having put the money into their own pocket at Calcutta." In the present case the petitioner received goods at Calcutta

(1) [1910] 7 P.L.R. Cr. 1910—7 P.W.R. Cr. 1910—11 Cr.L.J. 253—172 P.L.R. 1910—5 I.C. 830.
(2) [1912] 34 All. 487—10 A.L.J. 45—13 Cr.L.J. 479—15 I.C. 319.
(3) [1921] 19 A.L.J. 69—22 Cr.L.J. 308—60 I.C. 996.

and he was to hold them in trust until he made payment. He disposed of them at Calcutta without making payment. The alleged offence was therefore complete as soon as he misappropriated the goods by selling them without authority, at Calcutta. The fact that he did not first pay at Delhi as agreed upon does not affect the case. The loss at Delhi such as it is, is not a "consequence" such as is referred to in S. 179 of the Criminal Procedure Code. Indeed loss is not an ingredient of the offence as the intention to cause wrongful loss by itself amounts to dishonesty (S. 24 Indian Penal Code). A more recent ruling *Kali Dass* v. *Karam Chand* (4) also supports this view.

I recommend that the order be set aside on the ground that only the Calcutta Courts have jurisdiction and that petitioner accused be discharged."

Order.—Upon the facts set out by the Additional District Magistrate, there can be no doubt that the alleged offence, whether one of criminal breach of the trust or of cheating, was committed at Calcutta; and I agree with him that the Delhi Courts have no jurisdiction to entertain the complaint. I accordingly set aside the order of the Trial Magistrate.

Order set aside.

(4) [1916] 28 P.R.Cr. 1916 — 18 Cr.L.J. 353—38 I.C. 737.

1924 LAHORE 354

ABDUL RAOOF, J.

Uttam Chand and others—Appellants.

v.

Md. Bakhsh and others-Respondents.

S. A. No. 1535 of 1921, Decided on 30th June 1922, from the decree of D. J. Hoshiarpur, D/- 27th April 1921.

C. P. Code, O .41 R. 25—Lower Appellate Court remitting the issues, remitted to it, to the Subordinate Court—Procedure is wrong.

The High Court remitted certain issues to the Lower Appellate Court under O. 41 R. 25 for trial. That Court in its turn remitted those issues to the Munsif and directed him to record evidence and forward it with his opinion. The Munsif in accordance with the direction of the District Judge recorded the evidence of certain witnesses and came to certain findings upon that evidence. The District Judge however after receipt of the findings went into the evidence himself and came to a different conclusion from that arrived at by the Munsif.

Held: that the lower Appellate Court had no power to remit the issues to the Court Subordinate to it for trial and therefore all the proceedings were *ultra vires*. 105 P. R. 1013 Foll. 14 A. 23 Ref. [P 354 C 2 P 355 C 1]

Fakir Chand—for Appellants.

Shujauddin—for Respondents.

Order.—By my order dated the 8th December 1921, I remitted certain issues to the lower Appellate Court under O. 41, R. 25, Civil Procedure Code, for trial. That Court in its turn remitted those issues to the Court of a Munsiff, First Class, and directed it to record evidence and forward it with its opinion. The Court of the Munsiff in accordance with the direction of the learned District Judge recorded the evidence of certain witnesses and came to certain findings upon that evidence. The learned District Judge, however, after receipt of the findings went into the evidence himself and came to a different conclusion from that arrived at by the learned Munsiff. On receipt of this finding certain objections were filed on behalf of the respondent after the period fixed by me.

On the case coming up for hearing before me Dr. Shuja-ud-din for the plaintiff-respondents raised the following contention, namely, that the lower appellate Court had no power to delegate its duties to the Munsiff and that, therefore, the Munsiff had no authority to record the additional evidence in the case, or express any opinion upon it. In support of this contention the learned Counsel has relied upon *Lahore Bank, Limited* v. *Lakhi Ram* (1) and *Sabri* v. *Ganeshi* (2). In both these decided cases the findings recorded by the First Court were accepted by the lower Appellate Court, and it was held by the High Court that all the proceedings were

(1) [1913] 242 P.L.R. 1913—144 and 215 P.W.R. 1913—105 P.R. 1913—19 I.C. 970.

(2) [1892] 14 All. 23—(1891) A.W.N. 205.

ultra vires. In this case there is this distinction that the lower Appellate Court has not accepted the opinion of the First Court, but in principle it is not possible to distinguish the case from the reported cases relied upon. If the lower Appellate Court had no power to remit the issues to the Court subordinate to it for trial, all the proceedings must be held to be *ultra vires.* The objection taken is highly technical, but being bound by the Division Bench ruling, I must give effect to it. I accordingly remit the issues again to the lower Appellate Court for trial according to law.

Case remanded.

1924 LAHORE 355

ABDUL QADIR, J.

Karm Chand—Petitioner.

v

Emperor—Respondent.

Cr. Rev. P. No. 57 of 1922, Decided on 15th March 1922, from an order of S. J. Gurdaspur, D/-6th January 1922.

Penal Code, S. 21 (ix)—Sub-Inspector of Police belonging to Finger Print Bureau is a Public servant.

A Sub Inspector of Police belonging to the Finger Print Bureau and in the service and pay of Government, is a public servant within S. 21 (ix) even if he is not performing the ordinary duties of a police officer. It is a part of the duties of such officer to give evidence in Court in relation to an offence under Police Finger Bureau Manual part II Cl. (b) Para 3.

(P. 356 C. 1,2)

Tek Chand—for Petitioner.

Niaz Muhammad for *Govt. Advocate*—for Respondent.

Judgment.—One Karm Chand was convicted of an offence under Ss. 161/116, Indian Penal Code, and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 200 or in default, to further rigorous imprisonment for one month. He appealed to the Sessions Judge against his conviction and sentence, but his appeal was rejected. He has preferred an application for revision to this Court against the order of the Sessions Judge, and I have heard Mr. Tek Chand on his behalf and Mr. Niaz Muhammad for the Crown.

This case arises out of an another criminal case, in which a friend of Karm Chand, named Faqir Chand, was being prosecuted under S. 471, Indian Penal Code, on the allegation that a *bahi* entry on the basis of which he had brought a civil suit did not bear the thumb impression of the defendant and was a forged document. Sub-Inspector Gurdit Singh, an expert from the Finger Print Bureau, was summoned to give evidence about the thumb-impression in dispute. Gurdit Singh, when he came to give evidence in Court, produced Rs. 62 before the Magistrate before he started giving his evidence and stated that Karm Chand had offered him that money to give evidence favourable to the accused. After that he made his statement on the merits, which was not favourable to Faqir Chand. On the strength of what Gurdit Singh said the prosecution of Karm Chand was ordered for having abetted an offence under S. 161, Indian Penal Code by offering a bribe to a public servant with the object that he should show favour to a party in the discharge of his official duties.

It is contended by Mr. Tek Chand that S. 161 read with S. 116, Indian Penal Code, does not apply to this case, because Gurdit Singh was not a public servant according to the definition of the term given in S. 21, Indian Penal Code, and, that even if he was a public servant, there is nothing to show that giving evidence in Court was a part of his duties as such public servant. Apart from this legal objection, Mr. Tek Chand urges, on facts, that Gurdit Singh does not seem to have correctly stated the facts so far as the passing of the money to him is concerned. He wanted to make out that he was an innocent person on whom this bribe was somehow or other forced by Karm Chand, but it is contended that there are intrinsic circumstances showing that what probably happened was that he himself solicited the bribe and by bringing pressure on the friends of the accused person in that case, he got this money out of them. It is added that when he found that the thumb-impression in question in that case did not allow his giving evidence

in favour of Faqir Chand, he made up his mind to try to get a good name for himself by producing the money in Court. One of the intrinsic circumstances to which he refers is the admission made by Gurdit Singh that at first only Rs. 20 were offered to him. Mr. Tek Chand wants me to draw an inference from that that the fact that eventually the money given, as a bribe, was raised to Rs. 60, or Rs. 62 indicates that the party giving the bribe must have been made to make higher offers on account of Gurdit Singh's unwillingness to do anything for a smaller sum.

It seems there is something in this last theory but I am not prepared to hold that this represents the truth any more than the version of the affairs given by Gurdit Singh. I think that some of the circumstances under which this money passed into the hands of Gurdit Singh have been concealed by him and it is quite possible that Karm Chand may not be so much to blame in the matter as Gurdit Singh has tried to make out or he may not be the sole person responsible for negotiations which terminated in the passing of the bribe to Gurdit Singh. I would, therefore, treat this aspect of the case as a circumstance which extenuates, to some extent, the guilt of the petitioner.

As regards the point of law raised on behalf of the petitioner, I think on that point his petition must fail. I have no hesitation in agreeing with the learned Sessions Judge that Gurdit Singh is a public servant, being in the service and pay of Government, under clause (*ix*) of S. 21, Indian Penal Code, even if he is not performing the ordinary duties of a Police Officer. The learned Sessions Judge did express some doubt as to the question whether the giving of evidence was a part of the duties of an expert from the Finger Print Bureau at Phillaur, but before me that doubt is set at rest by Mr. Niaz Muhammad referring to the Police Finger Print Bureau Manual page 38, where it is clearly mentioned under part II clause (*b*) to paragraph 3, that it is one of the duties of a member of the staff of experts maintained at the Bureau "to appear in Courts and give expert evidence in criminal and civil cases." In face of that rule there is no doubt at all as to the applicability of S. 161/116, Indian Penal Code, to the case before me.

I, therefore, maintain the conviction of Karm Chand under the above sections, but in view of the remarks made above as to certain extenuating circumstances I reduce his sentence to the imprisonment already undergone by him, but the fine of Rs. 200, imposed on him, will stand.

Sentence reduced.

✱ 1924 LAHORE 356

MARTINEAU, J.

Kanhaiya Lal—Petitioner.

v.

Roshan Mal—Respondent.

Cr. Rev. P. No. 1475 of 1921, Decided on 10th March 1922, from the order of D. J. Ludhiana, D/- 17th Dec. 1920.

✱ *Cr. P. Code, S. 195—Munsif is subordinate to Senior Sub-Judge and not Dt. Judge.*

For the purposes of S. 195, a Munsif is subordinate only to the Senior Subordinate Judge and not to the District Judge who has therefore no jurisdiction to grant sanction for a prosecution for offences committed in the Munsif's Court. [P. 356 C. 2]

Balwant Rai—for Petitioner.

Kanwar Narain—for Respondent.

Judgment.—The District Judge was not competent to grant sanction for a prosecution for offences under Ss. 193 and 471 Indian Penal Code, committed in the Court of the Munsif as the latter is subordinate for the purposes of S. 195 Criminal Procedure Code only to the Senior Subordinate Judge: *Dina Nath* v. *Muhammad Abdulla* (1). I, therefore, accept this application and revoke the sanction.

Application accepted.

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(1) [1921] 2 Lah. 57—22 Cr. L. J. 325—61 I.C. 53.

1924 LAHORE 357

LE ROSSIGNOL, J.

Tota Singh—Appellant.

v.

Emperor—Opposite Party.

Cr. A. No. 502 of 1922, Decided on 25th October 1922, from an order of Spl. M., Punjab and N. W. F. Province, D/- 18th/19th May 1922.

Evidence Act, S. 133—Approver's detention in Police lock-up is immaterial—His evidence should be corroborated in material particulars.

That the evidence of an approver, if believed is sufficient foundation whereon to repose a conviction is quite clear, but in practice the Courts *ex majori cautela* insist upon corroboration of the approver's statement in material particulars. Where the statement of the approvers that there was a murderous conspiracy to which the accused was a party was supported by the evidence proving that he did aid the parties to that conspiracy to obtain murderous weapons.

Held: that there was sufficient corroboration. The facts that the approvers did not make statements as soon as they were arrested and that they were kept in the Police lock-up during the enquiry were immaterial.

[358 C 2 P 359 C 1]

R. N. Sahai and *J. N. Mackay*—for Appellant.

Dalip Singh for *Govt. Advocate*—for Opposite Party.

Judgment.—On the 23rd May 1921 four Sikhs came to the bungalow where Mr Isemonger and Mr. Bowring, Police officers of Lahore were residing together and enquired for Mr. Bowring. On receiving the reply that Mr. Bowring was away and would not return that day the Sikhs went off, but their enquiries had elicited suspicion and they were followed to the Railway Station where three of them were found sitting on the platform. Two of them were arrested and the third disappeared in the confusion. The present case arises from this arrest and from the statements which they made to the Police. As the result of the investigations made by the Police upon their statements eleven persons namely Tota Singh, Tara Singh, Bala Singh, Amar Singh, Sepoy, Prem Singh, Narain Singh, Mota Singh, Jagat Singh alias Bijla Singh, Sarjan Singh alias Gurbakhsh Singh, Amar Singh, Delhiwala and Kishen Singh (of these the last five were absconding) were sent up for trial. Of the six who were present at the trial Amar Singh, Sepoy, Prem Singh and Narain Singh were either acquitted or discharged whilst Tota Singh, Bala Singh and Tara Singh were found guilty on two charges and were sentenced under each charge to five years' rigorous imprisonment including three months' solitary confinement, but it was directed that the sentences should run concurrently.

Tara singh and Bala Singh have acquiesced in their convictions and have not appealed, but Tota Singh has appealed to this Court against his convictions and sentences. He has been convicted of conspiring to murder Bedi Kartar Singh, Sardar Sunder Singh, Majithia, Mahant Basadt Das, Mahant Devi Das of Nankana, Mr. King and Mr. Bowring, under Ss. 120 B and 302. Indian Penal Code, and also of conspiracy to import and possess secretly arms in contravention of S. 19 and 20 of the Arms Act.

The main incidents which the learned Magistrate has found proved and on which he bases his convictions are briefly that on the 9th and 10th of April 1921, at Amritsar a secret meeting of Akalis was held at which the appellant Tota Singh was present and that there it was resolved that the abovementioned notables and officers should be murdered, that Ganga Singh and Bela Singh should be the assassins and that Tota Singh was to collect arms from the Frontier, and that in furtherance of this conspircy between April 22nd and April 29th the appellant Tota Singh did take part and assist in the collection at Peshawar of two bombs, some cartridges and a revolver.

The chief evidence in the case is furnished by no less than six approvers, namely, Chattar Singh, Gurbakhsh Singh, Ganda Singh, Bur Singh, Sham Singh and Sarmukh Singh, and the line of attack adopted by the learned Counsel for the appellant has been to argue that, first of all, the story told by the approvers bears inherent marks of untruth, secondly, the approver's evidence is not corroborated in material particulars, thirdly, where there is evidence

of corroboration, that evidence is unreliable. So far as the case of the appellant is concerned the chief witne ses to be considered are Chattar Singh, Gurbakhsh Singh and Ganda Singh approvers, and witnesses No. 33 Jumman, No 34 Rashid and No. 68 Jaman Singh. From the learned Magistrate's judgment it is difficult to determine whether he finds that there is any corroborative evidence of the approver Chattar Singh's story that the appellants were present at the secret meeting of April 9th and 10th. The Magistrate finds that Tota Singh's attempt to prove an *alibi* on those dates is a failure and I agree with him in his appreciation of the value of the defence evidence, but it remains to determine whether there is any evidence directly corroborative of Chattar Singh's statement that Tota Singh was a party to the conspiracy of the 9th and 10th April, and Counsel for the Crown admits that apart from the evidence of Ganda Singh there is no corroboration. Ganda Singh, moreover, is himself an approver and from his account it appears that he was introduced into the revolutionary circle at Amritsar only on the 20th April, so that he could not have been present at a meeting held on the 9th or 10th of April. Admittedly there is some confusion as to dates, and Ganda Singh cannot be referring to the same meeting as Chattar Singh for whilst Chattar Singh states that it was a secret meeting held behind closed doors Ganda Singh says it was a meeting held in the open on grass at *Guru Ka Bagh*. I am thus unable to find that there is any evidence corroborating the approver's statement that the appellant was present at the meetings of 9th and 10th April at Amritsar.

That Chattar Singh came to Pesha war at the end of April and applied to the appellant for aid in the purchase of arms and that the appellants aided him in purchasing arms and ammunition and bombs from across the frontier, I hold to be established by the evidence of Gurbakhsh Singh, approver, Jumman witness No. 33 who is a servant of the appellant, and Jaman Singh witness No. 68, who is a relative of Gurbakhsh Singh. There seems to be no reason whatever for discarding the evidence of these witnesses, especially in the absence of any reasonable explanation from the appellant why such a serious charge should be levelled against a totally innocent person. That evidence shows that not only revolvers and cartridges were purchased but also bombs. That the evidence of an approver, if believed, is sufficient foundation whereon to repose a conviction is quite clear, but in practice the Court *ex majori cautela* insists upon corroboration of the approver's statement in material particulars. In this case, although I can find no direct corroboration of Tota Singh's presence at the secret meeting at Amritsar on the 9th or 10th April, there is evidence which I hold to be trustworthy, that within a short period of that meeting he aided and abetted Chattar Singh in the collection of murderous arms and weapons; and bearing in mind the practical impossibility of obtaining corroborative evidence relating to the events of the 9th and 10th April, that appellant subsequently aided to carry out the object of the conspiracy is all the corroborative evidence that can be expected. If a conspiracy such as is described by Chattar Singh did take place, it is very incredible that the appellant, a fanatic who was wounded at Tarn Taran and subsequently became a Secretary or Assistant Secretary of the *Akali Dal* and spent a good deal of his time at Amritsar, should not have been aware of it.

Learned Counsel for the appellant has animadverted upon the facts that the approvers did not make statements as soon as they were arrested, that they were kept not in judicial but in, the Police lock-up during the enquiry, and that many other persons were arrested during the enquiry who were not sent up for trial. But there are circumstances which are common to all cases in which the enquiry is intricate and lengthy and it is not to be expected that an approver will come forward with his story as soon as he was placed under arrest. It is inevitable in cases such as this in

which the evidence covers many incidents spread over a considerable space of time and happening in different localities that the evidence is somewhat confused but the facts on which the appellant's conviction is upheld are few in number and free from confusion. The statement of the approvers that there was a murderous conspiracy to which Tota Singh was a party is supported by the fact that there is evidence proving that Tota Singh did aid the parties to that conspiracy to obtain murderous weapons.

For these reasons the conviction must be upheld and I dismiss the appeal.

Appeal dismissed.

✱ 1924 LAHORE 359

BROADWAY, J.

Khan Muhammad—Appellant.

v.

Ahman and others—Respondents.

Mis. S. A. No. No 876 of 1922, Decided on 1st December 1922, from an order of A. D. J. Jhelum, D/–16th February 1922.

✱ (a) *C. P. Code, S. 151 and O. 20 R. 14—Failure to deposit even Costs in time cannot be excused.*

Where a preemptor was directed to pay into Court preemption money and costs in a certain time and he paid the money but failed to pay costs.

Held: that the mistake cannot be excused. [P. 359 C. 2]

(b) *C. P. Code, S. 148— Does not apply to decree in pre-emption suits.*

S. 148 does not apply to decrees in pre-emption suits. [P. 359 C. 2]

Nanak Chand—for Appellant.

Jalaluddin—for Respondents.

Judgment.—In a pre-emption decree, passed on the 31st May 1920, it was ordered that the pre-emptor should pay into Court a sum of Rs. 1,500 and costs within three Months from the date of the decree. The pre-emptor had already deposited Rs. 300 in Court and within the prescribed time he paid in the balance of Rs. 1,200 but omitted to file the costs. The vendees thereupon urged that the suit should be dismissed. The Court of first instance gave effect to this plea and against this the preemptor preferred an appeal to the District Judge who found that the decree was in no way ambiguous and clearly required the preemptor to deposit the costs as well as the preemption money within the specified period of three months. He, however, came to the conclusion that the *parcha* given to the preemptor was a little misleading and, acting under S. 151, Civil Procedure Code, extended the time for payment of the costs. Against this order the vendee has come up to this Court in second appeal through Mr. Nanak Chand. The respondents have been represented by Mr. Jalaluddin.

Reliance is placed on *Kanhaya Lal* v. *Mohammad Shafi Khan* (1) as giving the Court power to extend time. That case, however, is clearly distinguishable, for there the decree, which was passed under O. 20, r. 14, Civil Procedure Code did not include the costs as part of the money to be paid in by the date fixed. A reference to the *parcha* said to have been given to the appellant is not very clear. No *parcha* was produced in the Court of first instance and the grounds of appeal contained no reference to the existence of such a document. As pointed out by Mr. Nanak Chand, such a piece of paper is obtainable at any time without any serious difficulty. If, as a matter of fact, the appellant had been misled by any such *parcha* it is this document that would have been the basis of his claim for extension of time. As pointed out in *Kanhaya Lal* v. *Mohammad Shafii Khan* (1) it is the duty of the decree-holder in a pre-emption suit to take all precautions and make sure that the decree passed in his favour is strictly complied with. As pointed out by the District Judge, the decree is perfectly clear and I am unable to see that any case has been made out for the extension of the time under S. 151 of the Civil Procedure Code. S. 148 does not seem to apply and, according to *Suranjan*

(1) [1913] 3 P. W. R. 1913—141 P. L. R. 1913—18 I. C. 600.

Singh v. *Rambahal Lal* (2), it is not meant for preemption suits.

I accordingly accept this appeal and, setting aside the decree of the lower Appellate Court, restore the order of the Court of first instance with costs throughout.

Appeal accepted.

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(2) [1913] 35 All. 582—11 A. L. J. 950—21 I. C. 585.

✱ 1924 LAHORE 360

SCOTT-SMITH, J.

Mehr Chand and another—Appellants.

v.

Ram Lal and another—Respondents.

Mis. F. A No. 1996 of 1922, decided on 17th February 1923, from an order of Senior Sub. J. Gurgaon, D/-10th, July 1922.

✱ (a) *Civil Procedure Code, O. 21 R. 37 and Ss. 47, 96 and 104 (1) (h)—Order issuing warrant for arrest of judgment-debtor is appealable.*

An order issuing a warrant for the arrest of a judg nent-debtor in execution of a decree, falls under S. 47 and is appealable as a decre under S. 96 though not under S. 104 (1) (h)

[P 360 C 2]

(b) *Civil P. Code, O. 21. R, 37—Filing of appeal from the decree is no bar to arrest.*

Where the execution of the decree has not been stayed, the mere fact that an appeal is pending is no reason for not enforcing execution by arrest of the judgment-debtor.

[P 360 C 2]

Kanwar Narain—for Appellants.

Nanwa Mal—for Respondents.

Judgment.—This is an appeal by the judgment debtors, Mehr Chand and Hukam Chand against an order of the Subordinate Judge, First Class issuing warrants for their arrest in execution of a decree. Lala Nanwa Mal raised a preliminary objection on behalf of the respondents to the effect that no appeal lay and referred to section 104 (1) (h) of the Civil Procedure Code which allows an appeal from an order under any of the provisions of the Code of Civil Procedure imposing a fine or directing the arrest or detention of any person except where such arrest or detention is in execution of a decree. Mr. Kanwar Narain urges that the order of the lower Court certainly is not appealable as an order under S. 104 but that it is appealable as a decree under S. 96 of the Code of Civil Procedure and that it was an order passed under S. 47. In my opinion this contention is correct as was held in *Ardeshirji Framji* v. *Kalyan Das* (1).

As regards Mehr Chand appellant it is admitted that his father Mitter Sen is one of the judgment debtors. He is the manager of the family to which his son belongs and the Court below has directed a warrant of attachment of moveable and immoveable property to issue against the other judgment debtors including Mitter Sen. There does not seem to be any reason why Mehr Chand should be arrested at present at all events until it is seen what the result of the attachment of the property belonging to the family is.

As regards Hukam Chand no such reason for not issuing a warrant exists and the only point urged in the grounds of appeal is that as an appeal is pending from the decree sought to be executed a warrant of arrest should not have issued. The execution of the decree however has not been stayed and the mere fact that an appeal is pending is no reason for not enforcing execution by arrest of the judgment debtor. When Hukam Chand appears, before the Court he will have an opportunity of showing cause why he should not be confined in the Civil prison and if he is not satisfied with the order that is passed he will be at liberty to appeal from it.

I accept the present appeal so far as Mehr Chand is concerned and set aside the warrant issued against him. As far as Hukam Chand is concerned the appeal is dismissed.

Appeal partly accepted.

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(1) [1909] 32 All. 3—6 A. L. J. 912—3 I. C. 46.

1924 LAHORE 361

(FULL BENCH)

BROADWAY, HARRISON, AND MOTI SAGAR, JJ.

The Notified Area Committee, Una, through its Secretary—Defendant—Petitioner.

v

Amar Singh and others—Plaintiffs—Respondents.

Civ. Rev. No. 489 of 1921, Decided on 9th May 1923, from the decree of Munsif, with powers of a Judge, Sm. C. Court, Una, Hoshiarpur, D/-12th March, 1921.

Punjab Municipal Act, Ss. 242 and 61 (b)—Powers of Local Government.

The powers conferred by S. 242 are limited to the imposition of taxes described in S. 61 (b). [P 361 C 2]

Madan Gopal for *Fakir Chand*—for Petitioner.

H. Jagan Nath—for Respondents.

Harrison, J.—The question referred for decision is whether the Local Government has power under S. 242 (1) (a) of the Punjab Municipal Act to impose in a notified area those taxes, which a Municipal Committee can only impose with the previous sanction of the Governor General in Council or whether its powers are restricted to the imposition of the taxes detailed in S. 61 (B) of the Act, for which only the previous sanction of the Local Government is required. It is contended that inasmuch as S. 242 is silent as to the question of sanction the Local Government has under the Act taken upon itself the right reserved to the Governor General in Council under S. 61, that the fact that the section does not recite the substitution of the Local Government for the Governor-General in Council in so many words is immaterial inasmuch as the Act was assented to, and that if the only possible construction of the words used be that the necessity of obtaining the previous sanction of the Governor-General in Council does not exist in notified areas that meaning must be given effect to. It appears to me that there is no force whatever in this argument and that the confusion, if any, is due to the failure to realise that the procedure in introducing taxation in Municipalities falls under two distinct heads or rather is divided into two consecutive chapters. In the first place the sanction of the necessary authority has to be obtained and, until this has been done, the Municipal Committee does not function as an authority imposing taxation. It doubtless has to correspond with the sanctioning authority and to observe certain necessary preliminaries with a view to obtaining the sanction. When and if the sanction is obtained then, and not before, has a Municipal Committee any power to act under S. 61. It then imposes the tax. In notified areas this latter action is performed by the Local Government and not by any Committee but the fact that Local Government is substituted for the Committee in no way alters the procedure. The material with which the imposing authority deals is the contemplated tax, as sanctioned, and the authorisation of the Local Government in S. 242 to perform the functions of the Committee in this respect is clearly limited to the same field. It imposes what has been sanctioned. The fact that in a certain large class of taxes the Local Government is itself the sanctioning authority does not affect the position It can of course at the same time sanction and impose a tax or it can even take for granted its own sanction, but the taxes, for the imposition of which the sanction of the Governor-General in Council is an indispensable preliminary condition, is still sacred, and, until and unless that sanction has been obtained, the Local Government is powerless. The answer, therefore, to the question is that the powers conferred by S. 242 are limited to the imposition of taxes described in S. 61(B).

Broadway, J.—I agree in the proposed answer to the Reference.

Moti Sagar, J.—I concur.

✱ 1924 LAHORE 362

MOTI SAGAR, J.

Bhup Singh-Defendant—Appellant.

v.

Prem Singh and others—Plaintiff & Defendants—Respondents.

C. A. No. 713 of 1923, Decided on 3rd July 1923, from the Order of D. J. Ludhiana, D/-21st February 1923.

(a) *Custom — Punjab—Alienation — Can be avoided by son born after alienation if before alienation a person who could challenge it did not ratify before the birth of the son.*

A transfer by an owner who has no heir existing at the time to challenge alienation cannot be contested by son begotten by the owner after the date of the transaction unless there was in existence at the date of the transfer some one who could challenge it and such person did not ratify it before an after born son was begotten. 55 P. R. 1903 foll. [P 363 C 2]

✱ (b) *Civil P.C., O. 41 R. 23—Inherent power.*

Apart from O. 41 R. 23 the Court has inherent jurisdiction to remand the case. 44 Cal. 929, 53 I. C. 417, 3 Pat, L. J. 353 and 5 Pat. L. J. 146 foll. [P 363 C 1]

Sheo Narain—for Appellant.

Nand Lal—for Respondents.

Judgment.—This is an appeal from an order of remand, dated the 21st February 1923. made under order 41 rule 23 of the Code of Civil Procedure The matrial facts of the case are the following :—On the 5th of August 1911 one Budha and his step mother *Mt.* Ratno executed a deed of sale in respect of 42 *bighas*, 6 *biswas*, 19 *biswansis pukhta* of land in *manga* Rorian in the *Tahsil* and District of Ludhiana in favour of one Bhup Singh Defendant No. 1, for Rs. 5,000. In December 1920 the plaintiff, who is the minor son of Budha brought this suit for a declaration that the alienation was without consideration and legal necessity and that it should not affect his reversionary rights after the death of the alienors. It was further alleged in the plaint that the land in suit was ancestral and that the plaintiff's father, who was a simple minded person, had been overreached by the vendee defendant No. 1 in this case. The defendant admitted the ancestral character of the land but repudiated the other allegations made in the plaint, and the main question which, therefore, arose for the determination of the Court in this case, was whether the alienation in question was or was not for consideration and legal necessity. It appears that certain mortgages had been created in respect of this land prior to the date of the plaintiff's birth, some in favour of the present vendee and some in favour of third parties. The consideration for these mortgages was included in the sale-deed in question, and they were redeemed by the present vendee.

The trial Court held that the mortgages, which were made prior to the date of the plaintiff's birth, were not open to attack, in asmuch as they were more than 12 years old and that the plaintiff, who was an after-born son, had no *locus standi* to impeach them In respect of other items forming part of the consideration recited in the sale-deed, the finding of the Court was that necessity in respect thereof had been fully established. As a result of these findings the plaintiff's suit was dismissed in its entirety. On appeal by the plaintiff the learned District Judge held on the authority of 71 P. R. 1898 that the view of the law taken by the first Court, as stated above, was erroneous and that in the present suit, which was in respect of the sale executed in 1911, it was open to the plaintiff, so far as the question of limitation was concerned, and without reference to other questions, to attack the mortgages made prior to the date of his birth, the consideration of which was included in that of the sale. He accordingly remanded the case for a fresh decision to the Court of first instance under Order 41, rule 23 of the Civil Procedure Code. There was a further question raised in the grounds of appeal to the lower appellate Court that the price of the land at the time of the sale was Rs. 15,000 and that it was not an act of good management on the part of the alienors to sell it for Rs. 5,000. No finding had been arrived at by the Court of first instance on this point and it was directed by the learned District Judge that the trial Court should take their point also into consideration and give a finding as to the value of the land at

) time o th sale.

Against this decision a second appeal has been preferred to this Court by the defendant through Pandit Sheo Narain, and I have heard Dr. Nand Lal on behalf of the respondent. The first contention raised by Pandit Sheo Narain is that the order of remand under Order 41 rule 23 was illegal, inasmuch as the suit had not been decided by the Court of first instance on a preliminary point. His second contention is that the learned District Judge has not kept in view the distinction which obviously exists between cases in which an alienation is not open to attack by reason of the fact that the person attacking it has no *locus standi* to maintain the suit and those in which an alienation cannot be impeached merely because the suit in respect thereof is barred by limitation. He argues that 71 P. R. 1898, on which the learned District Judge has relied, is distinguishable, inasmuch as the plaintiff in that case was not an after born son and no question arose therein as to his *locus standi* to maintain the suit. In my opinion there is no force in the first contention and it must he overruled. It is true that the suit was not decided by the Court of first instance on a preliminary point, but I do not think that the powers of an appellate Court as regards remand are restricted to the case specified in Order 41, rule 23 of the Civil Procedure Code only. It has been repeatedly held that the Court, by reason of its inherent jurisdiction, recognised and preserved in the Code, may order a remand in cases other than the case specified in Order 41 rule 23, if it be necessary for the ends of justice, *vide* 44 Cal., 929 ; 3 Pat L. J. 253 ; 53 I. C. 417 and 5 Pat L. J. 141. In the present case certain points were left undecided by the Court of first instance, and the appellate Court was of opinion that the judgment of the trial was unsatisfactory and that the case should be re-decided on the merits. I do not think that there was anything illegal in this order, and it must, therefore, be confirmed.

On the second question the law, as laid down in the Full Bench ruling reported as 55 P. R. 1903, is that under the Punjab Customary Law a transfer by an owner who has no heir existing at the time competent to challenge it cannot be contested by a son begotten by the owner after the date of the transaction unless there was in existence at the date of the transfer some one who could challenge it and such person did not ratify it before an after-born son was begotten. This means that two facts must clearly be proved before advantage can be taken of the rule laid down in this authority, namely, (1) that no heirs competent to challenge the alienation were in existence at the time the alienation was made ; and (2) that if they were in existence, they did not ratify the transfer before the after-born son was begotten. *Pandit* Sheo Narain argues that the burden of proving both these points was upon the plaintiff and that he has failed to discharge it. Dr. Nand Lal, on the other hand, contends that the point was never specifically raised and that the appellant should not be allowed to urge it in second appeal. It appears, however, from an application made by the defendant in the trial Court on the 13th of June 1922 that the question as to the plaintiff's *locus standi* to maintain the suit was definitely raised but no issue was framed by the Court on this point, as it was of opinion that the issues already fixed were comprehensive enough to include this point. I am not inclined to accept this view. The only issues framed were (1) was the sale for consideration and necessity. and (2) had the plaintiff no *locus standi* to challenge the sale by *Mt.* Ratno because his father had joined in the sale ? These issues clearly did not cover the question which has now been argued before me, namely, that the plaintiff as an after-born son had no *locus standi* to maintain the suit. It appears to me that the parties were probably misled by the form of the issues and did not, therefore, lead evidence on the two questions set forth above. In order to decide the case satisfactorily it is necessary that clear issues should be fixed and the case sent down to the Court of first instance for a fresh decision on all the points arising in the case. It should be noted that the findings of the Court of first instance on other

items forming part of the consideration of the sale deed have not been challenged before me, and it is only the mortgages made before the date of the plaintiff's birth that have been called into question. I frame the following issues and remit the case to the Court of first instance for a fresh decision after parties have been given an opportunity to produce their evidence :—

(1) Were any heirs competent to challenge the alienation in existence at the time when the mortgages in question, namely, A—1 ; A-2 ; A-4 and B-1 were made ?

(2) If so, whether they ratified the alienations before the plaintiff was begotten ?

(3) If they were in existence but did not ratify whether the alienations were for consideration and legal necessity ?

(4) What was the value of the land at the time when it was sold and whether the sale was an act of good management on the part of the alienors ?

Stamp on appeal to be refunded; other costs to be costs in the case.

Case remanded.

1924 LAHORE 364

SCOTT-SMITH, J.

Amir Chand—Appellant.

v

Hakim Ali and others—Respondents.

S. A. No. 2382 of 1921, Decided on 8th June 1922, from the decree of D.J. Amritsar, D/-15th July 1921.

Legal Practitioner—Fees should be calculated on the value for jurisdiction in suits falling under Court fees Act, S. 7 (iv) (d).

In suits falling under Court Fees Act S. 7 (iv) (d) the valuation for Court fees and jurisdiction is the same, i. e., the value at which the relief is valued in plaint, which also is the basis for calculating pleader's fees. [P. 364 C. 2]

Kanwar Dalip Singh—for Appellant.

Niaz Muhammad—for Respondents.

Judgment.—This is a second appeal upon a question of costs. The plaintiff-appellant sued for an injunction restraining the defendants from demolishing and rebuilding certain houses. On the day before the defendants' reply was put in, the plaintiff put in an application in Court saying that for certain reasons given he wished to withdraw his suit. The Trial Court upon this dismissed the suit with costs. The plaintiff appealed to the District Judge on the question of costs and his appeal was dismissed.

The only point argued before me is as to the amount of Pleader's fee allowed. The Trial Court allowed Rs. 200 calculated at five percent on the value for purposes of jurisdiction as given in the plaint. The contention on behalf of the appellant is that the fee should be calculated upon the value of the suit as fixed by the plaintiff for purposes of Court fee namely upon Rs. 110. The suit is one of the nature described in S. 7 (i) (d) of the Court Fees Act and in such a suit the amount of Court fees shall be computed according to the amount at which the relief sought is valued in the plaint and in accordance with S. 8 of the Suits Valuation Act the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same. The plaintiff could not therefore fix the value for purposes of jurisdiction at Rs. 4000 and that for purposes of Court-fees at Rs. 110. He paid Court fees on Rs. 110 only and, therefore, it is clear that the value for purposes of Court fees was put at that sum and the value for purposes of jurisdiction must be held to be the same : see *Barru* v. *Lachhman* (1). The Court ought to have asked the plaintiff to re-state the value but it did not do so and, therefore, I think Rs. 110 must be taken as the value for both purposes. In these circumstances Pleader's fees should be calculated on Rs. 110 and according to rules it comes to Rs. 5-8 only.

I therefore, accept the appeal and direct that the decree be modified accordingly. Costs in this Court in the lower appellate Court shall be borne by the parties.

Appeal accepted.

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(1) [1913] 111 P.R: 1913—228 P.W.R. 1913—23 P.L.R. 1914—22 I.C. 503.

1924 LAHORE 365

MARTINEAU AND MOTI SAGAR, JJ.

Bashu Ram and another — Plaintiffs—Appellants.

v

Piara Chand—Defendant—Respondent.

S. A. No. 1292 of 1921, Decided on 25th April, 1923, from the decree of the Dt. J., Rawalpindi, D/-1st April 1921.

(a) Punjab Courts Act, S. 41—Order itself may amount to a certificate.

Where the order of the Dt. J. was in the following terms:—

"I have held that parties are bound by Hindu Law. Petitioner's contention is that they are bound by custom. The evidence is conflicting and difficult. The question affects a whole village and is thus important. I accordingly grant a certificate under S. 41 of the Punjab Courts Act."

Held: that this order itself amounts to a certificate and that the requirements of the section had been satisfied. [P 365 C 2]

(b) Custom—Punjab—Adoption—Rai Brahmans.

In the villages of Mohra Bhattam and Mangot in the Rawalpindi Tahsil of the Rawalpindi Dt. Rai Brahmans are governed by Hindu Law and an adoption of uncle's daughter's son or wife's brothers son is valid. [P 365 C 2]

M. S. Bhagat—for Appellants.

Tek Chand—for Respondent.

Judgment.—The plaintiffs sue for a declaration that they are the owners of the lands and houses left by their brother Sant Ram, who died in 1917. The defendant who is Sant Ram's uncle's daughter's son and also Sant Ram's wife's brother's son, claims title to the property on the ground that Sant Ram adopted him and made a will in his favour. The suit has been dismissed, the Courts below having concurred in finding that the parties are governed by Hindu Law and that the adoption and the will have been proved and are valid. The plaintiffs have preferred a second appeal, in which the main contention is that the parties are governed by custom.

A preliminary objection is taken on behalf of the respondent that there is no proper certificate from the District Judge as required by S. 41 (3) of the Punjab Courts Act. It is true that there is no certificate apart from the order of the District Judge granting one, but the appellants have filed a copy of that order which is in the following terms:—

"I have held that parties are bound by Hindu Law. Petitioner's contention is that they are bound by custom. The evidence is conflicting and difficult. The question affects a whole village and is thus important. I accordingly grant a certificate under S. 41 of the Punjab Courts Act."

We think that this order itself amounts to a certificate and as, when read with the application on which it was passed, it is found to contain all the particulars required by S. 41 of the Act we hold that the requirements of the section have been satisfied and we overrule the objection.

The property in suit is situate in the villages of Mohra Bhattan and Mangot in the Rawalpindi Tahsil of the Rawalpindi District. Sant Ram was a *Rai Brahman* or *Bhat* of Mohra Bhattan, and the village was named after the *Bhats* who inhabited it. The material facts are given in the following passage from the judgment of the learned District Judge:—

"Both the villages in question, Mohra Bhattan and Mangot, are populated in the main by *Rai Brahmans*. There are about 140 houses in both the villages and there are less than six houses belonging to other persons. There are two *dhoks* however, in the village. *Dhok Sayadan* seem to contain two houses of *Sayads* and *Dhok* Hashu contains four houses of occupancy tenants. These *Sayads* are owners by purchase in the village. There are a few barbers, a *Jhiwar*, and a *Sunar*, whose presence there may only be temporary. Of both the villages the *lambardars* are *Brahmans*. There is also evidence to show that there are only 40-50 ploughs in those villages though the families number 140. In spite of this it would seem that numerous *Brahmans* do plough the land themselves, though there are some who use tenants. Further there are 88 people out of the villages, who are in service in the police, army etc. Then there are others who are shopkeepers, *Granthis*, tonga drivers, and

pony hirers etc: It is also in evidence that some of the poorer members still take *birt* and perform priestly functions, though this has become less common than formerly. Even plaintiff's own witness (P. W. 5) further admits that some still wear the sacred thread."

It is, as the learned District Judge observes, difficult to say whether the principal means of livelihood of the *Rai Brahmans* is agriculture or service, since so many are in outside employ and engaged in other occupations. The proprietary body is also no longer homogenious, as persons of different tribes such as *Sayads*, *Ghakhars*, *Khatris*, *Mohyats*, etc: have become owners by purchase. Still the majority of the proprietors are *Rai Brahmans*, and the learned District Judge seems to be right in saying that they form a fairly compact village community and that their basic occupation is agriculture, and that thus the *onus*, which originally rested on the plaintiffs, is shifted to the defendant to prove that they are governed by Hindu Law. He has, however, held that the *onus* has been discharged by proof of the fact that there have been numerous uncontested alienations in the village as well as many adoptions, and by proof of certain instances in which daughters have succeeded to property in the presence of collaterals.

There have been 44 sales in the village, of which 21 were in favour of a *Khatri* and many others in favour of persons of various castes besides *Brahmans*, and 15 gifts. None of these alienations have been contested. The learned District Judge has mentioned a case in which Mr. Stephen decided in 1903 that the parties followed custom, but that case is not in point as it related to another village and the parties to it were *Mahal Brahmans* and not *Rai Brahmans*. There have also been many adoptions of sons or grandsons of daughters or sisters. One of these was contested by the plaintiffs family and the suit failed.

Besides the alienations, there are two instances mentioned by D. Ws. 7 and 18 in which daughters have succeeded in preference to the collaterals. Only two instances to the contrary have been cited and both are capable of explanation. One Chet Ram was succeeded by his collaterals, but the land was very small in area and it was in mortgage with Gurdit Singh (D. W. 11) at the time of Chet Ram's death, so that the daughters may not have thought it worth while to claim it. Moreover the mutation took place only in 1917, so that the succession may yet be contested. The other instance is that of the succession to the property left by one Bharo, and the explanation of her daughter not succeeding is given by the latter's husband D. W. 11, who says that there was only a small quantity of land and that the collaterals were his sister's sons.

None of the authorities cited before us appear to be on all fours with the present case. 56 P. R. 1909, on which counsel for the appellants relies, does not help him, as no evidence was given in that case to rebut the presumption which it was held arose in favour of the parties following custom. In 34 P. R. 1911, although many alienations were shown to have taken place, only one of them was permanent transfer to a *non-Brahman*, and the power of alienation was restricted by the provisions of the *wajib-ul-arz*.

There is one case, not cited before us, which in some respects resembles the present case, namely, 59 P. R. 1908 a case relating to *Brahmans* of Gopalpur in Amritsar District. Those *Brahmans* formed, as in the present case, a compact village community and they followed agriculture, although they were not wholly dependent upon it and followed other professions also. But in a previous case a daughter's son had been allowed to succeed as it was found to be proved that daughters excluded collaterals, and as the evidence adduced in the case before the Chief Court did not lead to a different conclusion the findings of the Lower Courts that the plaintiff's family were governed by Hindu Law as regards alienation of ancestral property were affirmed.

We think that in the present case the learned District Judge is right in finding that the defendant has succeeded in discharging the *onus* of pro-

ving that Sant Ram was governed by Hindu Law.

As regards the validity of the defendant's adoption, although under the strict Hindu Law the adoption of a person standing to his adoptive father in the relation in which the defendant stood to Sant Ram would not be permissible, it must be borne in mind that that law is, in practice, often modified by custom, and we find in the present case sufficient evidence that it has been so modified in respect of adoptions, sisters and daughter's sons and grandsons having, as already remarked, been adopted in several instances, and no such adoptions having ever been declared invalid.

The appeal consequently fails and we dismiss it with costs.

Appeal dismissed.

1924 LAHORE 367

SHADI LAL, C. J.

Piara Ram—Defendant—Petitioner.

v.

Ganga Ram—Plaintiff—Respondent.

Civil. Rev. No. 75 of 1922, Decided on 28th June 1922, from the decree of Munsif, First class, Jhang, D/-17th August 1921,

Civil P. Code, O. 21 Rr. 58 to 63—Apply to attachment of debt—The party against whom an order is made, cannot in another proceeding assert his rights unless a suit is brought under R. 63.

The procedure laid down in rules 58 to 63 applies to a debt attached in execution of a decree and an order made against the alleged debtor is binding upon him if he does not institute a suit for declaration that no debt was due from him within a year from the date of the order passed against him. And unless a suit is brought as provided by rule 63 the party against whom the order is made cannot assert either as plaintiff or as defendant in any other suit or as a party to any other proceedings the right denied to him by the order. 38 B, 631 foll. (P. 367 C. 2)

Beni Prasad Khosla—for Petitioner.

Mukund Lal Puri—for Respondent.

Judgment.—The facts of this case are briefly as follows:—In execution of a decree obtained by one Masta Ram against Shada, the decree-holder attached a debt-alleged to be due by the defendant, Piara Ram, to the judgment-debtor, Shada. It appears that Piara Ram raised an objection that no debt was due by him to Shada, but the Executing Court did not accede to the objection and passed an order advertising the sale. In November 1920 the plaintiff, Ganga Ram, purchased the debt at the auction-sale, and has now brought this suit for the recovery of the money against Piara Ram.

The Trial Judge holds, that, as the defendant, Piara Ram, did not bring a suit within one year in accordance with the provisions of O. 41, R, 63, Civil Procednre Code, he is precluded from urging that no money was due from him to Shada. The learned Counsel for the defendant contends that the statutory period of one year had not expired when his client denied in the written statement his liability to Shada, and that it is not necessary that he should have filed a suit in order to establish his contention. But, as pointed out in Mulla's Civil Procedure Code, 7th Edition, page 615 unless a suit is brought, as provided by rule 63. the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceedings the right denied to him by the order. Further it has been held in *Tayabali* v *Atmo Ram* (1) that the procedure laid down in rules 58 to 63 applies to a debt attached in execution of a decree, and that an order made against the alleged debtor is binding upon him if he does not institute a suit for a declaration that no debt was due from him within a year from the date of the order passed against him.

For the aforesaid reasons, I am of opinion that no ground for my interference has been established. The application for revision is, therefore, dismissed with costs.

Application dismissed.

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(1) [1914] 38 Bom. 631—66 Bom. L. R. 520—25 I. C. 375.

1924 LAHORE 368

BROADWAY AND MOTI SAGAR, JJ.

Iftikhar Ali Khan and others–Defendants—Appellants.

v.

Ri alat Khan and others—Plaintiffs–Respondents.

S. A. No. 2692 of 1921, Decided on 19th July 1923, from the decree of D. J. Karnal, D/- 24th August 1921.

Punjab Courts Act, S. 41 (3)—Does not prohibit supporting a decree by agitating a question of custom by cross objections without certificate.

S. 41 (3) only provides that an appeal shall not be entertained on questions relating to custom without a certificate and does not in any way prohibit a respondent from agitating the question of custom in answer to the appeal and from supporting the decree on any of the grounds that may have been decided against him in the Court below under Order 41 rule 22. [P. 369, C. 2]

Jagan Nath—for Appellants.

Manohar Lal and *Shamair Chand*—for Respondents.

Judgment.—On the 15th of November 1915 one Saadat Khan, a *pathan* of Gohana, sold 413 *bighas* of land to defendants 2, 3 and 4 for Rs. 11,900/-. The plaintiff, who is the minor son of Saadat Khan thereupon brought this suit for a declaration that the sale was without consideration and legal necessity, and that it would not affect his reversionary rights after the death of the vendor. It was alleged in the plaint that the vendor was a debauchee, and that he had contracted a large number of debts for immoral purposes. The defendants repudiated the claim, and alleged that the sale was for necessary purposes. A further contention was raised on their behalf to the effect that *Pathans* of the Rohtak District had unrestricted powers of alienation and that consequently the plaintiff had no right to sue.

The trial Court found necessity established to the extent of Rs. 2,300/-, only, and decreed the plaintiff's suit subject to his paying that sum to the defendant-vendees. On appeal the learned District Judge Mr. Spencer following 76 P. R. of 1914, held that the onus of proving that Saadat Khan had an unrestricted power of alienation was upon the defendant-vendees and that they had failed to discharge this onus. He further held that full consideration had passed and that it had not been shown that the money had been taken for or spent for immoral purposes. No finding was arrived at on the question of necessity and the suit was eventually dismissed.

Against this decision a second appeal was preferred to the High Court, and in the memorandum of appeal the findings that the plaintiff's father was not a debauchee and that full consideration had passed were challenged. These findings were, however, obviously findings of fact, and it was not competent to the High Court to go behind them. But as no finding had been arrived at on the question of necessity, the High Court remanded the case to the lower appellate Court under Order 41, rule 23, Civil Procedure Code, with a direction that a definite finding should be arrived at on this question and the case should then be disposed of according to law.

At the hearing of the appeal no objection appears to have been taken by the defendant vendees in answer to the plaintiff's appeal that the finding of the learned District Judge on the question of custom was erroneous and that *Pathans* of the Rohtak District had unrestricted powers of alienation. When the case went back an application was made to the learned District Judge, Mr. Skemp, that the defendant-vendees should be allowed an opportunity to produce further evidence in the case on the question of necessity. The learned District Judge refused to accede to this prayer, and held that on the record as it stood there was no evidence indicating necessity for any part of the expenditure, and dismissed the appeal except with regard to the items of Rs. 2,300/- which had been found to have been raised for necessity by the trial Court and in respect of which no objection had been taken by the plaintiff on appeal. Against this decision the defendant-vendees have preferred a second appeal to this Court through Mr. Jagan Nath, and we have heard Mr. Manohar Lal for the respondents.

It appears that before the appeal was filed the defendant-vendees had made an application to the District Judge for the grant of a certificate under S 41 (3) of the Punjab Courts Act. This application was refused on the ground that there was no question of custom involved in the case, and because no such question had been decided by the Court. Against this refusal to grant a certificate the defendant-vendees have also filed an application for revision in the Court in which it has been contended that the certificate has been refused on insufficient grounds, and that the learned District Judge has erroneously refused to exercise jurisdiction which lay vested in him under the law. Mr. Jagan Nath's argument is that the order of remand made by this Court on the 20th of June 1921 was not limited in its scope and that, inasmuch as the remand had been ordered under Order 41, rule 23 and not under rule 25 of the Civil Procedure Code, it had the effect of opening up the whole case for a fresh decision. He further contends that, inasmuch, as the learned District Judge had given no separate finding of his own on the question of custom, he should be taken to have adopted the finding of his predecessor, Mr. Spencer, in regard to it, and that he is wrong in holding that there was no question of custom involved in this appeal. With this contention we are unable to agree. In our opinion the order of remand is very clear in its terms and does not admit of any doubt whatsoever. The findings relating to the character of the vendor and to the passing of the consideration were clearly findings of fact, and could not be impugned in second appeal. No objection was raised by the defendant-vendees, as to the correctness of the District Judge's decision on the question of custom in reply to the plaintiff's appeal which they were fully competent to take under Order 41, rule 22 of the Civil Procedure Code, and the only question on which a remand could be ordered and was, as a matter of fact, ordered was as to whether the sale had or had not been made for necessity. It was not competent to the learned District Judge to go into any other question except that of necessity, and he was right in our opinion in holding that there was no question of custom involved in this case on which a certificate could be granted. It is argued that the defendant-vendees could not agitate the question of custom in answer to the plaintiff's appeal without a certificate under S. 41 (3) of the Punjab Courts Act. We do not think that this contention is sound. S. 41 (3) of the Punjab Courts Act only provides that an appeal shall not be entertained on questions relating to custom without a certificate, and does not in any way prohibit a respondent from agitating a question of custom in answer to the appeal, and from supporting the decree on any of the grounds that may have been decided against him in the Court below under Order 41, rule 22 of the Civil Procedure Code. We, therefore, hold that, inasmuch as the defendant-vendees failed to raise this question at the time when the order of remand was made, they must be taken to have waived it. In these circumstances there can be no doubt that the learned District Judge was right in refusing to grant the certificate, and we decline to interfere. We dismiss the petition with costs

On the question of necessity it has been urged by Mr. Jagan Nath that his clients should have been given an opportunity to produce further evidence, and that the learned District Judge was wrong in holding otherwise. Having regard to the grounds of appeal taken by the defendant-vendees in their memorandum of appeal to the District Judge, we do not think that this contention is sound and we refuse to entertain it. The learned District Judge, after a full consideration of the evidence on the record, has found that no necessity has been established, and we cannot go behind this finding in second appeal.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 LAHORE 370

CHEVIS AND HARRISON, JJ.

Waziri Mal and others-Defendants-Appellants.

v.

Ganga Ram and others — Plaintiff & Defendants-Respondents.

F. A. No. 2697 of 1916, Decided on 21st February 1922, from the decree of Senior Sub. J. Ludhiana D/-23rd August 1916.

(a) *Hindu Law—Alienation in favour of a distant reversioner is not surrender—Alienation by widow without necessity is voidable only at the option of next reversioner.*

Surrenders of life estate, under Hindu Law, are simply cases of accelarating succession to the next heir, which mean that the female lifetenant effaces, herself and succession of the whole estate goes on to the next heir just as if the life-tenant had died. But a transfer in favour of any person other than the nearest reversioner is an alienation and not a surrender. 27 I. C. 167; 16 Bom. L. R. 699; 39 B. 87 foll.

An alienation by a Hindu female although made without necessity is not absolutely void but is only voidable. The option of avoiding such an alienation rests with the next heir and nobody else has the right to challenge it. [P. 371 C. 1, 2]

✱ (b) *Adverse possession—Tying cattle on open site does not constitute — Trespasser cannot claim compensation for building on property while in his possession.*

Tying up cattle and storing cowdung cakes on an open site are not sufficint to prove adverse possession of the site. [P 372 C 2]

Where a trespasser spends money on additions to the property of which he is in wrongful possession and knows that an action for his ejectment is likely to be brought, he does so at his own risk and can not get any compensation on ejectment from the property nor is he entitled to disturb the property by dismantling any portions of it though that part be built by himself. [P. 373 C. 2]

Tek Chand and Jagan Nath—for Appellants.

Moti Sagar and Balwant Rai—for Respondents.

Chevis, J.—In this case the plaintiff, Ganga Ram has been given a decree for possession of 19 shops and for *mesne* profits for three years. The principal defendant is Waziri Mal defendant No. 1. His son, Puran Chand, is defendant No. 2 while *Musammat* Daropdi and *Mt.* Atma Devi are defendants No. 3 and 4. The two last are daughters of Diwan Chand, brother of Ganga Ram. *Mt.* Daropdi has two minor sons and *Mt.* Atma Devi, who has since died, has left Sat Parkash, a minor son. The minors have not been made parties. Both sides have appealed from the lower Court's decree. Waziri Mal urging that the suit should have been dismissed and the plaintiff claiming further *mesne* profits and claiming also that a certain sum which has been allowed by the lower Court to Waziri Mal on account of certain additions made to the shops should not have been so allowed.

According to the plaint Diwan Chand was the owner of the shops and of the site under them. Diwan Chand died on the 5th of April 1910, and a dispute then arose between Ganga Ram and Diwan Chand's daughters, which was settled by a compromise which is printed on page 47 of the paper-book. The daughters executed a deed which is called a *dastbardari*. This document recites that they had a dispute with Lala Ganga Ram and that they had now given up the whole of the property consisting of certain land and houses in village Gill and one-half of 19 shops in Wakefield Ganj, Ludhiana City, but that as one Waziri Mal had taken unlawful possession of the shops they would keep the *pacca* house situated in Gill unless and until Ganga Ram dispossessed Waziri Mal and put them in possession of 5 out of the 19 shops. Later on the deed says that Ganga Ram is not to bring any suit against them regarding the land in village Gill already mutated in Atma Devi's favour and any other property left by Diwan Chand which had already come into possession of the daughters. Now the shops in question were the self-acquired property of Diwan Chand, and, therefore, even under ordinary custom as prevailing amongst agriculturists in the Punjab, the daughters would succeed to it in preference to the brother. No special custom to the contrary has been proved and we take it that the real heirs to the shops were the daughters and not the brother. In fact it does not appear that custom applies to the case at all, but that the parties are governed by their personal

law according to which the daughters would be the first heirs and next would come their sons, the brother coming after both of them. The daughters would succeed to a life-estate jointly; on the death of either, the surviving daughter would take the whole by survivorship; and on her death the daughter's sons would take possession *per capita* as full owners. That this would be the rule of succession according to Hindu Law is not disputed. The first point argued on behalf of Waziri Mal is that the alienation by the daughters, if it be regarded as a surrender of the life-estate, is invalid under Hindu Law, for two reasons, first, that it was not a surrender in favour of the next heir, and secondly, that it was not a surrender of an entire estate. On behalf of the respondents, however, it is pointed out that the alienation cannot be regarded as what is known in Hindu Law as a surrender of the life-estate. As has been pointed out in *Basangauda Nagangauda* v. *Basangauda Dodangauda* (1), surrenders of life-estate under Hindu Law are simply cases of accelerating succession to the next heir which mean that the female life-tenant effaces herself and succession of the whole estate goes on to the next heir just as if the life-tenant had died. It is, therefore, absurd to talk of accelerating succession in favour of anyone but the nearest reversioner, for that is not acceleration but alienation. We hold, therefore, that this is not a case which can be described as one of surrender of the life estate but is merely a case of an alienation. Such alienations can be made only subject to certain conditions being complied with, but, even if the alienation be made without necessity, it is not absolutely void but is voidable at the election of the heir, who may think fit to affirm it or may at his pleasure treat it as a nullity and may take action to recover possession on the death of the female life-tenant. For this we have authority in the Privy Council ruling *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2). Thus in the present case, granting that the alienation was one made by Diwan Chand's daughters without legal necessity, we hold that the alienation is only voidable and not void. *Hayes* v. *Harendra Narain* (3) is further authority for the proposition that an alienation made by a female life-tenant is not void but only voidable, and may be validated by the consent of the reversioner. On behalf of Waziri Mal *Wazir Chand* v. *Makhu* (4) is quoted, but we fail to see how this helps the defendant, for the judgment seems merely to lay down that the next heirs cannot maintain an action on the basis merely of a partial surrender in their favour by the female life-tenant. The same may be said of *Buta Singh* v. *Khushal Singh* (5). The case before us is, however, not one of surrender in favour of the next heir, but of alienation. *Sher Muhammad* v. *Phula* (6) lays down that under Customary Law a widow can surrender her husband's property merely taking maintenance from the next heir, and that the effect of this is to invest the next heir with a right of ownership. This, however, is a ruling under Customary Law, and we note that it is again a case of a surrender to the next heir. The alienation in the present case is not in favour of the next heir and cannot be regarded as a surrender, but merely as an alienation, which is voidable and not void. The option of avoiding it rests with the next heirs and we hold that nobody else has the power to challenge it.

It has also been contended on behalf of the plaintiff that the arrangement effected between him and his brothers's daughters was a family

(1) [1915] 39 Bom. 87—16 Bom. L. R. 699—27 I. C. 167.

(2) [1907] 34 Cal. 329—34 I. A. 87—11 C. W. N. 424—5 C. L.J. 334—9 Bom. L. R. 602—2 M. L. T. 133—17 M. L. J. 154—4 A. L. J. 329 (P. C.)

(3) [1904] 31 Cal. 698.

(4) [1902] 17 P. R. 1902—16 P. L. R. 1902.

(5) [1910] 151 P. L. R. 1910—159 P. W. R. 1910—8 I. C. 558.

(6) [1899] 9 P. R. 1899.

arrangement, entered into *bona fide* in order to settle a family dispute, and that it is binding even on the next heirs. The next heirs are not parties to the present suit and so we cannot adjudicate on the question whether the alienation is binding on them. It is sufficient for us to say that in our opinion no one other than the heirs can challenge the alienation.

The next point raised is that even according to the plaint Diwan Chand was the owner of the shops and that the alienation by his daughters only covers one-half of the 19 shops and, even of the one-half stipulates for return of 5 shops to the daughters. So, it is urged that the plaintiff cannot, in any case, get possession of more than 4½ shops We note here that the site under the shops was acquired by two separate sale-deeds, and one plot having been bought in 1897 by a sale-deed which was written in favour of Diwan Chand, and another plot by a sale-deed in 1907 which was written in favour of Ganga Ram. The second sale seems to have been *benami* and from the whole evidence on the record there can be no doubt whatever that Diwan Chand was the real owner of both sites. But it is quite possible that when the dispute between Ganga Ram and his brother's daughters was pending the daughters misunderstood the real position and thought that, as one sale deed was in favour of Ganga Ram, he was half owner of the property. The fact, however, remains that the daughters gave up all their rights in the shops, so that Ganga Ram became the full ower so far as they were concerned and we do not see how any one else can challenge Ganga Ram's right to be the owner. The daughters were impleaded in the present case, but they never set up any plea that they retained any rights of ownership in the shops. As to the plea that they stipulated for return of 5 shops, this was merely an agreement between them and Ganga Ram that in the event of his getting possession from Diwan Chand he should make over 5 shops to them and if he did not do so they were to retain the house in the village Gill. In our opinion Diwan Chand alone can be regarded as the owner of all the 19 shops at present, though, no doubt he will only be able to recover from his brother's daughters the house in village Gill in the event of his being willing to give 5 of the shops to the daughters. If he does not choose to do so he will remain owner of the 19 shops and they will retain the house in village Gill.

The next points which we have to consider are questions of fact. On behalf of Waziri Mal it was pleaded that the sale-deeds of the sites were *benami* and that Waziri Mal was the real owner not only of the shops but also of the site. Bakhshi Tek Chand, however, admits that there is no proof of the sale-deeds having been effected *benami*. Further, we note that in previous litigation between Waziri Mal and Bishambar Das the former admitted that Diwan Chand was the owner of the site. Another plea raised on behalf of Waziri Mal was that he had become owner by long adverse possession. The shops in question were admittedly built in the winter of 1907-08 and there is nothing to prove any idea of possession on the part of Waziri Mal except a little flimsy evidence as to his tying up his buffalo and storing cowdung cakes on the site. This is quite insufficient in the case of an open site to prove adverse possession. That Bakhshi Tek Chand himself admits.

The next question to consider is whether Waziri Mal or Diwan Chand built the shops and who was the real owner. According to the plaintiff Waziri Mal was a friend of Diwan Chand's, and it was Diwan Chand who constructed the shops and bore the expenses of building, while Waziri Mal was merely a tenant of two shops and acted as agent for Diwan Chand, collecting rents for the other shops. We have been taken through a large mass of evidence, both sides having produced numerous witnesses. The oral evidence is conflicting. There can be no doubt that Waziri Mal at least assisted in supervising the construction of the shops. Further several leases have been executed in his favour by the tenants, though apparently only one such lease was

executed in the lifetime of Diwan Chand. But the striking point is that in the previous litigation between Waziri Mal and Bishambar Das, son of plaintiff, Waziri Mal, not only admitted that Diwan Chand was the owner of the site, but said, as regards the shops, that Diwan Chand had made an arrangement with him that he was to retain possession until Diwan Chand paid him the cost of construction. This obviously is a plea not of ownership but of tenancy, and in the face of this we have no hesitation in rejecting the plea that the shops are the property of Waziri Mal. On full consideration of all the evidence we hold that Diwan Chand constructed the shops and was the owner. There is no evidence whatever of any agreement between Diwan Chand and Waziri Mal as to the latter bearing the cost of construction and being entitled to retain possession until re-paid. (The statement of Waziri Mal in the previous litigation above referred to is to be found on page 46 of the paper-book and the evidence of Lala Nathu Ram, Pleader of Waziri Mal in the former litigation, printed on pages 230 and 231 of the paper-book may also be referred to.) This disposes of the appeal by Waziri Mal, ground No. 4 of his appeal. which urges that the plaintiff's suit in respect of *mesne* profits is time-barred, having been given up in this Court, and ground No 5 which attacks the finding as to the amount of the *mesne* profits awarded not having been argued.

We turn now to the cross-appeal by the plaintiff. Grounds Nos. I and 2 have been given up by Rai Sahib Moti Sagar and ground No. 4 has not been argued. The only ground which has been argued is that the defendant being a trespasser is not entitled to be recouped for the additions alleged to have been made by him. It should be noted that the lower Court has allowed a sum of Rs. 223-15-0 on account of certain additions by Waziri Mal. The lower Court in its judgment says that the additions are not much and appear to be necessary. There is, however, so far as we can discover, no evidence on the record to prove that the additions were in any way necessary. The additions were made only a short time prior to the suit, and Waziri Mal must, we think, have had good reason to believe that he would not be left in undisturbed possession but Diwan Chand's heirs would take action. In such circumstances, if a trespasser chooses to spend money on making additions to the property, he does so at his own risk and we do not consider that he is entitled to any compensation. Bakbshi Tek Chand argues on his behalf that he should be allowed to remove the *malba*. This, however, seems to be quite a new plea and, further, we do not think that he is entitled to disturb the property by dismantling any portion of it, even that part which he built himself, seeing that, as we have already pointed out, he built it voluntarily and at a time when he must surely have known that action for his ejectment was likely to be taken.

The defendant's appeal is dismissed. The appeal of the plaintiff is so far accepted as to raise the amount payable by the defendant Waziri Mal to the plaintiff to Rs. 581 4-0. Costs in the lower Court will be as ordered by that Court. In this case costs of printing the record will be borne by parties in the following proportions:—

	Rs.	A.	P.
Plaintiff	224	11	2
Waziri Mal... ...	552	2	4

Other costs incurred by the parties in this Court in Waziri Mal's appeal will be borne by Waziri Mal. No order as to costs incurred by the parties in plaintiff's appeal.

Harrison, J.—(*February* 21, 1922).—I agree that the appeal of Waziri Mal must be dismissed and that of the plaintiff Ganga Ram accepted to the extent stated in the order. I do not, however, hold that the daughters gave up all their rights in the shop by the execution of the document V. A. No. 7 but that, as recited in that document, they gave up their rights in one-half of the shops, or rather, alienated their rights to him and, as explained in *Basangauda Nagangauda* v. *Basangauda Dodangauda* (1), there was no question of surrender in the technical sense

or of acceleration. The document is also a compromise and, so far as the remaining half of the shops is concerned, the daughters recognised Ganga Ram as the owner, the consideration for both the alienation and the recognition being as detailed in the deed. Mr. Tek Chand tries to impugn the compromise on the ground that it was not effected in settlement of a *bona fide* dispute. It is, however, stated in the deed itself that there was a dispute between Ganga Ram and the daughters as to the property of Diwan Chand, and Ganga Ram has explained in his statement on oath at page 118 that he claimed to succeed in preference to the daughters on the strength of a special custom governing Sudhe. We are not concerned with the question of whether the claim was good or bad and likely to succeed or fail. There was a dispute between the adult members of a family regarding the property owned by a deceased member and this was settled by a compromise, and I can see no reason for presuming that it was not *bona fide*. The question of what rights the sons of the daughters may or may not have does not affect the present position. The plaintiff is entitled to bring his suit and the transaction between him and his daughters cannot be questioned by the defendant Waziri Nal.

Appeal dismissed.

✱ 1924 LAHORE 374

BRASHER AND SCOTT-SMITH, JJ.

Ghulam Muhammad — Defendant—Appellant.

v.

Panna Ram and others—Appellants Respondents.

Civil A. No. 531 of 1917, Decided on 6th July 1922, from the decree of D. J. Mianwali, D/-13th December 1916.

(a) *Interpretation of Statutes—Proceedings of Legislature are not to be considered nor the intention of the framers.*

The meaning of an Act is not to be interpreted with reference to what the framers intended to do but with reference to the language which they did in fact employ. Proceedings of the Legislature in passing a Statute are excluded from consideration on the Judicial construction of Indian as well as of British Statutes. 22 C, 788 foll.

It matters not in such a case what the consequence may be, when by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature it must be enforced even though it be absurd or mischevous. [P. 376 C. 1 2]

✱ (b) *Provincial Insolvency Act (1907) Ss. 16 and 36—S. 36 is not controlled by S. 16.*

S. 16 (6) of the Act does not govern S. 36 and therefore transfers taking place within two years of the presentation of the petition but beyond two years of the order of adjudication cannot be annulled. 23 I. C, 924 foll. 6 N. L. R. 146 dist.—35 M. L. J. 296 not foll. [P. 377 C. 1 2]

Saleem—for Appellant.

M. L. Puri—for Respondents.

Judgment.—In this case the learned District Judge has held that a mortgage and a gift are void against Receiver under S. 36 of the Provincial Insolvency Act (III of 1907). The transactions were effected about 6½ months before the petition for insolvency was presented, and more than two years before the order of adjudication was passed. The District Judge considered that S. 36 Act III of 1907 is governed by S. 16 (6) of the same Act, and that, consequently, the transactions could be annulled since they took place within two years of the date of the presentation of the petition.

The main question raised in this appeal is, whether the District Judge was correct in this view of the law, and since there was some conflict of authority upon the point the learned Judge before whom the appeal came up for hearing has referred the case to a Division Bench.

At the time when the order of reference was passed there appear to have been only two Judicial decisions dealing with the matter in issue. In *Bhagwant* v. *Munim Khan* (1) the Judicial Commissioner of Nagpur held that S 16 (6) of the Provincial Insolvency Act governed S. 36 and that the two years mentioned in the later section mean the two years before the date of the presentation of the insolvency petition. In *Jokhan Singh* v. *Deputy Commissioner, Fyzabad* (2) the opposite view was taken by the Judicial Commissioner of Oudh. There

(1) [1910] 6 N.L.R. 146—8 I. C. 1115.
(2) [1914] 23 I. C. 924.

have since been two cases decided in accordance with the view expressed by the Judicial Commissioner of Nagpur, *viz.*, *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (3) a decision of a Division Bench of the Calcutta High Court and *Sankaranarayana Aiyar* v. *Algiri Aiyar* (4) a decision of a Division Bench of the Madras High Court. The later decision has also been approved in *Sheo Nath Singh* v. *Munshi Ram* (5), though in that case there was no question as to the annulment of a transfer under S. 36 of the Act.

The weight of authority, therefore, favours the view taken by the District Judge, but after careful consideration of the judgments in the cases cited above we consider that the correct exposition of the law is that given in *Jokhan Singh* v. *Deputy Commissioner Fyzbad* (2). S. 36 of the Provincial Insolvency Act (III of 1907) provides that a transfer of property may be annulled if the transferor is adjudged insolvent within two years after the date of transfer, and in order to support the decision of the lower Court it must be held that the transferor is adjudged insolvent when the petition for insolvency is presented. Under S. 16 (6) an order of adjudication shall relate back to and take effect from the presentation of the petition on which it is made, but this cannot mean that for all purposes the date of adjudication is to be taken as identical with the date of presentation of the petition. If there were any doubt on the subject it would be removed by the difference in the phraseology employed in Ss. 36 and 37 of the Act. S. 37 allows the annulment in certain cases of transfers in favour of creditors "where the transferor is adjudged insolvent on a petition presented within three months after the date of the transfer." If the framers of the Act intended that the period provided by each section should terminate on the date of the presentation of the petition for insolvency it is obvious that the words "once a petition presented" which occur in S. 37 either should have been inserted also in S 36 or on the supposition that S. 16 (6) would apply should have been omitted altogether.

This point is fully discussed in *Jokhan Singh* v. *Deputy Commissioner, Fyzabad* (2) and in only one of the decisions in the respondents' favour, *viz.*, *Sankaranarayan Aiyar* v. *Alagiri Aiyar* (4) is any reference made to it. The decision in *Bhagwant* v. *Munim Khan* (1) is based upon the wording of the corresponding English Act and upon the debate which took place in the Legislative Council when the Indian Act was passed S. 43 of the English of 1883 is the section which is said to have led to the provision contained in S. 16 (6) of the Indian Act, while Ss. 47 and 48 of the English Act are the sections which correspond to Ss. 36 and 37 of the Indian Act. While, however, S. 37 of the Indian Act of 1907 is almost a literal reproduction of S. 48 of the English Act, Ss. 16 (6) and 36 of the Indian Act differ materially from the corresponding sections of the English Bankruptcy Act. Under S. 43 of the later Act; "the bankruptcy of a debtor, whether the same takes place on a debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor."

S. 47 runs as follows:—

"(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith for valuable consideration, or a settlement made on

(3) [1919] 46 Cal. 991—24 C. W. N. 172—52 I. C. 747.
(4) [1918] 35 M. L. J. 296—24 M. L. T. 149—(1918) M. W. N. 487—8 L. W. 281—49 I. C. 283.
(5) [1920] 42 All. 433—18 A. L. J. 449—55 I. C. 941.

or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

"(2) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property where it had not at the date of his marriage any estate or interest whether vested or contingent in possession or remainder and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

"(3) 'Settlement' shall for the purposes of this section include any conveyance or transfer in property."

Though it appears that the framers of the Indian Act of 1907 had these sections in mind when they drew up Ss. 16 (6) and 36 of Act III of 1907, the difference in language is so great that we think it would hardly be safe to conclude that they intended S. 16 (6) to govern S. 36. Assuming, however, that we are mistaken on this point, we conceive that the meaning of the Act is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ.

The learned Judicial Commissioner of Nagpur appears to us also to have been wrong in placing reliance on the debates which took place in the Legislative Council. In *Administrator-General of Bengal* v. *Premlal Mullik* (6) their Lordships of the Privy Council observed that proceedings of the Legislature in passing a Statute are excluded from consideration on the Judicial construction of Indian, as well as of British, Statutes. The Calcutta decision *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (3) is based mainly upon the consideration that, if the contrary view were adopted, the provisions of S. 36 might be defeated by delay in the insolvency proceedings. This, however, is not a matter which can be taken into account when the meaning is plainly expressed.

"It matters not in such a case what the consequence may be when by the use of clear and unequivocal language capable of only one meaning anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous." (Maxwell on the Interpretation of Statutes, 5th Edition, page 5).

In the Madras case *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (4) reference has been made, as mentioned by us above, to the argument based on the difference in the language of Ss. 36 and 37 of the Act, but the reason given for rejecting this argument appears to us, with all due respect, to be unsound According to the judgment of Sadasiva Aiyar. J., the Indian Legislature aimed at brevity in framing S. 36 and "as S. 16 (6) precedes S. 36 it seems to have considered the words, 'adjudged insolvent' to be sufficient as indicating that the date was the date from which the adjudication takes effect by the force of S. 16 (6)."

This amounts merely to an admission that the framers of the Act committed a mistake and to an explanation as to how the mistake came to be committed. If the framers of the Act were really so careless as not to notice what the difference between the languages of Ss. 36 and 37 implied we must again observe that the Act cannot be interpreted with reference to what they intended to do. We accordingly hold that S. 16 (6) of the

(6) [1895] 22 Cal. 788—22 I. A. 107—6 Sar. 603 (P. C.)

Act does not govern S. 36, and it follows that the transactions which are in dispute in this case connot be annulled. We accept the appeal, and set aside the order of the District Judge. The appellant will be given his costs in both Courts against the Receiver.

Appeal accepted.

1924 LAHORE 377

BROADWAY AND ZAFAR ALI, JJ.

Gobind Sarup and another—Defendants—Appellants.

v.

Kuldip Singh and others—Plaintiff & Defendants—Respondents.

S. A. No. 2838 of 1918, Decided on 20th January 1923, from a decree of the D. J. Gurdaspur, D/-28th June 1918.

Transfer of Property Act, S. 101—Merger takes place though mortgagee purchases equity of redemption in son's name, where there is no intervening mortgage.

Part 3 of S. 101 does not apply where no intervening incumbrances exist and where a merger of lease estate takes place in a greater estate as distinguished from the merger of a lower in a higher security.

Where a mortgagee purchased the equity of redemption in his son's name:

Held, that the mortgage was extinguished by merger and the transaction taken together amounted to a sale, which was liable to pre-emption. 40 C. 89 P. C. Ref. [P. 371 C. 1]

Mukand Lal Puri for Nand Lal—for Appellants.

Bakhshi Tek Chand—for Respondents.

Judgment.—This was a pre-emption suit. The land pre-empted had originally been mortgaged to Ram Chand Khatri and Charan Das Agarwal, but the owner subsequently sold the equity of redemption to Gobind Sarup, son of Ram Chand. The pre-emptor asserted that the son was a *benamidar* for the father and that the mortgage had merged in the sale. This was denied by Ram Chand and it was contended on his behalf that the mortgage still subsisted and did not merge in the sale under S. 101 of the Transfer of Property Act, *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1); *Yellapaddi Mahalakshammal* v. *Sriman Madhva Siddhantha Oonahini Nidhi* (2); *Khiali Ram* v. *Gulab Khan* (3); *Ghanaya* v. *Pandit Chhajju Ram* (4) and *Baldeo Parshad* v. *Uman Shankar* (5) were cited in support of this plea. The Trial Court came to the conclusion that the authorities cited were not applicable and that the mortgage merged in the sale because the mortgagee and the purchaser of the equity of redemption were one and the same. In his appeal to the District Judge, Ram Chand raised for the first time the point—which was not mentioned even in the grounds of appeal—that as there was a co-mortgagee with him in the person of Charan Das, the mortgage could not merge in the sale. Having regard to the fact that the name of Charan Das did not appear either in the deed of the sale of the equity of redemption, or in the pleas of the defendant, or in the Revenue Records wherein Ram Chand figured as the sole mortgagee, the learned District Judge presumed that Charan Das had been bought out by Ram Chand. On the question of merger he agreed with the First Court and dismissed the appeal.

In this further appeal to this Court, the defendant-appellant's Counsel Mr. Mukand Lal Puri, contends (1) that the lower appellate Court erred in presuming that Gharan Das had been bought out, and (2) that in the absence of all evidence to the contrary, the proper inference as to Ram Chand's intention was, that he intended to keep his mortgagee rights alive as evidenced by the fact that he purchased the equity of redemption in the name of his son. Besides the rulings cited by the Trial Court he refers to *Dinobundho Shaw Chowdhry* v. *Jogmaya Dasi* (6); *Gopal Chunder Sreemany* v. *Herembo Chunder Holdar* (7); *Girdhar Das* v. *Ram Autar Singh* (8);

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(1) [1884] 10 Cal. 1035 (P. C.)
(2) [1912] 35 Mad. 642.
(3) [1911] 11 I. C. 392.
(4) [1894] 38 P. R. 1894.
(5) [1909] 32 All. 1.
(6) [1902] 29 Cal. 154 (P. C.)
(7) [1889] 16 Cal. 523.
(8) [1903] 8 C.W.N. 690.

and *Ber Singh* v. *Hazara Singh* (9) and Gour's Law of Transfer of Property, Volume II, page 1284, paragraph 2002. Bakhshi Tek Chand has argued to show that these rulings are not in point and has cited to the contrary *Mohesh Lal* v. *Mahant Bawan Das* (10); *Bhawani Kumar* v. *Mathura Prasad Singh* (11); *Arumugasundara Maharaja Pillai* v. *Narasimha Iyer* (12); *Rajah of Kalahasti* v. *Prayag Dossjee Varu* (13); *Sri Ram* v. *Ramji Das* (14); *Ahmad Shah* v. *Walidad Khan* (15); and *Ram Dut Singh* v. *Balkaran Singh* (16) and Dr. Ghose's Law of Mortgages, Volume I, pages 516-17.

As regards (1) we are of opinion that the lower Court was justified in drawing the inference that Charan Das had been bought out, and we need say no more on this point.

As regards (2) the law of merger in this country is codified in S. 101 of the Transfer of Property Act, but part 2 of that section does not apply where no intervening incumbrances exist and where a merger of a less estate takes place in a greater estate which is be distinguished from the merger of a lower in a higher securi. ty. In the present case a less estate merged in a greater estate and by purchasing the equity of redemption the mortgagee became the proprietor of the estate and thus the mortgage was extinguished. *Bhawani Kumar* v. *Mathura Prasad Singh* (11), which is a Privy Council ruling is one of the authorities on this point. In that case the porperty mortgaged was sold in execution of a decree obtained by the mortgagee on the mortgage-bond and was purchased by himself. It was held that the purchaser became the proprietor of the estate sold and not merely the purchaser of such right, title and interest in it as the mortgagor might have had.

In *Arumugasundara Maharaja Pillai* v. *Narasimha Iyer* (12) it was decided by a Division Bench of the Madras High Court that S. 101 of the Transfer of Property Act leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the encumbrance in his favour is extinguished.

Similarly, a Division Bench of that Court in the case reported as *Rajah of Kalahasti* v. *Prayag Dossjee Varu* (13) held that where a mortgagee becomes also absolute owner of the equity of redemption the equitable estate merges in the legal, unless there are any puisne or mesne encumbrances against which the equity is required to be kept alive.

The same view was held by the Punjab Chief Court in *Sri Ram* v. *Ramji Das* (14) where it was decided that when a mortgagee purchases the equity of redemption in respect of the land mortgaged, the mortgagee rights merge in the right of ownership.

Lastly, may be cited the following from Ghose on Mortgages, 5th Edition, Volume I, page 516.—"A merger can take place only when a security comes into immediate contact, so to speak, with the ownership, or, in other words, when they unite without any outstanding interest in a third person."

The authorities said to be the contrary *i. e.*, *Khiali Ram* v. *Gulab Khan* (3) and *Girdhar Das* v. *Ram Autar Singh* (8) are distinguishable. In the former the land mortgaged was sold by the widow of the mortgagor who had only a life estate in the property and, therefore, the sale by her was not held equivalent to a sale by the owner-mortgagor himself. In *Girdhar Das* v. *Ram Autar Singh* (8), the facts are not fully stated and, therefore, it cannot be said whether it has any bearing on the facts of the present case.

Having regard to all the authorities reviewed above, we are of opinion that the mortgage was extinguished. Therefore, we dismiss the appeal with costs.

Appeal dismissed.

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(9) 1922 Lah, 275.
(10) [1883] 9 Cal. 961 (P. C.)
(11) [1913] 40 Cal. 89 (P. C.)
(12) [1915] 29 M.L.J. 583.
(13) [1916] 30 M L.J. 391.
(14) [1909] 2 I. C. 949.
(15) [1906] 98 P R. 1906,
(16) [1918] 5 O.L.J. 87.

1924 LAHORE 379

BROADWAY, J.

Narindra Nath Sahni—Appellant.

v.

Kishen Lal and another—Respondents.

Mis. F. A. No. 815 of 1920, Decided on 12th February 1923, from an order of D. J. Lahore, D/-16th March 1920.

Companies Act, S. 169—Delay in filing appeal due to appellant's negligence—Delay will not be excused.

Where an appeal was filed on the twentysecond day from the date on which the order appealed against was pronounced and the appellant was guilty of negligence in that he filed a memorandum of appeal together with documents improperly stamped.

Held, that no extension would be allowed. 95 P, R. 1908 Foll. [P. 379 C. 2]

Dharm Das Suri—for Appellant.

G. C. Narang, *Sunder Das* and *Mahesh Das*—for Respondents.

Judgment.—A preliminary objection is taken to the hearing of this appeal, it being urged that it is time-barred. The order appealed against was passed on the 16th March 1920. The memorandum of appeal was filed in this Court on the 1st April 1920 together with an application asking that the matter be treated as urgent. As the copy of the order appealed against did not bear a Court-fee label the memorandum of appeal was returned by the office on the same day and was re-filed with the necessary Court-fee label affixed on the 7th April 1920, that is to say on the twenty-second day from the date on which the order appealed against, was pronounced. S. 169 of Act VI of 1882 Indian Companies Act, provides a period of three weeks within which not only has the appeal to be filed but notices of appeal have to be actually served on the opposite party. The section gives the Court power to extend this period and in recognition of this power a prayer for extension was made in a foot-note to the memorandum of appeal. The admitting Judge granted an extension of time for the service of notice subject to all just exceptions.

Dr. Narang for the respondent, Pandit Kishen Lal, contended that this power to extend should only be exercised on sufficient cause being shown, and that in the present case no such cause has been made out. It is perfectly clear that the appellant in this case was guilty of negligence, in that he filed a memorandum of appeal together with documents improperly stamped. In *Daulat Ram* v. *Woollen Mills Co.* (1) it was held that appeals under the Indian Companies Act, 1882, ought to be filed with such promptitude as to render service of notice upon the respondent possible within the three weeks prescribed by S. 169 of the Act, and that the Appellate Court will not extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the appellate Court. In the present case it has not been suggested that the respondent was in any way responsible for the delay in filing this appeal, nor can it be urged that the delay was due to any mistake made by an official of this Court. *Daulat Ram* v. *Woollen Mills Co.* (1), was followed by Chevis J., in *Hira Lal* v. *Himalaya Glass Works Co.* (2), where it was held that the carelessness or ignorance of the pleader is not a sufficient reason to extend the time fixed by S. 169 of the Companies Act. Chevis, J., also pointed out that Courts should not show leniency in such matters without sufficient cause. In *Ghisu Mal* v. *Porter* (3) expression was given to the same view as that contained in *Daulat Ram* v. *Woollen Mills Co.* (1), and the same was the case in *Ramanappa* v. *Official Liquidator, Bellary Brucepetta Stock and Loan Transacting Company* (4).

In the present case the mistake is a bad one. Mr. Dharm Das Suri for the appellant has not suggested that either he, or the gentleman who filed the appeal, was ignorant of the necessity for stamping the copy of the

(1) [1908] 165 P.W.R. 1908—95 P. R. 1908.
(2) [1911] 100 P.W.R. 1911—176 P. L. R. 1911—10 I. C. 433.
(3) [1911] 33 All. 641—8 A. L. J. 719—10 I. C. 908.
(4) [1899] 22 Mad. 291.

order appealed against. It appears that from the 2nd to 5th April 1920 the Court was closed for the Easter holidays, but no reason has been shown why the appeal was not re-filed on the 6th April 1920 which does not appear to be a holiday. In these circumstances, the preliminary objection has force and the appeal is dismissed with costs.

Appeal dismissed.

1924 LAHORE 380

SCOTT-SMITH, J.

Sher Muhammad—Plaintiff — Petitioner.

v.

Ahmad and others — Defendants — Respondents.

Civ. Rev. P. No. 482 of 1921, Decided on 3rd March 1922, from the order of D. J. Shahpur at Sargodha, D/-16th March 1921.

(a) *Court fees Act, S. 7—Market value at the date of sale is the value for Court fees and Jurisdiction.*

In suits for preemption the market value at the time of the sale is the value for purposes of Court fee and jurisdiction and not the market value at the time of suit. 7 A. 775 Foll. [P. 381, C. 1]

(b) *Civil. P. Code, S. 115—Wrong valuation for Court fee and jurisdiction by lower Court is a good ground.*

The High Court will interfere where the Courts below in a pre-emption suit committed a material irregularity in assuming, as the value for purposes of jurisdiction, the market value at the time of the suit instead of that at the time of the sale. [P. 380, C. 2]

Sagar Chand—for Petitioner.

Nanak Chand—for Respondents.

Judgment.—Sher Muhammad plaintiff petitioner, sued for pre-emption of a share of the Shamilat deh sold on the 1st September 1915 by a registered deed of sale the price entered therein being Rs. 1,000. He alleged that the price actually paid was Rs. 500 and sought to pre-empt on payment of that sum. The Courts below held that as the land in suit was not a definite share of an estate paying revenue to Government and was not separately assessed to land revenue the value for the purposes of Court fee and jurisdiction was the market value of the land. A Commissioner was appointed to ascertain the market value and he reported on the 12th October 1920 that the market value at the time of the sale was Rs. 706 but having regard to the mutations which took place in the year 1919 the present market value was Rs. 5,332. The Court of the Subordinate Judge Second Class, in which the suit was pending, upon this, returned the plaint for presentation to the Court having jurisdiction as that Court had jurisdiction up to Rs. 5,000 only. The plaintiff appealed to the District Judge who held that the subject-matter of the suit was the land actually sold and that the market value (as determined by the Commissioner) at the time of the suit should be taken to be the value for the purposes of the Court-fee and jurisdiction. He, therefore, dismissed the appeal.

The plaintiff has come up to this Court on revision and on his behalf it is urged that the Courts below were in error in taking the market value at the time of the suit as the value for purposes of Court-fee and jurisdiction, and they ought to have taken the market value at the time of the sale. Mr. Nanak Chand on behalf of the respondents cites *Arur Singh* v. *Bua Ditta* (1) as an authority for the proposition that no revision lies as the Appellate Court had jurisdiction to decide the appeal from the order of the Subordinate Judge, and even if it has decided it erroneously that in itself is no ground for revision. In my opinion, the present case is distinguishable because here it is alleged that the Courts below committed a material irregularity in assuming as the value for purposes of jurisdiction the market value at the time of the suit instead of that at the time of the sale. In *Gobind Dayal* v. *Inayatullah* (2) it was held that the right of preemption is not a right of re-purchase, but is simply a right of substitution entitling the

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(1) [1911] 4 P.R. 1911—45 P.L.R. 1911—26 P. W. R. 1911—9 I. C. 674.

(2) [1885] 7 All. 775—(1885) A.W.N. 228—(F. B.)

pre-emptor by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is in effect as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. In other words, the plaintiff in the present case wishes to have his name substituted for the vendee in the deed of sale. This being so, I think it is clear that the market-value which has to be taken is the market value at the time of the sale. In Civil Appeal No. 288 of 1898 of the Chief Court, (unreported) it was held that it is the selling value of the property at the time of the sale, not what it may become after and where there is no question of improvements made subsequent to the sale by the vendee, that has to be considered in determining the price payable. In other rulings such as *Sundar Das* v. *Sham Singh* (3) and *Fazl* v. *Gular Khan* (4) the question of improvements came in and it was held that the pre-emptor had to pay the value of these in addition to the value of the property sold at the time of the sale. The Courts below have not considered this aspect of the case at all but have assumed without any authority in support thereof that the market value intended in S. 7 (*v*) (*d*) of the Court-Fees Act is the market-value at the time of the suit. This no doubt is so in ordinary suits for possession of property. But suits for pre-emption stand on a different footing.

I, therefore, allow the revision and setting aside the orders of the lower Courts, remand the case for decision to the Trial Court in accordance with law.

Revision allowed.

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(3) [1875] 74 P.R. 1875.
(4) [1883] 161 P.R. 1883.

1924 LAHORE 381

LE ROSSIGNOL, J.

Arjan Singh—Appellant.

v.

Bakhtawar Singh—Respondent.

S. A. No. 142 of 1922, Decided on 26th October 1922, from the decree of D. J. Ambala, D/-14th October 1921.

Mortgage—If no consideration has passed there is no mortgage.

The decision in 53 P. R. 1916 does not rule out a defence that the mortgage does not exist because the mortgagee had paid no part of the consideration or that there was no consideration for the mortgage. [P 381 C. 2]

K. J. Rustomji—for Appellant.

Rama Nand—for Respondent.

Judgment.—This was a suit for possession by a mor gagee on four unregistered deeds of Rs. 99 each.

The defendant denied receipt of consideration and the Trial Court dismissed the suit.

The District Judge without deciding whether consideration passed, decreed for plaintiff on the ground that *Allah Dilta* v. *Nazar Din* (1) justified such course.

Allah Ditta v. *Nazar Din* (1) does not, in my opinion rule out a defence that the mortgage does not exist because the mortgagee had no part of the consideration or that there is no consideration for the mortgage. In such a case the Courts must decide whether there is a subsisting contract. As a mortgage is a mere security for a loan the mortgage fails if there is no loan.

In this case defendant's contention is that there is no loan, so there is no mortgage.

The transaction is of a very suspisious nature, plaintiff has not proved whence he obtained the money, nor is it satisfactory that registration was avoided by the execution of four deeds in liew of one. The oral evidence is quite unreliable.

I do not believe that consideration passed and accepting the appeal I dismiss the suit with costs throughout.

Appeal accepted.

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(1) [1916] 33 P. R. 1916—51 P.W.R. 1916—33 I. C. 474 (F. B.)

1924 LAHORE 382

MARTINEAU, J.

Ali Muhammad Khan—Plaintiff—Appellant.

v.

Ali Akbar Khan and others—Defendants—Respondents.

S. A. No. 1426 of 1921, Decided on 6th February 1922, from the decree of D. J., Hoshiarpur, D/- 1st April 1921.

(a) Civil P. Code, S. 100—Existence of Wakf is a question of fact.

The finding that no wakf has been proved is a finding of fact. [P 382 C 2]

(b) Mohammaden Law—Wakf—Tomb.

A tomb would not of itself be wakf without an act of dedication. [P 382 C 2]

(c) Mohammaden Law — Wakf — Officer without office holds courtesy title.

Where there was no wakf existing, and plaintiff was appointed Sajjadanashin.

Held that the appellation of Sajjadanashin was nothing but a courtesy title. [P 383 C 2]

Tek Chand—for Appellant.

Abdul Aziz and *Badri Das*—for Respondents.

Judgment. — Mian Muhammad Khan, a *Pir* of the Chishti sect. lived in the defendants' village, Bassi Nau, in the Hoshiarpur District. The second defendant was married to one of his daughters, and the plaintiff was the son of another daughter and was one of his *murids*. Mian Muhammad Khan died in May 1914 at Bassi Nau, and was buried in a grove belonging to the defendants in the neighbouring village of Kakkon. Near his tomb is a *Hujra*, where he used occasionally to perform his religious exercises, and there is also a *chhappar* which was erected by the defendants after the *Pir's* death for the convenience of visitors. On the 28th June 1914, the 40th day after the death of the *Pir*, a large number of persons including his *murids* and representatives of shrines, such as the well-known shrines at Ajmere, Pakpattan and Mehrauli, assembled at the tomb, and the plaintiff was elected by a majority of the congregation as *sajjadanashin*, a deed of appointment, Exhibit P 1, being drawn up, which was signed by 23 persons including some of the defendants. The plaintiff also alleges that the defendants dedicated 16 *kanals* of land to the shrine as *wakf*, and he sues to restrain them from interfering with the shrine and with his management. The Courts below have agreed in finding that the plaintiff was duly appointed a *sajjadanashin*, but that no dedication of the land as *wakf* has been proved. The First Court granted an injunction that the defendants should not interfere in the management of the *Urs* or prevent the plaintiff from having free access to the shrine and using the *Hujra*, that they should not interfere with the plaintiff's servant, who would look after the *chhappar* and the tomb for the plaintiff, and that they should have nothing to do with the offerings.

On appeal the District Judge substituted for the injunction given by the First Court an injunction which provided for the plaintiff and his *murids* having access to the tomb by a path 12 feet wide and for worshippers of the tomb being allowed access to the grave on the occasion of the *Urs* ceremony, and forbade the defendants to interfere with any building made or religious ceremony performed by the plaintiff or his agents or *murids* within a circle of 30 feet radius from the centre of the tomb, or with the offerings made to the tomb, and also provided for the payment by the plaintiff of Rs. 150 a year to the defendants. Both parties have preferred second appeals to this Court.

The finding that no *wakf* has been proved being a finding of fact cannot be contested on second appeal, and the first question for consideration is whether on that finding the suit should not have been dismissed. The plaintiff's case rests on the allegation that a *wakf* was created. No dedication had been proved, and the tomb would not of itself be *wakf* without an act of dedication: *Mahmud* v. *Muhammad Hamid* (1). Mr. Tek Chand contends on behalf of the plaintiff that there is a distinction between the tomb of an ordinary Muhammadan and the tomb of a saint, but he has cited no authority to show that the tomb of a saint would be *wakf* unless

(1) [1917] 33 P.R. 1917—11 P.W.R. 1917—38 I.C. 387.

it has been dedicated as such. The tomb and its adjuncts must, therefore, be held to be the private property of the defendants, and it does not appear what right the plaintiff has over them or how the defendants can be compelled to allow the plaintiff or his *murids* or other persons a passage to the tomb over their land. The plaintiff does not in his plaint claim any rights in respect of the the tomb, *Hujra* and *chappar* apart from the existence of the *wakf*, and it is to be noted that the learned District Judge has found not only that the alleged dedication of the land is not proved, but also that the user of the land has not been proved to have been dedicated as *wakf*.

The plaintiff, it is true, was appointed *sajjadanashin* or successor of Mian Muhammad Khan, but it is difficult to see how this fact can benefit him when no *wakf* was created. It is, moreover, argued by Mr. Badri Das in support of the defendants' appeal that the appointment of the plaintiff as *sajjadanashin* is invalid. Mr. Tek Chand takes the objection that this point was not raised in the Trial Court, and he urges that the question would be one of custom, with regard to which evidence might have been given if the point had been put in issue. There could, however, be no evidence of custom in respect of the particular institution with which this case is concerned, there having been no appointment of a *sajjadanashin* before the plaintiff was appointed, while evidence as to custom prevailing in other institutions would be irrelevant. There is, besides, a definite finding by the lower Appellate Court that there is no custom applicable to such an appointment, and that finding cannot be challenged without a certificate The question as to the validity or efficacy of the appointment is purely one of law. It was raised in the lower Appellate Court without objection, and the defendants are entitled to raise it here.

Mr. Badri Das's contention that a *sajjadanashin* cannot be appointed by the congregation is opposed to the view expressed by Amir Ali, J., in *Piran* v. *Abdool Karim* (2), and I do not see much force in his further contention that the plaintiff's appointment as *sajjadanashin* is rendered invalid by the fact that four out of the eight defendants were not present and did not sign the document, Exhibit P-1. But what appears to render the appointment ineffectual is the fact that there was no religious institution existing when the appointment was made. The office of *sajjadanashin* implies the existence of a religious institution, the holder of the office being the person in charge of the spiritual affairs of the institution, *Hussain Shah* v. *Zahoor Shah* (3). As observed in *Piran* v. *Abdool Karim* (2), a *sajjadanashin* is the curator of the *Dargah* where his ancestor is buried, and in him is supposed to continue the spiritual line. Mian Mohammad Khan did not found any religious institution and was not a *sajjadanashin*, so that the election of the plaintiff as his successor was meaningless and confers no rights, there being no office to which the plaintiff could succeed, and the appellation of *sajjadanashin* given to him is nothing but a courtesy title, see on this point *Zinat Bibi* v. *Emma* (4).

The learned District Judge has held that the defendants by refraining from objecting to the burial of the holy man in their land must be held to have acquiesced in the necessary arrangements for the proper worship of his tomb, but the defendants' case is that they themselves buried the *Pir* in their land, and there is nothing to warrant the assumption which the learned Judge seems to make that the *Pir* was buried there by the plaintiff or some persons other than the defendants. No question of acquiescence arises.

As no *wakf* was created and the election of the plaintiff as the successor of Mian Muhammad Khan gives him no rights in respect of the tomb and its adjuncts, which are the property of the defendants, the suit

(2) [1892] 19 Cal. 203.
(3) [1868] 67 P R. 1868.
(4) [1917] 107 P.R. 1917—111 P.L.R. 1917—92 P.W.R. 1917—40 I.C. 240.

must fail, and it is unnecessary to enter into a discussion of other points which have been argued before me at some length, such as whether a *wakf* made for the purpose of defraying the expenses of the performance of the *Urs* ceremony of the deceased *Pir* would be valid. The plaintiff's Appeal No. 1426 of 1921, is dismissed with costs, and the defendants' appeal No. 1642 is accepted, the decrees of the Courts below are reversed, and the suit is dismissed with costs throughout.

Decrees reversed.

1924 LAHORE 384

ABDUL RAOOF, J.

Ishar Singh—Plaintiff—Appellant.

v.

Peshawri Rai and another—Defendants—Respondents.

Mis. S. A. No. 2040 of 1921, Decided on 7th March 1922, from the order of District Judge., Gujranwala, D/- 5th July 1921.

C. P. Code, O. 20 R. 14—Preemption—decree for—Full amount not deposited—Suit stands dismissed.

A decree for pre-emption was passed in favour of the plaintiff, on payment of Rs, 384 and Rs, 2-2-9 were awarded as costs, He paid Rs, 381-14-3, that is, to say he deducted the amount of costs, In appeal the amount of the price was raised to Rs. 470 by compromise, The Court passed a decree in accordance with the compromise and further ordered that parties were to bear their own costs in both the Courts below, Further the plaintiff only deposited Rs, 86-2-0 more which, added to the amount of Rs. 381-14-3 already deposited brought the total to Rs. 468-0-3. Therefore there was a deficiency of Rs. 2-2-9.

Held: that the decree on appeal was not sufficiently complied with and the suit should stand dismissed. 10 A. 400 and 34 A. 593 dist.

[P 384 C 2]

Jagan Nath and Mukand Lal Puri—for Appellant.

Niaz Ali and Mul Chand—for Respondents.

Judgment.—The facts giving rise to this second appeal may be summarised as below:—

On the 26th July 1920 a decree for preemption was passed in favour of the plaintiff-appellant on payment of Rs. 384. Rs. 2-2-9 were decreed to the pre emptor as costs, 31st of August 1920, was the date fixed by which the money was to have been paid in. On the 19th August 1920 the pre-emptor paid in Rs. 381-14-3, that is to say, he deducted the amount of costs from the price which he had been ordered to pay. In appeal on the 13th November 1920 the amount of the price was raised to Rs. 470 by compromise. 13th of December 1920 was fixed for payment. The Court passed a decree in accordance with the compromise and further ordered that parties were to bear their own costs in both the Courts below. On the 9th of December 1920 the plaintiff decree holder only deposited Rs. 86-2-0 more which, added to the amount of Rs. 381-14-3 already deposited, brought the total to Rs. 468-0-3. Therefore, there was a deficiency of Rs. 2-2-9. It has been held by the lower appellate Court that owing to this deficiency in payment the suit of the plaintiff decree-holder stood dismissed.

In second appeal it is contended that the view taken by the two Courts below is opposed to decided cases. Reliance is placed on the case of *Balmukand* v. *Pancham* (1), and also upon *Ali Husain* v. *Amin Ullah* (2), Both those cases are, however, clearly distinguishable from the present case. In the former case the full amount ordered by the Court to be paid as the price was deposited in Court. Subsequently the pre-emptor executed his decree for costs and drew out the amount of costs decreed to him. The price was enhanced in appeal and the parties were ordered to bear their own costs. The plaintiff decree-holder deposited the additional amount of the price on the hypothesis that the whole price decreed by the first Court had already been deposited. The question raised was that the amount had been reduced by the withdrawal of the amount of costs but as originally the full decretal amount had been paid in and the amount of costs had been drawn out

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(1) [1888] 10 All. 400-(1888)A.W.N. 74.
(2) [1912] 34 All. 593—10 A.L.J. 153—15 I. C. 337.

by the execution of the decree, the Allahabad High Court held that this was a sufficient compliance with the decretal order. To the same effect is the decision in *Ali Husain* v. *Amin Ullah* (2). In the present case, however, the facts are different. In this case the plaintiff did not deposit the full amount of Rs. 384, fixed as the price to be paid in. He only deposited Rs. 381-14-3. On the passing of the appellate decree it became clear that in order to make up the total amount of Rs. 470 the plaintiff would have to pay back the amount of costs which he had withdrawn. The learned Counsel for the appellant has relied also on *Bhagwana* v. *Goru* (3) but the decision in that case is based entirely on the rule laid down in the two Allahabad cases. The learned Judges of the Punjab Chief Court did not notice the distinction between the facts of the Allahabad cases and those of the case which they had to decide. The present case, however, stands upon a different footing from the case decided in *Bhagwana* v. *Goru* (3). Here the amount of Rs. 470 was fixed by the Court in pursuance of a compromise. According to the compromise, the plaintiff had undertaken to pay Rs. 470, and in strict compliance with the compromise decree the plaintiff ought to have paid in the full amount, the decree having made it quite clear that the parties were to bear their own costs. It could never have been contemplated by the parties, when they settled their dispute by a compromise, that the plaintiff was to deposit only Rs. 468-0-3 and that the defendant was to recover the balance of Rs. 2-2-9 by instituting proceedings in execution for restitution of costs.

I, therefore, uphold the decision of the Courts below and dismiss the appeal with costs.

Appeal dismissed.

(3) [1910] 56 P. R. 1910—133 P. L. R. 1910—166 P. W. R. 1910—6 I. C. 954.

✱ 1924 LAHORE 385

LE ROSSIGNOL, J.

Hussaina—Defendant—Appellant.

v.

Mt. Jivani—Plaintiff—Respondent.

S. A. No. 1711 of 1921, Decided on 21st January 1922, from the decree of D. J. Jhelum, D/-2nd June 1921.

✱ *Muhammadan Law—Marriage—Option of puberty—Interpretation of rules as to.*

The Muhammadan Law was promulgated to people living under very different conditions from those which obtain, today and must be interpreted with due regard to the change in public feeling and taste on questions of decency. The principle underlying the crude provisions of Muhammadan Law regarding option of puberty is that there must be no acquiescence so that the question on all these cases will be 'has the plaintiff acquiesced." [P 386 C 1]

Shujauddin—for Appellant.

Mahesh Das and *Amar Nuth Monga*—for Respondent.

Judgment.—This was a suit by a girl of 17 for the cancellation of her marriage with defendant, on the ground that having attained puberty, she wished to repudiate the marriage into which she was contracted by her uncle, and the only question is whether her repudiation is within time.

It is urged that as menstruation in this country begins at the age of 15 at latest, the repudiation is *prima facie* too late and the Courts below erred in applying to this case the considerations which prevailed in *Bindu* v. *Bugli* (1).

In that case it was held that a woman who brought a suit to repudiate a marriage into which she had been forced could not be said to have acquiesced in the marriage because she had delayed to sue for two years.

In that case, however, the woman was *sui juris* at the time of the marriage and she pleaded duress; in this case the plaintiff was a minor at the time of marriage.

For the appellant defendant it is urged that Muhammadan Law i sists that the repudiation shall be made immediately the virgin perceives the first sign of the menstrual flow, but

(1) [1909] 73 P.R. 1909—114 P.W.R. 1909—118 P. L. R. 1909—2 I. C. 814.

the Muhammadan Law was promulgated to people living under very different conditions from those which obtain to-day, and must be interpreted with due regard to the change in public feeling and taste on questions of decency.

The principle underlying the crude provisions of Muhammad Law is that there must be no acquiescence so that the question in all these cases will be. Has the plaintiff acquiesced?

The Courts below find she has not and I agree with them and dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 386

ABDUL QADIR, J.

Suba Singh—Plaintiff—Appellant.

v

Gopal Singh and others—Defendants—Respondents.

S. A. No. 2181 of 1921, Decided on 17th February 1922, from the decree of D. J., Jullundur, D/- 24th June 1921.

Custom (Punjab)—Alienation—Remoter reversioners cannot sue to set aside, if sons refuse to do so.

In a case where it has been found that the male owner who has alienated ancestral land has got sons of whom some have even attained majority, it is not open to a reversioner whose rights would accrue after these sons, to bring a suit until he can justify himself by bringing his case within the conditions laid down in paragraph 67 of Rattigan's Digest of Customary Law. 84 P. R. 1898 (F. B.) and 67 P. R. 1900 ref. [P 387 C 1]

Kanwar Narain—for Appellant.

Sham Lal—for Respondents.

Judgment.—Narain Singh, defendant No. 3 sold 15 *kanals* and 13 *marlas* of land situated in Jullundur District to Gopal Singh, defendant No. 1, for Rs. 1,500. Suba Singh, a collateral of the vendor, brought a declatory suit contesting this sale on the usual grounds and alleging that the vendor was *la-wald*. It was pleaded on the other side that Narain Singh had three sons from a wife with whom he was residing at Jamesabod in Sind where he had some land, and that in the presence of his sons a remoter reversioner, such as the plaintiff, had no *locus standi* to sue. The Trial Court held that the reversioner could sue if the vendor's sons did not sue and went into the merits and granted the decree prayed for, holding that Rs. 952 out of the sale money were proved to be for legal necessity and would be a charge on the land. On appeal by the vendee, Gopal Singh, the learned District Judge held that in the presence of a nearer reversioner a remoter reversioner had no *locus standi* to sue unless any waiver of his rights by the nearer reversioner or any collusion with the alienor was shown. He observed, "there was nothing in the statement of the son of Narain Singh (who was examined in Court) which would prove that he had waived his rights or abandoned them or that he had colluded in the alienation made by his father." He, therefore, dismissed the plaintiff's suit. The plaintiff has now come up to this Court in second appeal and the sole question raised by him is that he had a *locus standi*. I have heard Mr. Kanwar Narain on his behalf and Mr. Sham Lal for the respondent.

Mr. Kanwar Narain relies on *Harvans Singh* v. *Harnam Singh* (1) and a subsequent ruling of the Punjab Chief Court, *Murad* v. *Jannat* (2), and says that the circumstances of this case were such that an inference of collusion or waiver on the part of the son of Narain Singh should have been drawn by the lower appellate Court, and it should have been held that the appellant had the right to bring a suit under those circumstances to contest the alienation made by Narain Singh, Mr. Sham Lal, on the other hand, replies that none of the circumstances mentioned in paragraph 67 of Rattigan's Digest of Customary Law, as entitling a remoter reversioner, in the presence of the nearest reversionary heir, to bring a suit to set aside an alienation, has been proved to exist in this case. He gees on to say that, so far from there being any proof that there were reasons justifying Suba Singh to institute a suit, there is even no allegation in his plaint that any such reasons existed, and that he had confined his case to the allegation that Narain Singh was sonless. I think there is

(1) [1898] 84 P. R. 1898 (F.B.)
(2) [1900] 67 P. R. 1900.

considerable force in this contention. In a case where it has been found that the male owner, who has alienated ancestral land, has got three sons of whom the eldest has attained his majority, it is not open to a reversioner, whose rights would accrue after these three sons, to bring a suit until he can justify himself by bringing his case within the conditions laid down in paragraph 67 of Rattigan's Digest of Customary law. This seems to be clear even from those authorities on which Mr. Kanwar Narain has relied. It was found in the Full Bench case that the nearest reversioner was alive but refused to join in the suit, and it was for that reason that the reversioner next to the one who refused to join in the suit was allowed to sue. Similarly, in *Murad* v. *Jannat* (2) it was found that the daughter, who was the possible next reversionary heir in that case, refused without sufficient cause to institute proceedings to challenge the alienation in question, admittedly concurred in it, and that, therefore, the reversioner next to her was entitled to bring a suit. None of these circumstances has been shown to exist here. It is not alleged that Lal Chand, the eldest son of Narain Singh has refused to join in the suit or refuse to sue. It is pointed out by Mr. Sham Lal that when Lal Chand was in the witness-box no question was put to him whether he was going to exercise his right or not which has not been waived. The alienation was made in 1920 and much time did not elapse between the sale and the suit, so that there is, nothing to show that the son was not going to exercise his right to question the sale. I think, under such circumstances, the conclusion arrived at by the learned District Judge is correct, that in the presence of a son of the vendor, the plaintiff has no rignt to sue, as the son had not refused to exercise his right and that as two other sons of the alienor intervene between Lal Chand and the plaintiff, the latter has no *locus standi* to sue.

This appeal is, therefore, dismissed with costs throughout.

Appeal dismissed.

1924 LAHORE 387

ABDUL QADIR, J.

Hans Raj—Plaintiff—Appellant.

v.

Malawa Mal and others—Defendants—Respondents

S. A. No. 2184 of 1921, Decided on 21st February 1922, from the decree of D. J. Gurdaspur at Dalhousie, D/-15th June 1921.

Easements Act, S. 28—Right to use roof as open space does not justify building on it.

Where defendants had acquired the right to use the roof A and B as an open space in front of the room C as an easement.

Held: that it cannot justify their building over that portion and raising a structure on walls belonging to another person and creating a complication seriously impairing the rights of the owner of the shop on the ground floor. [P 389 C 1]

Jagan Nath—for Appellant.

Badri Das—for Respondents.

Judgment.—Hans Raj, the plaintiff-appellant in this case, brought a suit against Malawa Mal praying for a permanent injunction ordering the defendant to remove a building which he had erected on the roof of a shop No. 881, in the town of Batala, belonging to the plaintiff. His suit was dismissed by the Court of first instance, and his appeal to the District Judge also failed. He has now come up to this Court in second appeal and I have heard Lala Jagan Nath on his behalf and Rai Bahadur Lala Badri Das on behalf of the respondents.

There are four shops adjoining one another. It is found by both the Courts below that No. 881 belongs to the plaintiff, No. 882 belongs to one Pohlu Mal, No. 883 belongs to Guranditta, and No. 884 admittedly belongs to Malawa Mal, the respondent. The roofs of all these four shops are reached by one staircase adjoining shop No 884. Each of these shops on the ground floor is divided into three parts, the front part being a verandah, behind which there is a room, leading to another room at the back. The situation on the roof is that the back rooms of all the four shops are built upon, with the rest of the roof of all the four shops serving the purpose of a courtyard

in front of the four upper rooms. It has been concurrently found by both the Courts, which have dealt with this case, that the building on the back rooms belongs to the respondent Malawa Mal, and has been let out by him on rent to a school for a long time. Malawa Mal has recently built a structure on the portion of the roof which covers the shop of the plaintiff. It is this building over the verandah and the front room of shop No. 881 which is objected to by the plaintiff. The lower appellate Court, after considering the evidence and all the circumstances of the case has held "that Malawa Mal had been using the roof over the *kothri* B and verandah A (in the plain Exhibit P. 1) as a flat with the *baithak* C, as an easement and as of right without interruption for twenty years." The contention in second appeal is that taking the finding of the lower Appellate Court as final on facts, the decree passed by it dismissing the plaintiff's suit for injunction is wrong in law, because all that the respondent was entitled to was the use of the roof over A and B as an open space, in front of the upper room marked C, but he had no right to build on it. It is argued that this amounts to an unwarranted extension of the easement in question. Lala Jagan Nath contends that under S. 22 of the Indian Easements Act the dominant owner must exercise his right in the mode which is least onerous to the servient owner, and even if he alters the mode of enjoyment in any way he can only do so subject to the provision of S. 23 which lays down that he should not thereby impose any additional burden on the servient tenement. Reference is made to a ruling of the Calcutta High Court in Letters Patent Appeal No. 130 of 1919, published as *Suresh Chandra Biswas* v. *Jogendra Nath Sen* (1) which holds that "it is well settled that no man can impose a new or increased restriction or burden on his neighbour by his own act, and for this reason an owner of an easement cannot, by altering his dominant tenement, increase his right."

(1) [1920] 32 C. L. J. 27—24 C. W. N. 896—58 I. C. 854.

Lala Badri Das, in reply, says that his client is really the owner of the whole of the roof in front of the four rooms belonging to him, and he is within his rights in building on any part of it. He adds that the learned District Judge has wrongly described the title of his client as a mere easement, and that the trend of his judgment shows that he was of opinion that the upper part of the property in dispute was owned by the defendant-respondent. He urges, therefore, that this finding should be taken to be final as to ownership, and, therefore, the appeal of the plaintiff should be dismissed. He pleads, in the alternative, that in case this Court comes to the conclusion that the right of easement has been exceeded and that the building on the roof of the plaintiff was not justified, the demolition of the building should not be ordered, because the suit was brought several months after the completion of the building. He adds that the plaintiff might be compensated for the infringement of his right in some other way, as the respondent would suffer great inconvenience and loss if the building is now ordered to be removed. Lala Jagan Nath argues in reply that the decision in favour of the defendant rests on a clear finding as to easement, though the complaint of the plaintiff is that in giving that finding, the Court below set up a new case for the defendant. But he goes on to say that in face of that finding it is not open to the respondent to urge that so far as the roof over A and B is concerned he is anything more than the owner of an easement. He points out that obviously it could not be otherwise, because the shop below admittedly belongs to the plaintiff, and the owner of the shop must be taken to be the owner of the roof.

As regards the plea that, even if it is found that respondent is not to be allowed to add to the burden of the servient tenement, the removal of the building should not be ordered, Lala Jagan Nath says that this has not been pleaded by the defendant before. There is no issue on the point whether the suit was delayed or as to the effect of such delay. In

fact it was stated clearly by the plaintiff that he did not come to know of the building till after its completion. The plaintiff does not live in Batala, but lives at Dera Baba Nanak. I think this last criticism of the new plea raised is reasonable, and it is not necessary for me to take up this new point. On the main question in the case I am of opinion that the rights established as having vested in the respondent by virtue of his enjoyment for 20 years is the right to use the roof A and B as an open space in front of the room C, but I do not think that can justify the plaintiff in building over that portion and raising a structure on walls belonging to another person and creating a complication seriously impairing the rights of the owner of the shop on the ground floor.

I, therefore, accept this appeal and decree the plaintiff's suit and grant him the perpetual injunction prayed for. The respondent, Malawa Mal, will remove the materials of the structure erected by him on the roof of parts A and B of shop No. 881 and restore the roof to the condition in which it was before he started his structure. In the circumstances of the case I would allow the parties to bear their own costs throughout.

Appeal accepted.

✱ 1924 LAHORE 389

MARTINEAU, J.

Muhammad Hassan — Defendant — Appellant.

v.

Sohara and others — Plaintiffs — Respondents.

S. A. No. 2291 of 1921, Decided on 3rd August 1922, from the decree of D. J. Multan, D/- 12th June 1921.

✱ (a) *Evidence Act, S. 79 — Registration Act, S. 68—Registration certificate — Genuineness is presumed.*

Registering Officer's evidence is not necessary to prove the certificate of registration, the genuineness of which is to be presumed under S. 79. 38 I.C. 605 Appr.; 34 I.C. 281, 38 A. 1 and 17 C. 903, Diss. [P. 390, C. 2]

✱ (b) *Registration Act, S. 58 — Endorsement as to admission of execution is not necessary—Registration certificate is not admissible to prove admission of execution — Registration Act, S. 60.*

S. 58 does not require a Registering Officer to endorse on the document an admission of its execution by the executants and therefore a certificate of registration is not evidence of such an admission under S. 60 even if the admission is in fact mentioned in the endorsement on the document. [P. 391, C. 1]

✱ c) *Adverse Possession—Co-sharers—One co-sharer holding adversely to others—Entry of latter's name in Revenue Records does not affect.*

Where a co-sharer in possession of joint property has by an overt act shown to his co sharers that he would hold adversely to them, his possession does not cease to be adverse merely because subsequently the names of his co-sharers were entered in the Revenue Records as co sharers. Title to the Waste land will go with title to the cultivated area. 22 I. C. 805 ref. 29 I. C. 348 Dist. [P. 391. C. 2, P. 392, C. 1]

(d) *Adverse possession — Adverse possession by tenant—Landlord and tenant.*

The possession of a tenant does not become adverse by the mere fact of his repudiating the tenancy unless his repudiation is accepted by the landlord. [P. 393, C. 1]

Tek Chand—for Appellant.

Har Gopal—for Respondents.

Judgment.—The land in suit was sold to defendant No. 3 in 1919 by Sohara and Piara, defendants Nos. 1 and 2, who are entered in the Revenue records as joint owners with the plaintiffs. The latter sued for a declaration that they were the sole owners denying that Sohara and Piara had any rights in the land, and in the alternative they asked for a decree for pre-emption. The Subordinate Judge gave them a declaratory decree in respect of all the lands except the land of the Khichiwala well, for which he gave a decree for pre-emption. The declaratory decree has been upheld by the District Judge, and defendant No. 3 has preferred a second appeal to this Court.

The plaintiffs and Sohara and Piara are the grandsons of Rai Khanan, the former owner of the land, the plaintiff's father, Fazal, having been Rai Khanan's son by one wife and Sohara's and Piar's father, Wasaya, his son by another wife. Rai Khanan died in 1870, and disputes then arose between the sons by the two wives, the plaintiff's father, Fazal, and his brother, Karam, contending that Wasaya and his brother, Jawaya, were illegitimate and had no right to succeed to the property. In 1871 the Deputy Commissioner decided that

Wasaya and Jawaya were the legitimate sons of Rai Khanan, and ordered that all the four sons of Rai Khanan should be entered as owners. No change, however, was made in the records till 1878, when an order P-27 was passed by the *Tahsildar* of Alipur, which shows that Fazal and Karam again denied that Wasaya and Jawaya were the legitimate sons of the Rai Khanan, while Wasaya and Jwaya asserted their legitimacy and asked that they might be entered in the records as owners along with Fazal and Karam. The *Tahsildar* found that Wasaya and Jawaya were in possession of only two wells, and ordered that they should be entered as co-owners of the whole property but as being in possession of only two wells and not of the rest of the land. That order was carried out. The plaintiffs maintain that, notwithstanding the mutation effected in accordance with the *Tahsidar's* order of 1878, they remained in possession of the land in suit adversely to Jawaya and Wasaya, and they also allege that in 1897 Jawaya, Sohara and Piara executed a deed P-1 by which they agreed to take certain shares in the land of the Khichiwala well, Paluwala well and Tahliwala well in full satisfaction of their claim and gave up all rights in the remaining land.

The Courts below have found the execution of the deed P-1 to be proved, and the first question is whether there is evidence to support that finding. There is no evidence of the scribe or of any witness in whose presence the document was executed, but the Courts below rely on the statement of one Khuda Bakhsh, who says that the seal of one of the attesting witnesses to the deed is that of his father, Lal. This statement, however, would show only that Lal attested the deed and is no proof that Jawaya, Sohara and Piara executed it. Apart from Khuda Bakhsh's statement all that the plaintiffs have to rely on as proof of the execution is the Sub-Registrar's certificate of registration. The learned District Judge has held on the authority of *Ajudhia Prasad* v. *Jagannath Bakhsh Singh* (1) that that certificate is evidence of execution, and Mr. Har Gopal, who has argued the case for the respondents, has also referred to *Thama* v. *Govind Bilal* (2). and *Nittyanund Kur* v. *Raj Bullubh Adyapurahit* (3). On the other hand, Mr. Tek Chand on behalf of the appellant has relied on *Hori Lal* v. *Thakur Bhagwan Bakhsh* (4), *Rajmangal Misir* v. *Mathura Dubain* (5), *Salimatul Fatima* v. *Koylashpoti Narain Singh* (6) and some older rulings, in which it was held that the certificate endorsed by the Registering Officer is not evidence of execution. He also urges that the Registering Officer has not been called as a witness and that he is not shown to be dead; but as to this it is sufficient to say that the Registering Officer's evidence is not necessary to prove the certificate the genuineness of which is to be presumed under S. 79 of the Evidence Act. The question is what the certificate proves.

S. 60 (2) of the Registration Act provides that the certificate shall be admissible for the purpose of proving that the document has been duly registered in manner provided by the Act, and that the facts mentioned in the endorsements referred to in S. 59 have occurred as therein mentioned. The endorsements mentioned in S. 59 are those made under Ss. 52 and 58. S. 52 requires only that the day, hour and the place of presentation and the signature of every person presenting a document for registration, shall be endorsed on the document at the time of presenting it. S 58 requires the following particulars to be endorsed on the document, namely,—

(*a*) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(*b*) the signature and addition of every person examined in reference to

(1) [1917] 20 O.C. 18.

(2) [1907] 9 Bom. L.R. 401.
(3) 25 W.R. 267.
(4) [1916] 19 O.C. 23.
(5) [1916] 38 All. 1.
(6) [1890] 17 Cal. 903.

such document under any of the provisions of the Act, and

(c) any payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

Now, it is noticeable that, while clause (*c*) requires the Registering Officer to endorse on the document any admission of receipt of consideration made in his presence in reference to the execution of the document, there is no similar provision in clause (*a*) requiring him to endorse an admission of the execution, but what he is required by clause (*a*) to endorse is the signature and addition of the person admitting the execution. There appears to me to be a clear distinction between endorsing the signature of the person who admits the execution and endorsing the fact of the admission being made. Ordinarily, no doubt, a Registering Officer does endorse on the document the fact that the executant admits its execution; but S. 58 does not require him to do so, and I think that if it had been the intention of the Legislature to make it obligatory on the Registering Officer to endorse on the document an admission of execution made by the executant, there would have been a clear provision to this effect similar to the provision in clause (*c*) for endorsing an admission of the receipt of consideration. I hold, therefore, that, as the law does not require a Registering Officer to endorse on the document an admission of its execution by the executants, the certificate of registration is not evidence of such an admission under S. 60, of the Registration Act even if the admission is in fact mentioned in the endorsement on the document. The certificate on P-1 is consequently under the law no proof that Jawaya, Sohara and Piara admitted having executed the document, and I find that the execution has not been proved.

The next question is, whether the plaintiff's possession has been adverse to defendants Nos. 1 and 2. The lower appellate Court has found on the evidence that defendants Nos. 1 and 2 never succeeded in getting possession of their share of the property left by Rai Khanan, and this finding of fact cannot be contested. Defendants Nos. 1 and 2 were no doubt co-sharers with the plaintiffs, and I do not appreciate the distinction which the learned District Judge seeks to draw when he says that it would be more correct to call them co-heirs than co-sharers, but the plaintiff's predecessors clearly denied the title of Jawaya and Wasaya, the predecessors of defendants Nos. 1 and 2, in 1871 after the death of Rai Khanan, and again in 1878 in the proceedings before the *Tahsildar*, and they asserted their exclusive rights to the property openly in the presence of Jawaya and Wasaya.

It is contended for the appellant that that assertion was of no effect, because mutation was in spite of it effected in favour of Jawaya and Wasaya, but I do not agree with this contention. There is nothing to show that after the mutation the plaintiffs or their predecessors in any way changed their attitude and recognised the title of Jawaya and Wasaya. They continued as before in exclusive possion of the land in suit, and I do not see how the nature of their possession, which became adverse when they denied the title of Jawaya and Wasaya, can be said to have been changed by the mere fact of those persons being recorded as co sharers. *Akbar* v. *Tabu* (7), which is cited by Counsel for the respondents, is a case in point In that case the owner in possession had by an overt act shown to his co-sharers that he wanted to hold the land for himself alone, and it was held that the mere retention by the Revenue Officers of the names of his co-sharers after the overt act had been done did not prevent limitation from running against them and that even a decree in their favour, unaccompanied by actual effective assertion of their rights and the taking of possession of those rights, would not help them.

Mr. Tek Chand has referred to *Dalip Singh* v. *Rannia* (8), a case in which the persons in possession of the

(7) [1914] 22 I.C. 805.
(8) [1915] 29 I.C. 348.

land were lessees. They had at one time claimed to be proprietors, but on the objection of the landlords their claim had been rejected by the Revenue Officers They remained in possession, but it was held that their possession had not become adverse and that they had not acquired proprietary rights. That case, however, is not in point, as the position of a tenant is not analogous to that of a co-sharer. The possession of a tenant does not become adverse by the mere fact of his repudiating the tenancy unless his repudiation is accepted by the landlord.

It is urged by Mr. Tek Chand that the greater portion of the land was *banjar*, as is remarked in the lower appellate Court's judgment; but this fact does not appear to me to make any difference. The whole of the land in suit belonged to Rai Khanan, and there is no reason for treating that portion which is waste differently from the cultivated portion. The title to the former must go with the title to the latter and when it is found that the plaintiffs have by adverse possession acquired an exclusive title to the cultivated area they must also be held to have acquired an exclusive title to the waste.

Nothing has been said in argument with regard to grounds Nos. 5 and 8.

I agree with the lower appellate Court that the plaintiffs have by adverse possession become sole owners of the land in suit, and that, therefore, defendants Nos. 1 and 2 were not competent to sell it to defendant No. 3. The appeal is accordingly dismissed with costs.

Appeal dismissed.

1924 LAHORE 392

MOTI SAGAR, J.

Mam Chand and others—Accused Petitioners.

v.

Emperor—Opposite Party.

Cr. Rev. No. 258 of 1923, Decided on 27th April 1923, in the case reported by S. J. Karnal, D/- 30th January 1923.

Criminal. P. C., S. 133—Evidence must be recorded in a proceeding under the section.

Where the accused was served with a notice under S. 133 to remove a shed and the Magistrate without recording any evidence for the prosecution made the order absolute and directed the shed to be removed.

Held: that the procedure to be followed in such cases is as in a summons case and that evidence must be recorded. 32 P. R. 917 Cr; 31 A. 453; 24 C. 395 ref. [P. 392 C. 2]

Shankar Chand and N. C. Pandit—for Petitioners.

Order.—This case has been reported to this Court under S. 438 of the Criminal Procedure Code by the Sessions Judge of Karnal. It appears that the accused constructed a certain shed on a public thoroughfare without the permission of the proprietors of the village A complaint was filed before the Sub-Divisional Magistrate who ordered that a notice should be issued to the accused under S. 133, Criminal Procedure Code, for the removal of the shed. The accused appeared in Court and filed certain objections. The Magistrate, without recording any evidence for the prosecution, made the order absolute and directed the shed to be removed.

It is clear that the order is illegal and must be set aside. There is abundant authority for holding that the procedure to be followed in such cases is as in a summons case and that evidence must be recorded. *Sita Ram* v. *Emperor* (1), *Hingu* v. *Emperor* (2) and *Srinath Roy* v. *Ainaddi Haldar* (3)

I allow the revision and set aside the order passed by the Trial Magistrate as recommended by the earned Sessions Judge.

Revision allowed.

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(1) [1917] 32 P. R. 1917 Cr.—18 Cr. L.J. 888—43 P.W.R. 1917 Cr.—41 I. C. 1000.

(2) [1909] 31 All. 453—6 A. L. J. 685—10 Cr. L. J. 297—3 I. C. 482.

(3) [1897] 24 Cal. 395—I. C. W. N. 217.

1924 LAHORE 393

BROADWAY, J.

The Municipal Committee, Delhi—Defendant—Appellant.

v.

Abdul Hassan Khan—Respondent.

S. A. No. 2394 of 1921. Decided on 15th May 1922, from the decree of District Judge, Delhi D/- 22nd August 1921.

(a) *Punjab Municipal Act, S. 193—Sanction, subject to leave certain space, is not* ultra vires,

Where sanction was granted subject to the condition that a particular wall in the plan of the proposed new building should be put back a certain distance,

Held: the Committee was not acting beyond its powers in imposing the condition in question. [P. 394 C. 1]

(b) *Punjab Municipal Act, S. 3 (13)—Street—'Accessible' includes right of access.*

"Accessible to the public" does not mean merely physical access apart from right of access. [P. 394 C. 2]

Kunwar Dalip Singh—for Appellant.

Moti Sagar—for Respondent.

Judgment.—Nawab Abdul Hassan Khan applied to the Municipal Committee of Delhi for permission to erect a certain building. Sanction was accorded and the plans passed subject, however, to the condition that a certain existing wall, marked A. B. on the plan in Court, should be put back from the centre of the street. The building was erected but the wall was left standing in its old position. During the building operations the Committee pointed out to the Nawab that he was not complying with the condition imposed, and warned him in writing that he was failing to do so at his own risk. Nevertheless, the building was proceeded with and the condition ignored. The Committee then proposed to demolish the building and issued a notice to this effect to the Nawab.

The Nawab instituted a suit asking for a perpetual injunction directing the Committee to refrain from interfering with the said building.

He alleged that the space on which the wall A. B. abuts is not a "street" and that the Committee had no power to impose the condition to the demolition of an existing wall.

The Trial Court granted the Nawab a decree holding that the Committee's action in imposing the condition was *ultra vires* and that in any case the order to demolish was unreasonable and oppressive.

The Committee thereupon appealed to the District Judge who however held that the space on which the wall A. B. abutted was not a "street" within the definition given in the Act, and that, therefore, the action of the Committee in imposing the condition was *ultra vires* Its appeal having then been dismissed the Committee has come up to this Court in second appeal through Mr. Dalip Singh, while I have heard Mr. Moti Sagar for the Nawab.

Mr. Dalip Singh has contended that the Act gives the Committee power to impose any reasonable conditions when sanctioning the erection of any buildings, that therefore, the condition imposed was not *ultra vires* whether the space in question was a "street" or not. He also contended that the said space was a street.

Now, S. 189 of the Muncipal Act lays down that "no person shall erect ..... building without the sanction of the Committee", and that any person intending to erect any building must give notice in writing to the Committee of such intention. Sub-clause (3) empowers the Committee to prescribe, by its bye-laws, the manner in which such notice is to be given and the particulars that should accompany it. One of the bye-laws framed by the Committee under S. 189 (3), viz, No. 26, deals with the distance that must be left round buildings abutting on streets and lanes.

S. 193 of the Act empowers the Committee to refuse to accord sanction or to grant sanction subject to such modification as it may seem fit in respect of all or any of the matters specified in S. 189 (3): and one of these matters related to the space to be left about the proposed building.

In the present case when the Nawab applied for sanction it was granted subject to the condition that the wall A. B. which in the plan of

the proposed new building was to form part of the southern boundary wall, was put back a certain distance.

Assuming that the Committee had no power to direct the demolition of an existing wall can it be said that it could not take advantage of the application to erect a new building which was to include this wall as an integral part of it, to sanction the new building on condition that the wall A. B. should be put back a few feet?

After a careful consideration of the arguments of the learned Counsel and the authorities cited, viz., *Bhawanishankar Ravishankar* v. *Surat City Municipality* (1) and *Tribhovan* v. *Ahmedabad Municipality* (2), by Mr. Dalip Singh and *Damodar Das* v. *Municipal Committee, Delhi* (3) by Mr. Moti Sagar I am of opinion that the Committee was not acting beyond its powers in imposing the condition in question. *Damodar Das* v. *Municipal Committee, Delhi* (3) is clearly distinguishable. On the question whether the plot of land in question is or is not a "street" Mr. Dalip Singh referred to *Municipal Commissioner of Bombay* v. *Mathurabai* (4) and *Emperor* v. *Manilal Mohanlal* (5), while Mr. Moti Sagar cited *Kanidas* v. *Municipality of Dhandhuka* (6) *Ahmedabad Municipality* v. *Manilal Udenath* (7) and *Shahab-ud-din* v. *Emperor* (8). The expression "street" is defined in S. 3 (13) of the Act as meaning any road, footway, square Court. alley or passage accessible whether permanently or temporarily to the public whether a thoroughfare or not. Mr. Dalip Singh contended that "accessible to the public" meant merely physical access apart from right of access. As pointed out by Mr. Moti Sagar, however, that would include the drive to any house and I am inclined to think that mere physical access alone cannot be regarded as the test.

The lower appellate Court has held on the evidence that this piece of land is the private property of one Banarsi Das who can prevent the public from using it at his own will and pleasure. I am inclined that this is a finding of fact by which I am bound, but in any case on the finding that the public can be prevented from using this land by Banarsi Das at will it seems to me that it cannot be regarded as a street.

As, however, I hold that the Committee had the power to impose the condition under consideration I allow the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

(1) [1897] 21 Bom. 187 –(1895) P.J. 375.
(2) [1903] 27 Bom. 221—5 Bom. L.R. 48.
(3) [1901] 27 P.R. 1901–(1900) P.L.R. 395.
(4) [1906] 30 Bom. 518–8 Bom. L.R. 457—4 Cr.L.J. 23.
(5) [1912] 14 Bom. L.R. 499—13 Cr. L.J. 513—15 I.C. 785.
(6) [1882] 6 Bom. 686.
(7) [1896] 20 Bom. 146.
(8) [1918] 16 P.L.R. 1918—15 P.W.R. 1918 Cr,—19 Cr.L.J. 254—44 I.C. 46.

1924 LAHORE 394

BRASHER, J.

Misri Khan—Plaintiff—Appellant.

v.

Shahji and another–Defendants–Respondents.

S. A. No 2598 of 1921, Decided on 12th June 1922, from the decree of District Judge, Rawalpindi, D/– 1st July 1921.

Limitation Act, Art. 10–Punjab Pre-emption Act, S. 30—Vendee already in possession as tenant—Time runs from the date of mutation.

Where prior to the sale the vendee was already in physical possession of the property sold, as a tenant, and no physical possession could be given to him.

Held, that the subject of the sale did not admit of physical possession and that whether Art. 10 of the Limitation Act or S. 30 of the Punjab Pre-emption Act is to be applied, the date from which limitation runs is the date when the mutation was effected. [P. 395C. 1]

Kanwar Narain—for Appellant.

Mukand Lal Puri—for Respondents.

Judgment.—The only question raised in this appeal is one of limitation.

The plaintiff sued for pre-emption in respect of an oral sale, the vendee having been at the time of the sale a tenant under the vendor. The mutation relating to the sale was entered up on December 24th, 1918, and the mutation was sanctioned on December 29th, 1918. The learned District Judge has found that the oral sale took place about a month before the mutation was entered, *i. e.*, about November 24th, 1918. Taking this as the starting point for limitation he has held that the suit is barred by time, it being admitted that the suit would be within limitation if time is to be reckoned from the date of the mutation. For the appellant the finding that the sale took place prior to the date of the entry of the mutation is challenged and it is contended that Art. 10 does not apply at all, but that even if this Article is to be applied the vendee did not take possession under the sale until the mutation was sanctioned.

The finding that the sale took place a month prior to the date of the mutation entry is a finding of fact which has some evidence to support it, and I cannot question this finding in second appeal.

The question whether Art. 10 of the Limitation Act is applicable to a case of this kind is not free from difficulty and no authority directly in point has been cited. Prior to the sale the vendee was already in physical possession of the property sold as a tenant, and no physical possession could be given to him. I am disposed to hold that the subject of the sale did not admit of physical possession; but, if Art. 10 is to be applied, then limitation runs from the date of taking physical possession under the sale, and I do not see how the character of the vendee's possession changed on the date when the sale was effected. The vendee cannot, I think, be said to have taken possession under the sale until his new status was publicly proclaimed at the time of the mutation, and, therefore, whether Art. 10 of the Limitation Act or S. 30 of the Punjab Preemption Act is to be applied the date from which limitation runs is the date when the mutation was attested.

In my opinion, therefore, the suit is within time. It has been found that the plaintiff has a right of pre-emption and that the price, Rs. 200, was paid and fixed in good faith.

I accordingly accept this appeal and give the plaintiff a decree for pre-emption on payment of Rs. 200, the purchase money to be paid into Court on or before August 12th, 1922. On payment into Court of such purchase money the defendant shall deliver possession of the property to the plaintiff, but if the purchase-money be not paid on or before August 12th, 1922 the suit shall be dismissed with costs throughout to the defendant, Shahji. The appellant will get his costs in this Court against the respondent Shahji, in the event of the money being paid.

Appeal accepted.

1924 LAHORE 395

MARTINEAU, J.

Mula Mal—Appellant.

v.

Sardar Piara Singh and others—Respondents.

S. A. No. 2626 of 1921, Decided on 6th June 1922, from the decree of D. J. Sialkot, D/-11th August 1921.

Soldiers (Litigation) Act (IX of 1918) S. 11—Applies only where plaintiff is soldier at the date of suit.

Where the plaintiff was serving as a soldier for some time before the institution of the suit, but he was no longer a soldier when he brought the suit.

Held: that S. 11 did not apply. That section applies only where the plaintiff is an Indian Soldier at the date of suit. [P 396 C 1]

D. R. Sawhney—for Appellant.

Amin Chand—for Respondents.

Judgment. — Civil Appeals Nos. 2626 to 2629 of 1921 arise out of four suits for pre-emption instituted in December 1920 in respect of sales, of which three took place in 1918 and one in March 1919.

It is admitted that the suits are barred by limitation unless they are saved by the Indian Soldiers Litigation Act IX of 1918, S. 11 of which provides that in computing the period

of limitation prescribed for any suit in which the plaintiff is an Indian soldier the time during which such soldier has been serving under war conditions since the 4th August 1914 shall be excluded. The Courts below have held that the suits are within time when the period during which the plaintiff was serving under war conditions is deducted, and they have concurred in giving him decrees for pre-emption.

The Courts below have failed to notice that although the plaintiff was serving as a soldier for some time before the institution of the suits he was, as is admitted before me, no longer a soldier when he brought the suits and that, therefore, S. 11 of Act IX of 1918 does not apply to the present cases. That section applies only where the plaintiff is an Indian soldier, and it does not become applicable by the mere fact that he was a soldier at the time when the cause of action arose.

As S. 11 of Act IX of 1918 does not apply the time during which the plaintiff was serving under war conditions cannot be excluded in computing the period of limitation, and the suits are consequently barred by limitation.

I accept the appeals, reverse the decrees of the Courts below and dismiss the suits with costs in all the Courts.

Appeals dismissed.

✱ 1924 LAHORE 396

SCOTT-SMITH, J.

Az Khan—Appellant.

v.

Karim and others—Respondents.

S. A. No. 2714 of 1921, Decided on 20th June 1922, from the decree of District J. Attock D/-14th October 1921.

✱ (a) *Execution sale—Sale of site in a village without proprietor's consent in a Court auction, void.*

The site under the house of a non-proprietor in a village ordinarily belongs to the proprietors and its sale without the consent of the proprietary body is void and not voidable. [P 396 C 2]

✱ (b) *Limitation Act, Arts. 144, 91 and 12—Suit by third party to set aside a Court sale—Art. 144 applies.*

Where the plaintiff in a suit for possession of property sold in execution of a decree was the original owner of the property and was not a party to the decree under which the sale took place nor a representative of any of the parties and was consequently in a position to ignore the sale altogether,

Held art. 12 has no application and the suit falls under art. 144. Art. 91 also is not applicable, as it provides for the cancellation or setting aside of an instrument not otherwise provided for and it binds only the parties to the instrument and not strangers. 15 P. R. 1913. [P 397 C 1]

B. D. Qureshi—for Appellant.

M. S. Bhagat—for Respondents.

Judgment.—This is a second appeal from the order of the District Judge, Attock, dismissing the plaintiff's suit for possession of a site in Bhagni village on the ground that it was barred by time. The site together with the house on it was sold by public auction in execution of a decree against Karim, a non-proprietary resident on the 28th July 1910. The sale-certificate was granted on the 4th October of the same year. The present suit was lodged on the 16th November 1918 by the plaintiff as representing the proprietary body of the village on the allegation that Karim had a saleable interest in the materials of his house only and not in the site in dispute Both the lower Courts held that the suit was barred by time under Art. 120 of the First Schedule of the Limitation Act. The lower Appellate Court begins by saying that the sale of the site in dispute as the property of Karim was not void, but voidable at the instance of the proprietary body. I am not able to agree with this proposition. The site under the house of a non-proprietor in a village ordinarily belongs to the proprietors and its sale without the consent of the proprietary body is void and not voidable. The sale of the site of a residential house may perhaps be voidable and not void, but that is quite another matter. If A's property is sold by an unauthorised person without his consent, such sale is surely *ab initio* void and not merely voidable. It has been suggested by Counsel for the respondents that Art. 12 of the First Schedule of the Indian Limitation Act is applicable. That

Article provides for the setting aside of a sale in execution of a decree of a Civil Court, but there is ample authority for the proposition that the parties alone are bound by that Article, (see the commentary in Mr. Rustomji's Law of Limitation, 3rd Edition, page 265). In *Saif-ud-din* v. *Hansraj* (1) it was held that where the plaintiff in a suit for possession of property sold in execution of a decree, was the original owner of the property and was not a party to the decree under which the sale took place, nor a representative of any of the parties, and was consequently in a position to ignore the sale altogether, Art. 12 of the Limitation Act has no application and the suit falls under Art. 144. Again, Art. 91 of the First Schedule is not applicable. It provides for the cancellation or setting aside of an instrument not otherwise provided for. Here, again, the Article binds only the parties to the instrument and not strangers. I, therefore, hold that the present suit is governed by Art. 144 of the First Schedule and is not barred by time.

It appears that Shah Dad, one of the vendees and a defendant in the Trial Court, died even before the appeal was filed in the lower appellate Court, but was not made a party thereto. His two sons, Razi Khan and Bazid Khan, are also vendees and parties to the suit, and Mr. Kureshi says that they are his sole legal respresentatives. No objection was made in the lower Appellate Court to the effect that he had any other representatives besides these two sons, and Mr. Bhagat on behalf of the respondents, is unable to say that any other representative exists. No question of abatement therefore, arises. The appeal is accepted and the order of the lower appellate Court being set aside the case is remanded for decision on the merits under O. 41 R. 23, Civil Procedure Code. Stamps in this and in the lower appellate Court will be refunded and other costs will be costs in the case.

Case remanded

(1) [1911] 15 P. R. 1912—203 P.L.R. 194—252 P.W.R. 1911—11 I.C. 76.

1924 LAHORE 397

SCOTT-SMITH, J.

Mt. Bakho—Plaintiff—Appellant.

v

Lal—Defendant—Respondent.

S. A. No. 2840 of 1921, Decided on 12th June 1922, from the decree of D. J. Lyallpur, D/-17th November 1921.

Mahommadan Law—Marriage is dissolved by apostacy of either party.

Where a Muhammadan lady was baptised and sued for dissolution.

Held: that by the apostacy of either the husband or the wife a Muhammadan marriage is dissolved and that the real question in such cases is not whether she is baptised but whether she has renounced the Muhammadan religion. 124 P. R. 1876-132 P. R. 1884-61 P. R. 1899-85 P. R. 1906;-33 A. 90;-39 C. 409 Ref. [P 398 C 1]

Nanak Chand—for Appellant.

Judgment.—In the case out of which the present second appeal arises Mt. Bakho sued for dissolution of marriage with Lal on two grounds, (1) that she was married by her father during her minority and (2) that she has renounced Islam and become a Christian. I am not concerned with the first ground. The case was first of all tried by a Muhammadan Munsif, Syad Zulfiqar-ud-Din, who decreed the claim holding that the plaintiff had renounced Islam and had become a Christian. On appeal the District Judge, Khan Bahadar Abdul Ghafur Khan, remanded the case for inquiry into certain points under O. 4, R. 23, Civil Procedure Code. The case then came before a Hindu Munsif who held that the plaintiff had renounced Islam and become a Christian and gave a decree. The case then went on appeal before Mirza Zafar Ali, District Judge, who held that Mt. Bakho was not a Christian, because she had not been baptized by a duly authorized person. The learned District Judge set aside the decree and dismissed the plaintiff's suit. She has filed a second appeal to this Court which has been heard *ex parte* in the absence of the respondent.

The learned District Judge in the course of his judgment states that the plaintiff did not put herself in the witness-box to be examind with regard

to her views on religion. Before the remand, however, she appeared as a witness on her own behalf and she subsequently was called as a witness on behalf of the defendant and again gave evidence. She clearly stated in the course of her evidence that she had renounced Islam and had been baptized as a Christian and that she professed the Christian religion. She was baptized by an Indian Christian named Hakim Ali who belongs to a sect of Christians called the Christ Mission. Now Hakim Ali clearly deposed that he baptized Mt. Bakho and that for a month before baptizing her he instructed her in the principles of the Christian religion, in other words, he prepared her for baptism. It appears from the evidence of Mr. Samad and Mr. Smith that Hakim Ali was what is called a section-in-charge and that every section-in-charge is authorised to perform the rite of baptism. Even according to the rules of the Church of England, any private person can, in the case of emergency, perform the rite of baptism, and I am not prepared to agree with the learned District Judge that the baptis n of Mt. Bakho was wholly inefficacious. But even if it was, the real question which had to be determind was whether Mt. Bakho had renounced the Muhammadan religion.

There is ample authority for holding that by the apostacy of either the husband or the wife a Muhammadan marriage is dissolved : see, *inter alia*, *Nowroz Ali* v. *Aziz Bibi* (1), *Khan Bibi* v. *Pir Shah* (2), *Allah Baksh* v. *Amir Begam* (3), *Imam Din* v. *Hasan Bibi* (4), *Amir Beg* v. *Saman* (5) and *Abdul Gani* v. *Azizul Haq* (6). The learned District Judge has not come to a clear finding as to whether the plaintiff is an apostate from Islam or not. In my opinion, there can be no doubt of this fact. We have her own clear statement in the witness-box and this is supported by the evidence of Hakim Ali who baptized her, and of Lal Din. I, therefore, hold, in accordance with the authorities above mentioned, that the marriage has been dissolved.

I, therefore, accept the appeal and setting aside the order of the lower appellate Court, restore the decree of the First Court with costs throughout.

Appeal accepted.

(1) [1876] 124 P.R. 1876.
(2) [1884] 132 P.R. 1884.
(3) [1899] 61 P.R. 1899.
(4) [1906] 85 P.R. 1906—148 P.L.R. 1906—97 P.W.R. 1906.
(5) [1911] 33 All. 902—7 A.L.J. 956—7 I.C. 342.
(6) [1912] 39 Cal. 409—16 C.W.N. 451—15 C.L J. 263—13 Cr.L.J. 257—14 I.C. 641.

1924 LAHORE 398

ABDUL RAOOF, J.

Balla Mal—Plaintiff—Appellant.

v.

Jagan Nath and others-Defendants-Respondents.

Mis. F. A. No. 2843 of 1921, Decided on 7th June 1922, from the order of Junior Sub. J. Amritsar, D/- 16th November 1921.

Civil P. C., S. 20 (c)—Suit for declaration that a decree is fraudulent—Cause of action arises where the decree is transferred for execution.

B obtained a decree against N at Amritsar and J obtained another decree against N at Ferozepore, B applied for the execution of his decree at Amritsar and attached certain property of N situate at Amritsar. J applied for the transfer of his decree to be executed at Amritsar and after the transfer applied for reteale distribution. B objected to J's application alleging that his decree was obtained fraudulently but his objection was disallowed. Thereupon he filed a suit for declaration that J's decree was collusive and fraudulent.

Held: that the cause of action for the declaration arose at Amritsar only after J's decree was transferred and hence Amritsar Court had jurisdiction to try the suit. [P 399 C 2]

D. C. Ralli—for Appellant.

Jagan Nath—for Respondents.

Judgment.—The following facts will disclose the nature of the question which is to be decided in this appeal :—

In 1908 one Ball Mall sued Nasir-ud-Din for the recovery of Rs. 1,22,000 odd. A decree was granted in his favour on the 31st July 1911. There were subsequent proceedings in appeal which need not be mentioned. Jagan Nath and Nasir-ud-Din in consequence of a claim, real or unreal made a reference to arbitration on the 2nd July 1913. An award was

given on the 6th July 1913 and in terms of the award a decree was passed by a Ferozepore Court in favour of Jagan Nath on the 11th July 1913 for the sum of Rs. 56,208 with future interest at six per cent. The decree in favour of Balla Mal had been passed by a Court at Amritsar. Balla Mal applied for the execution of his decree at Amritsar and attached certain properties belonging to the judgment-debtor and situate in the District of Amritsar. Jagan Nath applied for execution of his decree to the Court at Ferozepore and asked for a certificate transferring the decree to be executed at Amritsar. When the decree had been transferred for execution at Amritsar Jagan Nath applied under S. 73, Civil Procedure Code, for a rateable distribution of the assests. Balla Mal objected to the application of Jagan Nath, alleging that he was not entitled to a *pro rata* share in the assets, as the decree on the award had been obtained fraudulently and without consideration in order to deprive him of the assets obtained in execution of his decree. Those objections were disallowed.

Thereupon the present suit was instituted by Balla Mal for the following relief .—

"That a decree with costs may be passed in his favour against defendants to the effect that the decree in favour of defendant No. 1 against Nasir-ud-Din dated the 11th July 1913 for Rs 56,208 passed by the Court of the District Judge, Ferozpore, according to the award is fictitious without consideration and collusive and it has no value against plaintiff's decree and is not liable for execution, neither any property of Nasir-ud-Din is liable to be attached and sold in that decree nor any application for *pro rata* share by defendant No. 1 could lie against plaintiff."

One of the pleas raised in defence was that the suit being for the cancellation of a decree passsd by the Ferozepore Court was not cognizable by the Court at Amritsar. This plea found favour with the learned Judge of the Court below and the plaint was returned for presentation to the Court competent to try it.

Balla Mall has come up in appeal to this Court and it has been contended on his behalf by Mr. Ralli that, inasmuch as a material portion of the cause of action had taken place at Amritsar, the plaintiff was entitled to institute his suit either at Amritsar or at Ferozepur. In support of his contention the learned Counsal has relied on the following cases which fully support his argument :—

Banke Behari Lal v. *Pok e Ram* (1) *Jawahir* v. *Neki Ram* (2). *Khushali Ram* v. *Gokul Chand* (3) and *Ram Lal-Ishar Das* v. *Salig Ram* (4).

The learned Judge of the Court below has held that inasmuch as the decree sought to be set aside was obtained in Ferozepur that was the cause of action for this case. In my opinion this view is incorrect. Balla Mall was not a party to the suit of Jagan Nath and the decree in no way affected him. He, therefore, had no cause of action to sue for the setting aside of that decree on any ground. It was only when the decree was transferred for execution to Amritsar and an application was made for a *pro rata* share in the assets, that a cause of action arose entitling the plaintiff to prefer the claim. On the facts it is clear that the main cause of action did take place at Amritsar. Mr. Jagan Nath, the learned Vakil for the respondent, has relied on *Umrao Singh* v. *Hardeo* (5) and *Dau Dial* v. *Munna Lal* (6) and has contended that the passing of the fraudulent decree must be taken to be the cause of action for the suit, but in both these cases the decree has been passed against the plaintiffs in the suits, and, therefore, their only cause of action was the passing of the decree. Those cases are, therefore, clearly distinguishable from the present case.

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(1) [1902] 25 All. 48-(1902)A.W.N. 179
(2) [1915] 37 All. 189—13 A.L.J. 190-28 I. C. 502.
(3) [1917] 39 All. 607—15 A.L.J. 638 41 I. C. 352.
(4) [1921] 7 P. W. R. 1921—59 I. C. 2.
(5) [1907] 29 All. 418—4 A.L.J. 392—(1907) A. W. N. 112.
(6) [1914] 36 All. 564—12 A.L.J. 955 24 I. C. 978.

I accordingly set aside the order of the lower Court and remand the case to that Court with the direction that it should receive back the plaint and dispose of the suit on the merits. Costs will abide the result.

Case remanded.

1924 LAHORE 400

BROADWAY, J.

Tola Ram and another—Plaintiffs—Petitioners.

v

Chandu Mal Tota Ram and others—Defendants—Respondents.

Civ. Rev. No. 122 of 1922, Decided on 2nd August 1922 from the order of Munsif F. C. Khanewal, D/-14th December 1921.

(a) *Civil P. C., Ss. 114 & 115—No revision lies from order rejecting review.*

Ordinarily an order rejecting an application for review is not open to revision. [P 400 C 2]

(b) *Civil P. C., S. 115—Appeal open—Revision is not allowed.*

When the legislature has given a right of appeal and that right of appeal has not been taken advantage of High Court should not interfere on the revision side. [P 400 C 2]

Md. Iftikhar Ali—for Petitioners.

Anant Ram Khosla—for Respondents.

Judgment.—The firm of Seth Prem Chand-Dharam Chand, acting through Seth Baldev Das, filed a suit against Chandu Mal and others carrying on business as a joint Hindu family. The suit first went to the Court of the Munsif at Multan who, after the case had proceeded up to a certain stage, sent it to the District Judge pointing out that the case fell within the jurisdiction of the Munsif at Khanewal. The learned District Judge accordingly, on the 9th February 1921, directed the transfer of the case to the Munsif at Khanewal. That officer on the 11th February 1921 caused notices to be issued to the parties for the 3rd March 1921. The notice to the plaintiff firm was sent to Baldev Das, who however, had already died and his *Munshi* Asa Nand reported this fact on the back of the summons saying that the other partners were in Bikaner. On the 3rd March 1921, however, the learned Munsif passed an order dismissing the suit in default.

On the 30th May 1921, the sons of Baldev Das filed an application for review of the order of dismissal, dated the 31st March 1921. This application was dismissed on the 14th December 1921. The sons of Baldev Das have now come up to this Court through Mr. Iftikhar Ali under S. 44 of Act IX of 1919, and I have heard Mr. Anant Ram Khosla for the respondent.

Mr. Iftikhar Ali contended that, while he was not asking for a revision of the order rejecting the application for review, he desired to have the order dated the 3rd March 1921 set aside as being illegal, and urged that, when that order was set aside, the order, dated the 14th December 1921, would be rendered of no effect. Mr. Anant Ram, however urged, on the authority of *Sewa Dat Pershad* v. *Karm Chand* (1) and *Ram Lal* v. *Ratan Lal* (2), that an order rejecting an application for review was not open to revision.

This view appears to be correct but, nevertheless, I think that this Court would have power to interfere in the case of an obvious injustice. In the present case, however, it will be seen that the petitioners had two courses open to them. Firstly, they could move the Court to set aside the order of dismissal or they could prefer an appeal against that order, and had they adopted the latter course it seems to me that they would have had an excellant case for the extension of the period of limitation.

They, however, chose to adopt neither of those courses but proceeded to apply for a review. It seems to me that when the Legislature has given a right of appeal, which right of appeal has not been taken advantage of, this Court should not interfere on the revision side.

I, therefore, dismiss this petition but, in the circumstances of the case, leave the parties to bear their own costs in this Court.

Petition dismissed.

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(1) [1911] 35 P. W. R. 1911—10 I. C. 725.

(2) [1904] 26 All. 572.

✱ 1924 LAHORE 401

SCOTT-SMITH, J.

Shahadat and others—Judgment-Debtors—Appellants.

v.

Hukam Singh — Decree-Holder — Respondent.

Mis. F. A. No. 161 of 1922, Decided on 9th June 1922, from the order of Senior Sub.-J. Sargodha, D/- 5th October 1921.

(a) *Court Fees Act, Ss. 4 and 28—Copy of order appealed against not stamped—Presentation is not valid.*

Having regard to Ss. 4 and 28 of the Court Fees Act there is no legal appeal filed if the order appealed against is not properly stamped. 41 Mad. 413 Dist. [P. 401, C. 1]

✱ (b) *Limitation Act, S. 5—Carelessness of Pleader's clerk is not sufficient cause—Legal Practitioner.*

Where an appeal was filed without the order appealed against being stamped and the same was returned and filed again with proper stamp but out of limitation.

Held: a Counsel when filing an appeal ought to see that all the documents which require stamp are properly stamped. He cannot shelter himself behind his clerk, and if his clerk has been guilty of any carelessness he is responsible for that. [P. 401, C. 2]

Niaz Ali—for Appellants.

Mehr Chand—for Respondent.

Judgment.—This is an appeal from the order of the lower Court directing execution of the decree-holder's decree to proceed against Shahadat and others, judgment debtors. A preliminary objection is raised by Counsel for the respondent to the effect that the appeal is barred by time. The appeal was filed on the 7th January 1922, but the copy of the order appealed against filed along with the memorandum of appeal was unstamped and the translation fee had not been paid. The appeal was, therefore, returned as incomplete. It was re-filed complete on the 17th January. The 9th of January was the last day of limitation for filing the appeal and it was, therefore, barred by time when filed on the 17th January. Having regard to Ss. 4 and 28 of the Court Fees Act there was no legal appeal filed on the 7th January and Counsel for the appellants does not contest that the appeal is not barred by time. He urges, however, that there is sufficient cause for admitting it within the meaning of S. 5 of the Limitation Act. He cites *Krishnasami Panikondar* v. *Ramasami Chettiar* (1).

That case is distinguishable from the present one. Every Counsel knows or ought to know that the copy of the order appealed against must bear a Court-fee stamp of eight annas or one rupee according to the value of the subject-matter Mr. Niaz Ali says that the mistake was that of the clerk who put in the appeal. In my opinion it is the duty of the Counsel when filing an appeal to see that all the documents which require stamp are properly stamped. He cannot shelter himself behind his clerk, and if his clerk has been guilty of any carelessness, he is responsiole for that. A valuable right has accrued to the respondent by reason of the period of limitation for filing the appeal having elapsed, and I do not think it would be fair to him to admit this appeal. Even when the appeal was returned to Counsel on the 7th January he had still two more days in which he could have stamped the copy of the order appealed against but did not re-file the appeal until ten days later. In my opinion he has been guilty of carelessness and I see no sufficient reason within the meaning of S. 5 of the Limitation Act for admitting the appeal beyond time.

The appeal is accordingly dismissed, but I make no order as to costs in this Court.

Appeal dismissed.

(1) [1918] 41 Mad. 412—45 I.A. 25—34 M.L.J. 63—4 Pat.L.W. 54—16 A.L.J. 57—7 L.W. 156—23 M.L.T. 101—27 C.L.J. 253—2 P.L.R. 1918—22 C.W.N. 491—21 Bom.L.R. 541—11 Bur.L.T. 121—(1918) M.W.N. 906—43 I.C. 493 (P.C.)

✱ 1924 LAHORE 402

CAMPBELL, J.

Malawa Ram—Appellant,

v.

Mt. Sunaran—Respondent.

S. A. No. 205 of 1922, Decided on 12th June 1922, from the decree of Addl. D.J. Jullundur, D/-5th February 1921.

✱ *Mahomedan Law — Dower—Widow can retain possession if obtained without force or fraud, till dower debt is paid.*

A Mahomedan widow whose dower remains unpaid is entitled to retain possession of the properties of her husband which she obtained lawfully, without force or fraud, but without the consent of, or any agreement with, the husband or his heirs. 33 A. 563—38 C. 475; 43 M. 214-38 A.581—17 W. R. 113 (P. C.) foll.—17 A. 77 dissent.—17 A. 93 Ref. [P 403, C 2]

Fakir Chand—for Appellant.

Badri Das—for Respondent.

Judgment.—The suit out of which this second appeal arises was by the sister of Rahmat Ali Shah, deceased against his widow for possession by partition of half of a house owned by Rahmat Ali Shah. The suit was resisted on the ground that the widow was entitled to retain possession until payment of her dower of Rs. 5,000. The First Court decreed the suit, but the finding was reversed on appeal and the suit was dismissed by the District Judge.

The following are the learned District Judge's findings.—The defendant widow's dower was fixed at Rs. 5,000 and was not paid. She has been in possession of the house ever since the death of her husband who was the owner of it. The house was purchased by Rahmat Ali Shah in the name of a third person, Dhanpat Rai. After Rahmat Ali Shah's death Dhanpat Rai executed a deed declaring that Rahmat Ali Shah was the actual purchaser. The contention by the plaintiff that after Rahmat Ali Shah's death Dhanpat Rai had put the plaintiff and the defendant in possession of the house jointly was not proved.

In these circumstances the learned District Judge held that the defendant was entitled to retain possession of the house until her dower-debt was paid and he referred to paragraph 162 of Wilson's Anglo-Muhammadan Law the first part of which reads as follows:—"When a widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled against the other heirs of her husband to retain such possession until her dower-debt is paid."

The question in second appeal is whether he learned District Judge has interpreted and applied correctly the provisions of Muhammadan Law relating to a widow's lien on her deceased husband's property as a creditor for dower.

Counsel for the plaintiff appellant relies upon a decision published as *Amanat un-nissa* v. *Bashir-un-nissa* (1) and upon a pronouncement by their Lordships of the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (2) on the law of dower. The first named authority undoubtedly is in favour of the plaintiff, but it has been dissented from in several subsequent rulings as will be shown presently. In *Amanat-un-nissa* v. *Bashir un-nissa* (1), a previous Privy Council judgment, *Bebee Bachun* v. *Sheikh Hamid Hossein* (3), which is the basis of what has been quoted above from paragraph 162 of Wilson's Anglo Muhammadan Law was interpreted to mean that if Muhammadan widow, entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs, of property to the possession of which they and she in respect of her share in the inheritance are entitled.

(1) [1895] 17 All. 77-(1895) A.W.N. 7.
(2) [1916] 38 All. 581—43 I.A. 294—14 A.L.J. 1055—21 C. W. N. 1—18 Bom. L. R. 999—1 M. L. J. 799—20 M.L.T. 505—4 L.W. 602—(1916) 2 M. W. N. 551—1 Pat. L. W. 57—25 C. L. J. 517—36 I. C. 87 (P. C.)
(3) [1871-72] 14 M. I.A. 377 (P.C.)

In *Hamira Bibi* v. *Zubaida Bibi* (2) the precise question now under consideration was not in issue but in a paragraph dealing with the Muhammadan Law on dower it was stated. "The dower ranks as a debt and the wife is entitled, along with other creditors to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied."

In a subsequent judgment by the same Judges who delivered *Amant-un-nissa* v. *Bashir-un-Nissa* (1) [reported at page 93 of the same Volume,] *Muhammad Karim Ullah Khan* v. *Amani Begam* (4) there was a slight modification of the previous attitude. It was held that when a Muhammadan widow has been in undisturbed possession for some time of her late husband's property and dower is due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that she was not let into possession by her husband in lieu of dower or did not obtain such possession with the consent or by the acquiescence of the heirs.

The plaintiff-appellant's case, however, depends upon whether *Amanat-un-nissa* v. *Bashir-un-nissa* (1) is to be followed, there being no evidence in the present case of any express disposition in defendant's favour by her husband. In a subsequent Allahabad case, *Ramzan Ali Khan* v. *Asghari Begam* (5) it was dissented from and the latter ruling appears to have been followed subsequently by the Allahabad Court. It was held there not to be correct to say that unless a Muhammadan widow has obtained possession either by contract with her husband or with the consent of the heirs, she cannot be lawfully in possession so as to give her a right to retain possession until her dower-debt is paid, and one of the learned Judges remarked that the balance of authority was in favour of the view that a widow, who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate, is entitled to hold that estate against the other heirs until her claim to dower is satisfied, without being asked to show either consent on their part, or on that of the deceased husband.

In *Sabjan Bewa* v. *Ansar-ud-din* (6), *Amanat-un-nissa* v. *Bashir-un-nissa* (1), was again dissented from. The learned Judges were unable to adopt as a correct exposition of the law the view that the possession of the widow cannot be maintained as against the heirs, unless it is established that such possession was obtained by agreement with either husband or his heirs, and it was remarked that in coming to this conclusion the Judges were adhering to what had been recognised as the rule on the subject in that Court.

Finally, the subject was discussed at great length in *Beeju Bee* v. *Moorthiya Sahib* (7) which reviewed a number of authorities and ruled that a Muhammadan widow, whose dower remains unpaid, is entitled to retain possession of the properties of her husband which she obtained lawfully without force or fraud but without the consent of or any agreement with the husband or his heirs.

The weight of authority, therefore, is in favour of the finding of the learned District Judge There is no suggestion that the present defendant came into possession of the house in suit by any unlawful act or by force or fraud. The appeal fails and is dismissed with costs.

Appeal dismissed.

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(4) [1895] I7 All. 93.
(5) [1910] 32 All. 563.

(6) [1911] 38 Cal. 475.
(7) [1919] 43 Mad. 214 (F.B.)

✱ 1924 LAHORE 404

SCOTT-SMITH AND CAMPBELL, JJ.

Karam Chand—Plaintiff—Appellant.

v

Jinda Ram—Defendant-Respondent.

F. A. No. 227 of 1922, Decided on 3rd May 1922. from the decree of Senior Sub. J. F. C. Montgomery, D/-26th October 1921.

✱ *Civil P. C., O. 17 R. 3—Rule does not authorise dismissal summarily—Party paying process fee is not responsible for non-appearance of witnesses.*

R. 3 merely authorises a Court to proceed to decide the suit forthwith. It does not authorise it to dismiss it summarily. Where a party to a suit has paid the process fee for summoning witnesses the Court and its officers are responsible for effecting service and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to "time granted to one party" within the meaning of O. 17 R. 3. 51 P.R. 1915 relied on. [P.404,C.2]

Badri Das—for Appellant.

Ram Chand Manchandra—for Respondent.

Judgment.—This is an appeal from an order of the Senior Subordinate Judge, Montgomery, dismissing the plaintiff's suit under O. 17, R. 3, Civil Procedure Code. The suit was one for dissolution of partnership and rendition of accounts and the issues of which the *onus probandi* was on the plaintiff were struck on the 13th July 1920. On the 18th August 1920 and on subsequent occasions some six witnesses for the plaintiffs were examined. For the 18th February 1921 Karam Singh and Hans Raj witnesses were summoned but were not served. On the 29th March there was an order postponing the hearing of the case on the ground that the record had gone to the High Court. On the 3rd August 1921 the record having come back, Karam Singh and Hans Raj were summoned for the 2 rd October. Meanwhile on the 8th August 1921 the plaintiff applied for the summoning of two more witnesses, namely, Jugal Kishore and Lakhu Ram. On the 3rd October it was found that none of the plaintiff's witnesses had come to Court. In regard to Karam Singh the report was that he refused to accept service. Hans Raj had gone to Chichawatni and the summons was stuck on his door. Jugal Kishore had been served but did not attend. Lakhu Ram has not been served. The Court then passed an order fixing the 26th October for the next hearing and directing under O. 17, R. 3, Civil Procedure Code, that the plaintiff must close his case on that date. On the 26 October none of the plaintiff's four witnesses was present. Karam Singh alone had been served. The Court then recorded a short judgment in which it dismissed the case under O 17 R 3, Civil Procedure Code, but the Court did not in its judgment refer to the evidence of the witnesses whom the plaintiff had produced or say whether the *onus* of the issues had been discharged or not. Order 17 R. 3, of the Code merely authorises a Court to proceed to decide the suit forthwith. It does not authorise it to dismiss it summarily, as has been done by the Subordinate Judge here. Lala Ram Chand, who appears for the respondent, admits that the order of the lower Court is not sound and that the case should be remanded for re-decision in accordance with law. There is no suggestion on the record on behalf of the defendant, nor is there any finding by the Court that the plaintiff is to be blamed for the non-service of the summonses on the witnesses for the 26th October 1921. In *Harjas Rai* v. *Narain Singh* (1) it was held that where a party to a suit has paid the process-fee for summoning witnesses the Court and its officers are responsible for effecting service, and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to "time granted to one party" within the meaning of O. 17 R. 3. In our opinion, therefore, the Court had no jurisdiction for its order dated the 3rd October by which it directed that the plaintiff must complete his evidence by the 26th October 1921.

We accordingly accept the appeal and setting aside the order of the lower Court remand the case, thereto for re-decision in accordance with

(1) [1915] 51 P.R. 1915—98 P.L.R. 1916—29 I.C. 938.

law. The plaintiff should be given another chance to produce his evidence If the Court is at any future time of opinion that either party is obstructive and preventing its witnesses from being served with summonses it should record an order giving its reasons therefor, and then it would be justified in granting one more opportunity under O. 17, R. 3, Civil Procedure Code.

Appeal accepted.

1924 LAHORE 405

BROADWAY AND ABDUL QADIR, JJ.

Bakhsh Ilahi—Petitioner.

v

Abdul Rahman and another—Respondents.

Civ. Rev. No. 278 of 1922, Decided on 31s March 1922, from the order of D. J. Delbi, D/-31st July 1921.

(a) *Arbitration Act (IX of 1890), S 8 (2)—Civil P. C., S. 47—Compromise not embodied in decree—Order under S. 8 (2) of Act, not appealable.*

Parties to a suit for accounts entered into a compromise and agreed to a preliminary decree being passed in accordance therewith. The compromise also provided that one of the parties would have a certain share in the profits of a contract with a tobacco firm and that the profits would be determined by a firm of Chartered Accountants. Any dispute relating to this share of the profits was to be referred to arbitration under the provisions of the Arbitration Act. A preliminary decree was passed as to past accounts and the petition of compromise was attached to it, but no mention whatsoever was made of the clause relating to the sharing of the profits of the contract, as, the compromise in para 3 expressly provided that this matter would be entirely distinct and separate from the rest When the accounts of this contract were about to be audited, the party entitled to a share in its profits insisted upon its right to be represented at the audit. The other party denied this right, whereupon the former claimed to refer the matter to arbitration, nominated its arbitrator, called upon the other party to nominate its arbitrator and on its failure to do so made an application to the District Judge under S. 8 (2). The learned District Judge decided that a dispute had arisen and that there had been a valid submission to arbitration within the meaning of Ss 4 and 8 of the Arbitration Act and directed that the parties were to nominate their arbitrators by a fixed date. In an appeal from that order.

Held : that the question before the Court was not one relating to the execution of any decree and that, therefore S. 47 had no application and no appeal was competent. [P 407 C 1]

(b) *Arbitration Act, S. 4—'Submission' includes reference.*

The definition of submission in S. 4 appears to cover a contract to refer as well as the reference, the reference amounting to delegation of authority to the arbitrator. 10 S. L. R. 1 Foll. [P 407 C 2]

Tek Chand and *Ghulam Rasul*—for Petitioner.

Moti Sagar—for Respondents.

Judgment.—This appeal has arisen out of an application filed by Haji Abdul Rahman and Ata-ul-Rahman against Haji Bakhsh Ilahi, C. I. E., of Delbi under S. 8 (2) of the Indian Arbitration Act, IX of 1899. The circumstances which led to this application being made are briefly these. Haji Bakhsh Ilahi, together with the petitioners and other relatives of his, was carrying on business in partnership Disputes arose between the parties which resulted in a suit being filed by one of the partners, Haji Muhammad Taqi, against the other partners in which it was prayed that the partnership be dissolved and accounts taken. During the course of those proceedings a petition was put in, signed by the present petitioners as well as all the other parties to that suit, and in this petition a compromise was detailed. Paragraph 2 of that petition dealt with the matter now in dispute and in paragraph 3 of that petition, it was specifically stated that this was to be regarded as an entirely separate matter from the matters referred to in paragraph 4 to the end. Finally, it was prayed that a preliminary decree be passed in the terms of this petition. Accordingly, the Court passed preliminary decree and to it attached this petition in its entirety. The preliminary decree was followed by a final decree which dealt with the dissolution of the partnership and rendition of the past accounts. No reference whatever was made to the subject-matter of paragraph 2 of that petition.

Now, sub-clause (*e*) and (*f*) of the second paragraph of that petition referred to a certain contract between Haji Bakhsh Elahi, C. I. E., and the

Imperial Tobacco, Co, and it was agreed that Haji Abdul Rahman and Ata ul Rahman, the present petitioners, were to be entitled to a three-annas nine pies share in the profits arising out of the said tobacco contract. The amount was to be ascertained for each year ending on the 31st day of December, three-months' grace being allowed for the payment. It was also agreed that during the continuance of the said contract the present petitioners would not directly or indirectly carry on or be interested in any business of a nature competitive with that carried on by the other parties to that suit. It was further agreed that "any disputes arising in connection with the said share of such profits shall, if the parties are unable to settle the same, be referred to arbitration in accordance with the provisions of the Indian Arbitration Act of 1899. In sub-clause (*f*) it was laid down that the accounts relating to that tobacco contract were to be kept separate and were to be audited annually on notice to the present petitioners by a firm of European Chartered Accountants, whose certificate as to the profits was to be regarded as final and binding.

Now, the first payment due under this arrangement was payable on the 31st of December 1920, and on the 7th of February 1920. Haji Abdul Rahman, etc., wrote to Haji Bakhsh Elahi asking for the amount. On the 11th of February 1921, Haji Bakhsh Elahi replied saying that the accounts had not been completed for the year and notifying the fact that Messrs. Maugens Peat and Co, Chartered Accountants, had been appointed to audit the accounts. Haji Abdul Rahman then, on the 17th of February, replied asking to be informed of the date when the audit was to commence, as they wished to be represented at the audit, Haji Bakhsh Elahi replied to this, saying that they were not entitled to be present, and on the 26th of February 1921, Haji Abdul Rahman at once claimed to be entitled to refer the dispute to arbitration and nominated an arbitrator. Correspondence then ensued and, ultimately, on the 29th of March 1921, Haji Abdul Rahman and Ata-ul-Rahman filed this present application under S. 8 (2) of the Arbitration Act. Haji Bakhsh Elahi opposed this application on various grounds. The learned District Judge settled nine issues arising out of the pleadings and decided that there had been a valid submission to arbitration within the meaning of Ss. 4 and 8 of the Arbitration Act and directed that the parties were to nominate their arbitrators by a fixed date, *i. e.*, 19th of August 1921. Against this order Haji Bakhsh Elahi has come up to this Court through Mr. Tek Chand.

It has been contended by Mr. Tek Chand that an appeal is competent, inasmuch as these proceedings related to the execution of a decree, and, therefore, fell within the purview of S. 47, Civil Procedure Code. In the alternative, he contended that if an appeal was not competent the matter should be treated as a revision. Mr. Moti Sagar, for the respondent, contended that no appeal was competent inasmuch as the present proceedings did not fall within the purview of S. 47, Civil Procedure Code, and, further, an order of this nature should not be examined in revision. The first point to decide is whether the proceedings fall within the purview of S. 47. Mr. Tek Chand contended that the petition filed in the suit for accounts was a compromise which had been given effect to by the Court and embodied in the decree, which *qua* the condition of the past accounts of the partnership was a preliminary decree which in due course was made final. Inasmuch as the petition or compromise in its entirety had been attached to that preliminary decree as a part of it, he contended that the compromise *qua* this part of the dispute merged in the preliminary decree and that, therefore, either by its omission from the final decree this portion of the compromise was rejected by the Court or the preliminary decree was preliminary only *qua* the past accounts and was a final decree in relation to paragraph 2 (*e*) and (*f*) of the compromise. He, therefore, contended that any disputes that might arise under paragraph 2 (*e*) and (*f*) were to be decided by a Court executing that decree, being a matter

relating to the execution of the decree.

Mr. Moti Sagar, on the other hand, contended that the preliminary decree in which this compromise was embodied *qua* paragraph 2 (*e*) and (*f*), even if a decree, was only a declaratory decree, declaring the rights of the parties and was incapable of execution. He contended, therefore, that any infringement of those rights, as declared by that decree, would give rise to a cause of action entitling the injured party either to bring a suit or to take action under the Indian Arbitration Act, but that the decree itself could not be executed. After a careful consideration of the arguments advanced on both sides we are of opinion that the contention of Mr. Moti Sagar must prevail and that the question now before the Court is not one relating to the execution of any decree and that, therefore, S 47 Civil Procedure Code has no application and no appeal is competent

Next comes the question whether we should take up this matter on the revision side. As to this, Mr. Tek Chand contended that there was no valid submission within the meaning of S. 4 of the Arbitration Act. He contended that the petition of compromise when it was embodied in the decree, declaratory or preliminary, ceased to have an independent existence and that the rights of the parties were henceforward regulated by the terms of that decree, and that, as the parties had not signed the decree, there was no agreement in writing signed by the parties to refer any further disputes to arbitration and that, therefore, the Court below had no jurisdiction to entertain the application under S. 8 (2) of the Arbitration Act. On the other hand, Mr. Moti Sagar contended that the compromise having duly been signed by the parties and filed in Court amounted to a valid submission which was not affected by its subsequent incorporation in the preliminary decree and that on the arising of any dispute parties could take advantage of the provisions to refer to arbitration. Mr Tek Chand also contended that even under the Arbitration Act when an agreement had been entered into to refer future disputes, before a valid reference to arbitration could be made, it was necessary for both sides to again agree to make a reference relating to the actual dispute. In this view, however, we are unable to agree. The definition of submission in S. 4 of the Arbitration Act appears to us to cover a contract to refer as well as the reference, the reference amounting to delegation of authority to the arbitrator. In this view we are supported by *Dhanpatmal Diwanchand* v. *Kishinlal Indraj* (1). The question remains whether the incorporation of the compromise in its entirety in the preliminary decree passed in the suit for accounts affects the agreement to refer so as to make its operation cease. The point is one not free from difficulty and no direct authority has been brought to our notice.

After a careful consideration of the circumstances which led to the passing of that preliminary decree it seems to us that it was not intended to pass any decree relating to the matters embodied in paragraph 2 (*e*) and (*f*) of the compromise. It is obvious that no preliminary decree could have been passed affecting these matters. The petition itself prayed for the passing of the preliminary decree. "In paragraph 3 of that petition it was specifically declared that the matters referred to in paragraph 2 were to be regarded as entirely separate from the matters to be referred to in the subsequent paragraph 3. Instead of embodying in the preliminary decree only those portions of the petition or compromise which related to the past accounts, the Court passing the decree merely noted that the petition was to be attached to the decree sheet as a part of it. We, therefore, think that as a matter of fact the matters now in dispute between the parties were never embodied in any decree and that, therefore, the agreement in paragraph 2 (*e*) to refer to arbitration was one of which advantage could be taken by either party. It seems to us that disputes have arisen between the parties relating to the matters involved in (*e*) and

(1) [1916] 10 S.L.R. 1—35 I.C. 536.

(*f*) of paragraph 2 and that, therefore, the order of the Court below cannot be held to be *ultra vires*.

In our opinion the District Judge had jurisdiction to deal with the application and we do not think we would be justified in interfering with his order in revision.

We therefore, dismiss the petition, but in the circumstances leave the parties to bear their own costs in this Court.

Petition dismissed.

✱ 1924 LAHORE 408

BRASHER, J.

Kirpal Singh—Petitioner.

v.

Niranjan Singh and others—Respondents.

Civ. Rev. P. No. 306 of 1922, Decided on 10th July 1922, from an order of Dt. J. Gujranwala, D/- 22nd March 1922.

(a) *C. P. Code, S. 115 — Charitable and Religious Trusts Act, (XIV of 1920), S. 10—Order under is a 'case'.*

An order asking defendant to deposit money in Court under S 10 of Act (XIV of 1920) is a 'case' within S. 115 and revision lies. [P. 408, C. 2]

✱ (b) *Charitable and Religious Trusts Act (XIV of 1920), S. 10 — Defendant may either furnish security or deposit money.*

The section can only mean that the option of furnishing the security or depositing the money rests with the defendant. The Court can order that he shall do one of these two things but it cannot specify which he is to do. The case is quite different from one where security for costs has been taken under the Code of Civil Procedure, under which an order may subsequently be passed directing the person who has furnished the security to pay the costs for which security has been given and this order can then be executed against the surety under S. 145 Civil Procedure Code. But the security furnished under S. 10 of Act XIV of 1920 relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot order execution against the surety. [P. 409, C. 1 & 2]

Mehar Chand—for Petitioner.

Gokul Chand Narang—for Respondents.

Judgment.—The plaintiffs in this case have instituted a suit under S. 92, Civil Procedure Code, against Mahant Kirpal Singh. The plaintiffs applied under S. 10 of Act XIV of 1920 that the defendant should be ordered to pay into Court Rs. 1,000 for their expenses in prosecuting the uit.

The District Judge passed an order on January 6th, 1922 directing the defendant to furnish security for Rs. 1.000 within three days and the order also stated that if the defendant failed to furnish the security he would be directed to pay the amount in cash.

The defendant complied with the order by furnishing two sureties who each undertook to pay Rs. 500 if the defendant should fail to pay this sum when called upon to do so. On the March 17th, 1922, the plaintiffs filed a second application purporting to be under S. 10, Act XIV of 1920, in which they stated that a large sum of money was required for a prosecution of the case and asked that the defendant and his sureties should be asked to deposit Rs. 1 000. The learned District Judge passed an order on March 22nd, 1922, directing the defendant to pay into Court Rs. 500 before the next hearing of the suit. The defendant is now applying for revision of this order, and a cross-petition has been filed by the plaintiffs in which they ask that the amount which the defendant is required to deposit should be increased from Rs 500 to Rs. 1,000.

Notwithstanding the fact that this cross-petition has been filed by the plaintiffs it is contended on their behalf that no revision is competent. I think, however, that this objection must be overruled. In *Pandit Rama Kant* v. *Ragdeo* (1) it was held that the word 'case' in S. 622 (now 115), Civil Procedure Code, does not necessarily mean the whole case and the order in question appears to form a particular branch of the case which is quite distinct from the suit.

S. 10 of Act XIV of 1920 provides that the Court trying a suit under S. 92, Civil Procedure Code may "direct the defendant either to furnish security for any expenditure incurred or likely to be incurred by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as

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(1) [1897] 60 P.R. 1897.

such Court considers sufficient to meet such expenditure in whole or in part." These words can only mean that the option of furnishing the security or depositing the money rests with the defendant. The Court can order that he shall do one of these two things but it cannot specify which he is to do. The order of March 17th, 1922, therefore, if it is to be treated as one under S. 10 of Act XIV of 1920, is an illegal one since the defendant was required to deposit the money and was given no option.

Moreover, assuming that the Court was competent to pass a second order under that section in connection with the same suit and that it could order the deposit of money, it could only direct the defendant to make the deposit from money in his hands as trustee and the defendant could not be required to pay any money from his own pocket.

The learned Counsel for the plaintiffs has not attempted to dispute that the order, if passed under S 10, would be illegal. He contends however, that the order was one passed in execution of the previous order. It is argued that the order requiring the defendant to deposit the amount was a preliminary step towards enforcing payment from the sureties. S. 11 (2) enacts that the provisions of the Code of Civil Procedure relating to the execution of decrees shall, so far as they are applicable, apply to the execution of orders under thi Act. When, however, security had been furnished the previous order had been complied with and no order remained which should be executed. The case is quite different from one where security for costs has been taken under the Code of Civil Procedure. When security for costs has been taken an order may subsequently be passed directing the person who has furnished the security to pay the costs for which security has been given, and this order can then be executed against the surety under S. 145, Civil Procedure Code The security furnished under S. 10 of Act XIV of 1920, however, relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot direct payment of this expenditure otherwise than in accordance with that section, and when security has been furnished I fail to see how the Court is competent to order execution against the surety. The order of March 22nd, 1922, therefore, if it was passed as a step in execution of the previous order, appears to have been entirely *ultra vires*.

I accordingly accept the petition of the defendant and set aside the order of March 22nd, 1922. The petition filed by the plaintiffs is dismissed and the defendant will get his costs of both petitions.

Petition accepted.

✱ 1924 LAHORE 409

SCOTT-SMITH, J.

Ilahia and others—Convicts—Appellants.

v.

Emperor—Respondent.

Cr. A, No. 484 of 1922, Decided on 2nd October 1922, from an order of S. J., Rawalpindi, D/- 12th May 1922.

✱ *Penal Code, S. 397—'Such Offender' means the man who uses deadly weapon.*

The words "such offender" in S. 397 clearly refer to the offender who uses a deadly weapon or causes grievous hurt to any person and not to those who jointly commit robbery or dacoity with him, 16 P. R. 1901 Cr Dissented from. [P. 410, C. 2]

K J. Rustomji—for Appellants.

The Public Prosecutor—for the Crown.

Judgment.—On the night between the 29th and 30th January 1922 a dacoity was committed in the house of Zaman Ali in Dhok Bangial in the Rawalpindi District. In the course of this dacoity one of Zaman Ali's ribs was broken with a blow by one of the dacoits. In connection with this, seven persons were committed to take their trial before the Sessions Judge of Rawalpindi. Out of these he convicted six *viz*, Sain Bak, Mardana, Ilahia, Karm Ilahi, Bak and Fatteh Khan, under S 395 read with S. 397, Indian Penal Code. The 7th accused Dina was acquitted. In the First Information Report the names

of three accused persons, Ilahia, Mardana and Dina, were given by Zaman Ali as having been identified. He, his wife *Mt.* Baggo, and Niaz Ali, his step-son, gave evidence at the trial that they had identified them. The Sessions Judge, however, was of opinion for reasons fully given by him in his judgment that it would not be safe in this case to convict any of the accused persons upon the uncorroborated evidence of the eye-witnesses. In regard to all the accused, except Dina, articles of property stolen in the dacoity were either found in their possession or in the possession of persons to whom they had handed them over. All the accused produced such articles from various places or gave information which led to their recovery No property was found in the possession of Dina nor did he give any information which led to the recovery of any. Sain Bak, Ilahia and Karam Ilahi have filed a joint appeal through Mr. Rustomji, Advocate, and Mardana, Bak and Fatteh Khan have appealed through the Jail Authorities. Bak, in view of the fact that he had three previous convictions against him, was sentenced to ten years' rigorous imprisonment; the other five appellants were sentenced to seven years' rigorous imprisonment each. The learned Sessions Judge found that it was not proved which of the appellants had given Zaman Ali the blow which fractured his rib, but he was of opinion, having regard to the decision of the Chief Court reported as *Crown* v. *Mohna* (1), that he could not pass a sentence of less than seven years' rigorous imprisonment upon any of the accused.

The judgment of the learned Sessions Judge is a very careful and elaborate one and deals in full detail with the various articles of property traced to each of the appellants. Mr. Rustomji in arguing the case for his clients has shown no reason whatever why I should reject any of the evidence as to identification of the property which has been accepted by the learned Sessions Judge and by the Assessors In regard to the evidence of Sukhdial and Sant Singh goldsmiths, he says that it is very easy to produce such evidence, but he gives no reason why these two witnesses should be regarded as unreliable. The appellants produced either no defence evidence at all or produced evidence of a worthless character and the learned Advocate for the three appellants has not asked me to accept any of the defence evidence. In my opinion the decision of the learned Sessions Judge as regards the six persons whom he has convicted is fully warranted by the evidence detailed in his judgment.

In *Crown* v. *Mohra* (1) it was certainly held that all persons taking part in a robbery or dacoity are liable to the minimum sentence laid down in S. 397 if grievous hurt is caused by only one of them. In that case the Judges referred to *Queen-Empress* v. *Mahabir Tiwari* ( ), but that ruling was specially dissented from in *Queen-Empress* v. *Santok Singh* (3) reported in Weekly Notes, N.W.P. of 1899 at page 186. The Madras High Court has taken a similar view. I am not aware of any reported cases of the Punjab Chief Court or of the High Court in which the view expressed in *Crown* v. *Mohra* (1) has been dissented from, but it is a fact that that view is not now-a-days followed in this Court and I do not agree with it. I fully concur in the reasoning of the Division Bench of the Allahabad High Court reported as *Queen-Empress* v. *Santok Singh* (3). In my opinion the words "such offender" in S. 397 clearly refer to the offender who uses a deadly weapon or causes grievous hurt to any person and not to those who jointly commit robbery or dacoity with him. The learned Sessions Judge has expressed his opinion that the dacoity was not of a bad type and has stated that had he not been bound to convict under Ss. 395 and 397, Indian Penal Code, he would not have given the accused, other than Bak, such a severe sentence as seven years' rigorous imprisonment. As regards Bak, having regard to his previous record, I consider that the

(1) [1901] 16 P. R. 1901 Cr.

(2) [1899] 21 All. 263 – (1899) A.W.N. 76.

(3) [1898] A. W. N. 186.

sentence of ten years' rigorous imprisonment is appropriate and I dismiss his appeal. As regards the other five appellants, I think the sentence of seven years' rigorous imprisonment is somewhat excessive. I agree with the learned Sessions Judge that the dacoity was not of a bad type. No great violence was used to the inmates of Zaman Ali's house and only one blow was struck by one of the dacoits which fractured one of Zaman Ali's ribs I, therefore, accept the appeals of Sain Bak, Mardana, Ilahia, Karam Ilahi and Fateh Khan and reduce their sentences to one of five years' rigorous imprisonment in each case.

Sentences reduced.

1924 LAHORE 411

BROADWAY, J.

Bahawala and others—Accused—Petitioners.

v.

Duni Chand — Complainant — Respondent

Cr. Rev. No. 494 of 1922, Decided on 26th June 1922, from the order of D. M. Jhang, D/- 13th February 1922.

Criminal P. C., S. 145—Restoration of possession-Magistrate has no jurisdiction to order.

In proceedings under S. 145 a Magistrate has no jurisdiction to order restoration of possession.

All that the Magistrate is empowered to do is to declare that a particular party is entitled to possession. At the same time if a party is declared to be entitled to possession and the world at large is forbidden to disturb his possession he would be entitled to take possession and no one would have any right to interfere with his doing so. (P. 413 C. 2

Ram Chand Manchanda—for Petitioners.

G. C. Narang—for Respondent.

Judgment.—This petition for revision has arisen out of certain proceedings under S. 145, Criminal Procedure Code, in connection with some agricultural land situate in village Gilawa in the District of Jhang.

The proceedings were instituted by Bawa Duni Chand who alleged that he had been in possession of the lands in question since 1904, and that Bahawala and others, *kmins* of the village, had forcibly taken possession of the same on the 14th March 1921.

On the 21st March 1921 the Magistrate passed the order contemplated by S. 145 (I), Criminal Procedure Code, and called on the parties to file their written statements and produce evidence.

On the 6th December 1921 the Magistrate passed the final order in the case.

He held that the complainant had been in continuous possession of the land till the 14th March 1921 when he had been forcibly dispossessed by Bahawala and his companions. He, therefore, acting under the first proviso to clause (4) of S. 145, Criminal Procedure Code, treated the complainant as if he had been in possession at the date of the order calling for written statements, *i. e.*, 21st March 1921, and then proceeded as follows :—

"Accordingly, under S. 145, Criminal Procedure Code, I direct that the complainants' possession of the disputed land be restored, and further forbid any interference with his possession till he is evicted in due course of law."

The *kamin* filed a petition for revision in the Court of the District Magistrate which was rejected and they have now come up to this Court through Mr. Ram Chand Manchanda For the respondent I have heard Dr. Gokal Chand Narang.

The first point raised was, that the whole of the proceedings were vitiated by the omission to give the notice to the petitioners that is required by S. 145 (I), Criminal Procedure Code. A reference to the record shows that on the 6th May 1921 the Magistrate recorded an order in which it is specifically set out that notice to the parties had been issued in accordance with law. I, therefore, hold that there is no force in this objection. It was then contended that the order directing that "the complainant's possession of the disputed land be restored' was bad inasmuch as the Magistrate had no power to make such an order.

In this connection, my attention was drawn to *Kalu* v. *Harnaman* (1),

(1) [1917] 28 P.W.R, Cr. 1917—40 P.R. Cr. 1917—18 Cr. L.J. 660—40 I.C. 308.

Emperor v. *Kameshar* (2), *Tulshi Ram* v. *Akbar Ahmad* (3) and *Moore* v. *Monoranjan Guha* (4). A reference to these authorities shows that they are in point and in them it is clearly laid down that, in proceedings under S. 145, Criminal Procedure Code, a Magistrate has no jurisdiction to order restoration of possession.

The section 145 itself contains no provision to the effect that a party in whose favour the order is made is to be put into possession nor does this section provide any machinery by which the successful party can have his possession restored by the Court. All that the Magistrate is empowered to do is to declare that he is entitled to possession.

At the same time, if a party is declared to be entitled to possession, and the world at large is forbidden to disturb his possession, he would be entitled to take possession and no one would have any right to interfere with his doing so. It follows, therefore, that, though the order of the Magistrate in this case is technically erroneous, the ultimate result is practically the same. The order being wrong, however must be amended, and I accordingly eliminate the words directing restoration and substitute therefor a declaration that the complainant is entitled to possession. In all other respects the order will stand.

Order modified.

(2) [1904] 27 All. 300—1 A.L.J. 619—(1904) A.W.N. 264.
(3) [1915] 37 All. 654-13 A.L.J. 932—16 Cr L J. 714—30 I.C. 1002.
(4) [1908] 12 C.W.N. 696—7 C.L.J. 547.

1924 LAHORE 412

SHADI LAL, C. J. AND FFORDE, J.

Nanak Chand and others—Appellants.

v.

Sajjad Hussain and others—Respondents.

L. P. A. No. 169 of 1922, Decided on 1st December 1922, from the order of Abdul Raoof, J. in Mis App. No. 430 of 1921, D/-27th June 1922.

Letters Patent (Lah.) S. 10—Order rejecting application to set aside dismissal of appeal, is appealable.

An appeal lies under clause 10 from an order made by a Single Judge rejecting an application for an order to set aside a dismissal of an appeal. 3 L. 188; 1922 Lah. 380 & 43 C. 857 Foll. [P 412, C 2]

G. C. Narang—for Appellants.

Muhammad Iqbal—for Respondents.

Judgment.—This is an appeal under clause 10 of the Letters Patent from an order made by a Single Judge rejecting an application for an order to set aside a dismissal of an appeal. The learned Counsel for the respondents raises a preliminary objection that the order in questian does not amount to a judgment under the Letters Patent and that no appeal lies from it. The objection is, in our opinion not well founded. The order satisfies the definition of the expression "Judgment" as laid down in *Ruldu Singh* v. *Sawal Singh* (1) and has been held to be appealable: *Muthura Sundari Dassi* v. *Haran Chandra Shaha* (2). We accordingly overrule the preliminary objection. On the merits we consider that there is considerable force in the contention of the learned counsel for the appellants that this was a fit case for setting aside the dismissal, but the question before us is not whether we would have accepted the application for an order to set aside the dismissal if it had been made to us in the first instance, but whether there is any adequate ground for interfering with the discretion of a learned Judge of this Court who has declined to grant the application. This question we must answer in the nagative. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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(1) 1922 Lah. 380.
(2) [1916] 43 Cal. 857—20 C. W. N. 594—23 C.L.J. 443—34 I.C. 634.

✱ ✱ 1924 LAHORE 413

BROADWAY, J.

Mula Singh and others—Convicts—Appellants.

v.

Emperor—Respondent.

Cr. App. No. 694 of 1922, Decided on 24th November 1922, from the order of Ss. J. Sialkot, D/- 13th June 1922.

✱ (a) *Criminal P. C., S. 226—Sessions Judge can add charges under Ss. 323, 325 326 to a charge under S. 302 Penal Code.*

Where seven persons were committed for trial to Sessions under S. 302 and at the commencement of the trial the Sessions Judge added charges under Ss. 326, 325 and 323 Penal Code in connection with the injuries inflicted on three of the prosecution witnesses.

Held: that the Sessions Judge acted within his powers in adding the charges relating to the injuries.

So long as the facts appearing in the Magisterial inquiry warrant the framing of the charge omitted by the Committing Magistrate, the Sessions Court has power to add the charge so omitted. It is not quite correct to say that the Sessions Court is not a Court of original jurisdiction. It has original jurisdiction which it can exercise on commitment made by a Magistrate, 9 S.L.R. 37 Foll; 4 I.C. 993; 32 C. 22 Dist. [P 414 C 2]

✱ (b) *Evidence Act, S. 32—Dying declaration though conflicting with initial report is not wholly unreliable.*

A difference between the dying declaration and the initial report no doubt renders it necessary to examine both pieces of evidence with extra care, but such a difference alone does not necessarily render a dying declaration wholly unworthy of evidence. [P. 415 C. 1]

Nand Lal—for Appellants.

Muhammad Rafi—for the Crown.

Judgment.—Mula Singh, Wiru, Jagat Singh, Sant Singh and Mohan Lal have been convicted under S. 326, Indian Penal Code, and sentenced, the first two, to seven years' rigorous imprisonment, and the last three, to five years' rigorous imprisonment. Each of them has also been sentenced to pay a fine of Rs. 50 or to undergo three months further rigorous imprisonment in default. They have appealed to this Court through Dr. Nand Lal and I have heard Mr. Rafi on behalf of the Crown.

The facts are detailed in the lengthy judgment of the learned Sessions Judge and I need refer to them very briefly. It is said that on the 21st June 1921 one Hira Singh was watering his fields while his son Sohan Singh, was working the well known as Bawewala. Wiru and Guran Ditta came there to water their cattle. After having done so they are said to have allowed the animals to trespass into Sohan Singh's sugarcane and cotton fields. This led to an altercation and a tussle. Hira Singh stopped the fight and Wiru and Guran Ditta went away.

Soon after this, according to the prosecution, the five appellants, together with many others, came to the spot in order to take revenge The deceased, Budh Singh, heard of this and hastened to the spot, with the result that he received injuries to which he ultimately succumbed. The initial report was made at the Police station, which is some six miles away, at 3 A.M. on the 22nd June 1921 by Mangal Singh who named 13 persons including four out of the five appellants; the one not named by him was Wiru Singh. The Police arrived on the spot in due course and Budh Singh was examined. Subsequently, while in hospital, his statement was recorded by a Magistrate, and in it he named 13 persons including four of the appellants, the one omitted by him being Sant Singh. In the course of the inquiry Mangal Singh stated that some of the persons named by him had been named as they had been there and had not attempted to stop the fight but that they had not actually taken any part in the affair. The Police ultimately sent up for trial nine persons, two of whom were, and apparently are, still absconding. The Magistrate making the inquiry framed charges against the other seven, including the five appellants, under Ss. 304, 326, 325 and 323, Indian Penal Code. The complainant, however, moved this Court on the revision side urging that the commitment should be under S. 302, Indian Penal Code, and the learned Chief Justice accepting the petition directed accordingly. On the case going back to the inquiring Magistrate the committal was made under S. 302, Indian Penal Code, alone *qua* all the seven persons. At the commencement of the trial the learned Sessions Judge added charges

under Ss. 326, 325 and 323. Indian Penal Code. in connection with the injuries inflicted on Mohan Singh, Assa Singh and Sohan Singh, three of the prosecution witnesses No objection was taken to this course when the addition was made and it was only at the conclusion of the case when Counsel for the defence was addressing the Court that exception was taken to this. The learned Sessions Judge's attention was drawn to *Shah Din* v. *Emperor* (1) but he found that distinguishable and held that the persons accused had not been prejudiced in any way by the addition. He also held that they had taken part in the affray with one common intention and were, therefore, all equally liable for the death of Budh Singh. He acquitted two of the persons under trial and convicted the five appellants under S. 326, Indian Penal Code "for causing grievous hurt to Budh Singh, Asa Singh and Mohan Singh."

Dr. Nand Lal for the appellants has urged that the appellants were entitled to an acquittal, as the learned Sessions Judge acted illegally in adding charges relating to the injuries sustained by Asa Singh, Mohan Singh and Sohan Singh. He referred to *Subrahmania Ayyar* v. *King-Emperor* (2) as an authority for the proposition that an illegality was not curable by S. 537, Criminal Procedure Code. With this authority I naturally have no quarrel. I do not, however, consider that it has any bearing on the point before me, as, in my opinion, no illegality has been committed. The learned Counsel referred to *Birendra Lal* v. *Emperor* (3) in which it was held that a Sessions Court was not a Court of original jurisdiction and could only amend or add to a charge with reference to the immediate subject of the prosecution and committal and not with regard to a matter or matters not covered by the indictment. The discussion of the question is not a detailed one and I think that decision must be confined to the facts of that particular case. This decision was followed by a Division Bench of the Chief Court in *Shah Din* v. *Emperor* (1). There the amendment or addition to the charge had not been made at the *commencement* of the trial but as the case developed. The Calcutta decision was referred to and approved of, but here again the question, whether the Sessions Judge had power to add a charge at the commencement of the trial, was not gone into or discussed. To this extent therefore, that authority is distinguishable from the case before me.

The addition to the charge in the present case was obviously made under the provisions of S. 226, Criminal Procedure Code, which provides that when any person is committed for trial (*a*) without a charge or (*b*) with an imperfect or erroneous charge, the Court may frame a charge or add to or otherwise alter the charge, as the case may be. Now, it is obvious that if the present appellants had been committed for trial without a charge, the learned Sessions Judge would have been competent under S. 226, Criminal Procedure Code, to remedy that defect by framing such charge or charges as the facts disclosed by the Magisterial inquiry would warrant. To my mind, this indicates that it is on the facts disclosed by the Magisterial inquiry, and on those facts alone, that any action under S. 226, Criminal Procedure Code, can be taken. This being so it seems to me that so long as the facts appearing in the Magisterial inquiry warrant the framing of the charge omitted by the Committing Magistrate, the Sessions Court has power to add the charge so omitted. It also seems to me that it is not quite correct to say that the Sessions Court is not a Court of original jurisdiction. It has original jurisdiction which it can exercise on commitment made by a Magistrate. In the above views I am supported by a decision of the Sind

(1) [1909] 20 P.W.R. 1909—11 Cr.L.J. 131—4 I.C. 993.
(2) [1902] 25 Mad. 61-28 I.A. 257—11 M L.J. 233—3 Bom.L.R. 540—5 C.W.N. 866—8 Sar. 160 (P.C.)
(3) [1905] 32 Cal. 22—8 C.W.N. 784—1 Cr.L.J. 794.

Judicial Commissioner's Court reported as *Dalo* v. *Emperor* (4) where the whole question is thoroughly and very carefully discussed and *Birendra Lal* v. *Emperor* (3) dissented from. Following *Dalo* v. *Emperor* (4) I hold that the learned Sessions Judge acted within his powers in adding the charges relating to the injuries inflicted on Asa Singh, Mohan Singh and Sohan Singh and that no illegality has been committed. It is clear that the appellants have not been prejudiced by the addition made, as from the outset the case for the prosecution has been that, in addition to Budh Singh, Asa Singh, Mohan Singh and Sohan Singh were also injured.

Dr. Nand Lal then urged that the dying declaration of Budh Singh was wholly unreliable, inasmuch as he had named persons not mentioned in the initial report and had omitted the names of those who had been referred to in that report. In this view I am unable to concur. A difference between the dying declaration and the initial report no doubt renders it necessary to examine both pieces of evidence with extra care, but such a difference alone does not necessarily render a dying declaration wholly unworthy of credence. According to this dying declaration, of the appellants, Mula Singh and Wir Singh were the assailants of Budh Singh. This dying declaration is corroborated by the other witnesses in the case, notably P.W. No. 9, Sant Singh; P.W. No. 10, Guran Ditta and P.W. No. 11, Karam Chand. These three witnesses have been regarded by the learned Sessions Judge as impartial persons and of them Sant Singh and Guran Ditta at least have not been shown to be in any way related to the prosecution or biased in their favour. Karam Chand has admitted that he is a distant relation of Hira Singh who in his turn is related to the deceased Budh Singh. Having regard to this mass of evidence corroborating the dying declaration, I see no reason to doubt the correctness of the view taken by the learned Sessions Judge in agreement with the Assessors, that these two appellants actually attacked the deceased with hatchets and inflicted injuries on him which caused his death. Their convictions are, therefore, amply borne out by the record and are maintained.

With regard to the remaining three appellants it was contended that they were entitled to an acquittal on the ground that charges relating to the injuries caused to Asa Singh, Mohan Singh and Sohan Singh had been improperly added and, further, that *qua* the injuries to the deceased Budh Singh S. 149 had not been applied and S. 34 was inapplicable. The question of the applicability of S. 34, Indian Penal Code, no longer arises, as I have held that the adding of the charges was not illegal. There is ample evidence to show that the remaining three appellants took part in the flight. Indeed Sant Singh and Jagat Singh do not deny their presence but give another account of what occurred which account is not borne out by the evidence on the record. Mohan Lal has attempted to prove an *alibi*. The evidence produced by him has not been relied on by the learned Sessions Judge and Dr. Nand Lal has not thought fit to refer to it. It is clearly unworthy of credence. I would add that I have also examined the defence evidence produced by Wiru Singh and Mula Singh and find that it, in no way, establishes their defences. Having regard to the serious nature of the assault I do not think the sentences are excessive and dismiss the appeal.

Appeal dismissed.

(4) [1915] 9 S.L.R. 37—16 Cr.L.J. 573—30 I.C. 125.

1924 LAHORE 415

SCOTT-SMITH AND HARRISON, JJ.

Bhag Singh and others—Convicts—Appellants.

v.

Emperor—Respondent.

Cr. App. No. 739 of 1922, Decided on 1st November 1922, from an order of Ss. Judge, Ferozepore, D/-25th July 1922.

Penal Code, Ss. 300 and 34—All persons taking part in assault are guilty of murder.

Where the evidence showed that four men armed with deadly weapons pursued the deceased and set upon him and killed him,

Held: that their common intention was to cause his death or to cause such bodily injury as was likely to cause death and under these circumstances all those who took part in the murderous assault upon him were guilty of murder. [P. 118 C. 1]

Nand Lal—for Appellants.

Kunwar Dalip Singh (*for Govt. Advocate*)—for Respondent.

Judgment.—Bhag Singh and Mengha Singh have been convicted by the Sessions Judge of Ferozepore of the murder of Bogi in the village of Manonke on the 25th April 1922 and have been sentenced to death. They have filed a joint appeal to this Court through Dr. Nand Lal, Advocate, and the case is also before us for confirmation of the sentences under S. 374, Criminal Procedure Code.

The facts as disclosed by the evidence for the prosecution are extremely simple and are briefly to the effect that shortly after sunset on the 25th April last, after Bogi had come out of the house of *Musammat* Har Devi, P. W. No. 12, he was pursued by the two appellants and Har Chand Singh and Indar Singh, who are said to be absconding, through the village street. The pursuing party are said to have been armed with *chhavis* with the exception of Mengha Singh who had a *gandhali*. Bogi ran into the verandah of Kala Singh's house and there was set upon by his pursuers who inflicted numerous injuries upon him with their weapons and then dragged him out into the lane. It is suggested that they intended to remove the body but owing to the arrival of Harnam Singh, P. W. No. 8, and other villagers, they were unable to do this and left the body on the spot. Direct evidence of the murder has been given by Kala Singh, P. W. No. 6 and his mother, *Musammat* Indan, P. W. No. 7 a very old woman whose age is shown on the record as 90 years. In addition to their evidence there is that of Harnam Singh, P. W. No. 8, who deposes that when he arrived upon hearing the alarm the four alleged murderers were dragging Bogi's body out of the door of Kala Singh's house. Then there is the evidence of *Musammat* Har Devi, who says she saw and recognized Bogi's pursuers, and of Maghi, P. W. No. 13, who also recognized them while he was coming along the village lane.

In addition there is the evidence as to motive. Some four or five years ago the son of Arjan Singh, P. W. No. 9, was drowned; certain persons including Har Chand Singh, absconder, were suspected of having murdered him and a case was brought against them but they were discharged. This admittedly resulted in enmity between Har Chand Singh and Arjan Singh, and Bogi is proved to be a partisan of Arjan Singh. It should be noted that Bhag Singh and Har Chand Singh are brothers and Mengha Singh and Indar Singh are brothers. Bhag Singh and Har Chand Singh are also first cousins of the other two. Again there is evidence of quarrels between Bogi and the appellants. The most recent quarrel occurred on account of the drawing of water from a well in the village by one Chanan Mehra. The appellant's party would not allow him to draw water whereas Bogi insisted that he should be allowed to do so. The first of these quarrels took place two days before the occurrence and there was a second on the afternoon immediately preceding the murder. The witnesses who have given evidence as to these are detailed in the judgment at page 27 of the printed record. Now, it must be admitted that these quarrels were not very serious and one would not expect them to furnish motive for a murder, but the question of adequacy of motive is not a matter of much importance if the evidence against the appellants that they committed the murder is clear.

Dr. Nand Lal in arguing the case commented upon certain discrepancies existing in the evidence of Kala Singh and *Musammat* Indan. These are referred to at length in the judgment of the learned Sessions Judge. We have carefully considered them and are of opinion that they are not at all material. Against Kala Singh it is objected that he is heavily in debt to Arjan Singh who is admittedly inimical to the appellants and it is urged that this is a sufficient motive for him to give false exidence against them. We do not think that this fact is in itself a sufficient ground for

rejecting his evidence. It is conclusively proved by the evidence for the prosecution and by the presence of marks of blood in Kala Singh's house that the murder was committed at the place alleged. There is, therefore, no ground for supposing that Kala Singh and *Musammat* Indan were not eye-witnesses. Again Harnam Singh is not shown to be in any way hostile to the appellants and we see no good ground for rejecting his evidence. In regard to *Musammat* Hardevi it is urged for the defence that she had intimacy with the deceased and that it is possible that she got some other lover of hers to commit the murder. It is, however, not proved that she has any other lover who would have been likely to murder Bogi. It is urged that she was in her house at the time of the murder and could not possibly have recognized the men who pursued Bogi. She states that she was standing outside her house and the appellants were her fellow villagers and well-known to her and we see no reason why she should not have been able to identify them. The same remarks apply to Maghi who is not shown to be interested in the prosecution or hostile to the appellants.

The first information report was made at the Thana, eight miles distant, at 11 o'clock on the morning of 26th April, and it is urged that the delay in making this report throws grave doubts on the truth of the prosecution story. We think that the delay in making the report has been sufficiently accounted for by the fact that the villagers were afraid to go to the Thana during the night because the murderers were at large. This specially applies to Arjan Singh with whom the appellants had enmity. A *chhavi* was found on the spot and a portion of a *gandhali* blade. The Assistant Surgeon, who held the *post mortem* examination, states that only two of the wounds, those on the right thigh, could have been caused by the *chhavi* which was found at the scene of the murder. He stated that on account of the shape of the *chhavi* blade it could only cause tapering wounds shallow at the extremities and that such wounds were observed only on the right thigh. These are wounds numbered nine in the list at page 6 of the printed record. The Assistant Surgeon on being further questioned stated that wounds Nos. 10 or 11, those on right knee and left foot, could also probably be caused by the *chhavi*. The learned Sessions Judge had some hesitation in accepting the evidence on this point. Now, the middle portion of a *chhavi* blade is almost straight and there would not be much difference in the depth of the wound caused by it in different portions thereof. It must also be remembered that at the time of the *post mortem* examination the body was decomposed and this fact also would considerably alter the appearance of the wounds, and we think it would have been difficult for the Assistant Surgeon to say with certainty that either of the wounds could not have been caused with the *chhavi*. Moreover, the evidence for the prosecution shows that four persons took part in the attack, and that all had weapons of which only two were produced. The other two were not produced before the Assistant Surgeon, nor were they produced in Court, and it cannot be said whether the wounds might not have been caused with them.

We attach no importance to the evidence regarding the identification of the broken piece of the *gandhali* blade and of the clothes found on the spot. We are not concerned with the evidence as to the identification of the *chhavi* because it is said to have been used by one of the absconders. A piece of yellow turban found on the spot was identified as that of Mengha Singh. It may have been his, but we do not think it would be safe to place much reliance on this piece of evidence. We note that there is what appears to be a sketch of the *chhavi* on the record but it has not been proved. A sketch of the *chhavi* produced at the trial should have been prepared in the Sessions Court and duly proved.

The final argument put forward by appellant's Counsel was that there was no evidence to show that either of the appellants inflicted wound No. 2 which is said to have been the wound which caused the death and that, therefore, they could not be convicted

of murder. He cited *Agra* v *Emperor* (1) and *Bahal Singh* v. *Emperor* (2). In those cases it was held that a particular common intention was not proved. The facts of the present case are distinguishable. Here the evidence shows that four men armed with deadly weapons pursued Bogi and set upon him and killed him. It is quite clear to us that their common intention was to cause his death or to cause such bodily injury as was likely to cause death. Under these circumstances all those who took part in the murderous assault upon him are guilty of murder. The cases in point are *Samand Singh* v. *Emperor* (3), *Kanhai* v. *Emperor* (4) and *Emperor* v. *Ram Newaz* (5). In our opinion, after carefully considering the evidence on the record and the arguments of counsel, it is clearly proved that both the appellants joined in murdering Bogi. We, therefore, dismiss the appeal and confirm the sentences.

Appeal dismissed.

(1) [1915] 37 P. R. 1914 Cr. — 16 Cr L.J. 209—219 P.L.R 1915—27 I. C. 833.
(2) [1920] 24 P. R. 1919 Cr.—20 Cr. L. J. 711—52 I. C. 791.
(3) [1919] 3 P. R. 1919 Cr.—20 Cr. L. J. 157—5 P.W.R. 1919 Cr.—49 I. C. 349.
(4) [1913] 35 All. 329—11 A. L. J. 752—14 Cr. L. J. 609—21 I. C. 657.
(5) [1913] 35 All. 506—11 A.L.J. 804—14 Cr. L. J. 615—21 I. C. 663.

1924 LAHORE 418

ABDUL RAOOF AND MOTI SAGAR, JJ.

The Zamindara Bank, Sherpur Kalan and others—Defendants—Appellants.

v.

Suba—Plaintiff—Respondent.

Mis. S A. No. 944 of 1922, Decided on 28th November 1922, from the order of D. J. Ludhiana, D/- 25th January 1922.

(a) *Interpretation of Statutes — Restrictive statutes should be strictly construed.*

Statute imposing restrictions upon the subject's rights should be strictly construed and such restrictions should not be extended beyond what the words used actually cover.

[P. 419, C. 1]

(b) *Co-operative Societies Act, (Act 2 of 1912) S. 40 and R. 10 framed thereunder by the Punjab Govt. — Dispute between a society and a member—Civil suit is barred.*

By the substitutional remedy provided under r. 18 in the shape of a reference to the Registrar in the matter of a dispute between a member and a society the common law remedy by an action in a Civil Court has by necessary implication been taken away. The object of the Act is to encourage thrift, selfhelp and co-operation among agriculturists, artisans and persons of limited means and it will be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worries of an expensive and protracted litigation.

[P. 420, C. 1]

Badri Das—for Appellants.

Abdul Aziz—for Respondent.

Judgment. — This appeal which raises an important question of jurisdiction arises out of a suit for a declaration that certain bonds alleged to have been executed by the plaintiff in favour of defendant No. (1) were not executed by him and that they were forgeries. The defendant, relying upon certain rules framed by the Local Government under the authority of S. 43 of the Co-operative Societies Act, pleaded that the Civil Court had no jurisdiction to hear and determine this suit, and that the only remedy open to the plaintiff was by way of a reference to the Registrar who could either decide the dispute himself or refer it to the arbitrament of one or more arbitrators whose decision is final, and not liable to be questioned in a Civil Court except on proof of the receipt of a corrupt gratification by the latter. This plea was given effect to by the Court of first instance, but did not find favour with the District Judge who on appeal came to the contrary conclusion, and remanded the case for decision on the merits. The defendant has now preferred a second appeal to this Court, and the sole point involved for determination here is whether the District Judge was right in holding that the suit was cognizable by a Civil Court.

Rule 18 of the Rules made by the Local Government under the Co-operative Societies Act (published in *Punjab Government Gazette*, dated the 23rd June 1917) and invoked by the defendant in support of his contention is in the following terms:—

(*a*) Any dispute concerning the business of a Co-operative Society between members or past members of the society or persons claiming through them, or between a member or past member or persons so claiming and the Committee or any officer shall be referred to the Registrar. Reference may be made by the Committee or by the Society by resolution in general meeting or by any party to the dispute, or if the dispute concerns a sum due to the society by any member of the society.

(*b*) The Rsgistrar may either decide the dispute himself or appoint an arbitrator or refer it to three arbitrators, of whom one shall be nominated by each of the parties and the third shall be nominated by the Registrar and shall act as Chairman. When any party to a dispute fails to nominate a suitable arbitrator within 15 days the Registrar may make the nomination. No legal practitioner may be nominated as arbitrator by any party.

(*c*) In such a proceeding the Registrar or arbitrator shall have power to administer oaths, to require the attendance of parties and witnesses, and to require the production of all necessary books and documents, by a summons delivered orally or sent by hand or by registered post or through the nearest Civil Court having jurisdiction in the area in which the society operates and shall further have power to order the expenses of determining the dispute to be paid either out of the funds of the society or by such party or parties to the dispute as he may think fit

(*d*) The Registrar or arbitrator shall hear the evidence of the parties and witnesses who attend, and upon that evidence and after consideration of any documentary evidence produced by either side, a decision or award shall be given in accordance with justice, equity and good conscience and shall be reduced to writing. In the absence of any party, duly summoned to attend, the dispute may be decided against him in default. Where three arbitrators are appointed, the opinion of the majority shall prevail.

(*e*) Any person duly summoned by the Registrar or arbitrator to appear before him or to produce any document and failing to do so shall be liable to the penalties prescribed in paragraph 7 (2) of the Second Schedule of the Civil Procedure Code, 1908.

(*f*) Any party aggrieved by an award of an arbitrator may appeal to the Registrar in person or by agent within one month of the date of the award.

(*g*) An arbitrators award, if no appeal has been made within a month, on a decision of the Registrar originally or in appeal, shall not, as between the parties to the dispute be liable to be called in question in any Civil or Revenue Court and shall be in all respects final and conclusive, except on proof of the receipt of a corrupt gratification by the arbitrator

(*h*) A decision or award shall, on application to any Civil Court having jurisdiction in the area in which the society operates, be enforced in the same manner as a decree of such Court.

(*i*) In proceedings before the Registrar or arbitrator no party shall be represented by a legal practitioner.

The District Judge, *Sardar* Sewaram Singh, found, in the first place, that, in accordance with the rules set forth above, the plaintiff did refer the dispute to the Registrar, but that the latter officer declined to take any action in the matter and that the plaintiff was consequently obliged to institute the present suit. Secondly, he was of opinion that it is only suits of the nature specified in sub-clause (*g*) of rule 18 that were excluded from the jurisdiction of a Civil Court, and that in respect of other suits which do not fall within the purview of clause (*g*) there was no such prohibition. In other words, his opinion was that Civil Courts were not precluded from taking cognizance of a dispute which had not resulted in an award and that it was an award and award alone which under the rules had been prohibited from being called into question in a Civil Court. In our opinion this view of the learned District Judge is erroneous and cannot be accepted. The principle of law as enunciated in various authorities is that Statute imposing restrictions upon the subject's rights should be strictly construed and such restrictions should not be

extended beyond what the words used actually cover. In the present case, however, it appears to us that the words used do clearly contain a necessary implication depriving the subject of his common law right of action and provides a special and prompt procedure for cases in which, having regard to the class of people affected, a speedy decision as to their disputes is essential. It will be observed that the object of the Act is to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means, and it will, in our opinion, be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worries of an expensive and protracted litigation.

It should further be noted that the English Law on the subject is also very much the same. Under the Friendly Societies Act, 1896 (59 & 60 Vic., Ch. 25) every society must by its rules determine the manner in which disputes are to be settled and when a direction on this point is contained in the rules disputes must be decided in the manner directed and any decision so given will be binding and conclusive even if erroneous in point of law and unfair. The Tribunals provided are usually arbitrators of justices, but the parties have the option of referring to the Registrar.

We think that it would be entirely repugnant to the scope and object of the Act if a suit like this is allowed to be decided in a Civil Court and we accordingly hold that by the substitutional remedy provided under the rules in the shape of a reference to the Registrar the common law remedy by an action in a Civil Court has by necessary implication been taken away.

As to the finding that the dispute had in fact been referred to the Registrar and not entertained, it is sufficient to say that we have not been able to discover any evidence on the record in support of this finding. A certain post card, marked as Exhibit P. 5, sent by the defendant to the plaintiff in reply to an application submitted by the latter has been relied upon, but it obviously does not help the plaintiff in any way whatever, and cannot be construed to mean that the Registrar was asked by the plaintiff to take action in respect of this specific matter and that he declined to do so. This finding, therefore, though a finding of fact, must be set aside as based on no evidence.

The result is that we accept the appeal, and dismiss the plaintiff's suit as not maintainable in a Civil Court, but, having regard to the peculiar circumstances of the case, we order the parties shall bear their own costs throughout.

Appeal accepted.

✱ 1924 LAHORE 420

CAMPBELL, J.

Emperor—Petitioner.

v

Fazal Dad—Accused—Respondent.

Cr. Rev. No. 1202 of 1922, Decided on 9th December 1922, from Dt. Magistrate, Gujrat, D/- 17th August 1922.

✱ (a) *Criminal P. C., S. 439—Reference by District Magistrate against the order of Sessions Judge is not allowed—Public Prosecutor should be moved.*

It is not the practice of the High Courts in India to take action under S. 439 on a report by a District Magistrate which has for its object interference with a decision by a Court of Session. A District Magistrate if he considers a Sessions Judge's order illegal should move the Public Prosecutor to bring it before the High Court. [P. 421, C. 1]

✱ (b) *Criminal P. C., S. 89—Restoration—Property sold—Nett proceeds and not the property should be restored.*

What can be restored under S. 89 is the nett proceeds of the sale and not the property. [P. 421, C. 2]

Zafrullah Khan—for Respondent.

Reference:—

(1) The application given by Fazal Dad to the Sessions Judge of Gujranwala on 13th March 1920, praying for the restoration of his property attached and sold under S. 89 of the Criminal Procedure Code, is clearly time-barred, having been made two years after the attachment.

(2) If the attachment was invalid, as is alleged by the applicant, no application under S. 89 of the Code, for the restoration of the property, can

be entertained by a Criminal Court. See *Mala Singh* v. *Emperor* (1).

(3) The order passed by the learned Sessions Judge dated 1st March 1922 is not according to law. An order directing the restoration of property to Fazal Dad could not legally have been passed.

(4) It is prayed that the order of the learned Sessions Judge be reversed and an order proper and according to law be passed.

Order.—It is not the practice of the High Courts in India to take action under S. 439 of the Code of Criminal Procedure on a report by a District Magistrate which has for its objeet interference with a decision by a Court of Session, *vide Queen-Empress* v. *Karamdi* (2), *Emperor* v. *Jamna Bai* (3), *Emperor* v. *John Francis Lobo* (4) and *In re Angumuthu Vanathrian* (5) (Madras High Court). In the last named ruling it was stated that a District Magistrate, if he considers a Sessions Judge's order illegal, should move the Public Prosecutor to bring it before this Court. In the present instance the learned District Magistrate has not even arranged that his recommendation should be supported by Counsel. I must decline, therefore, on the present reference to examine the correctness of the learned Sessions Judge's decision that Fazal Dad is entitled to restitution.

Since, however, the case has been brought to my notice, I take the opportunity of correcting an error which is evidently due to an oversight and which, if allowed to stand may give further trouble in the future. The learned Sessions Judge has purported to act under S. 89 of the Code of Criminal Procedure and that section provides that if the property has been sold, the person from whom it has been taken under S. 88 shall be entitled to recover not the property but only the nett proceeds of the sale. Fazal Dad in his original application prayed that he might be given either the property or the sale proceeds. The detailed order in the case by which it was referred to this Court for action on the revision side was written by one Sessions Judge and the final order after return by this Court with a direction that the Sessions Judge should himself dispose of the appeal preferred to him, was written by another Sessions Judge. The latter appears to have overlooked the precise terms of S. 89.

Accordingly, I alter the learned Sessions Judge's order of the 1st of March 1922 to the extent of substituting for the words "the property in question" the words "the nett proceeds of the sale of the property in question."

Order accordingly.

(1) [1917] 40 P.W.R.Cr. 1916—6 P.R. Cr. 1917—45 P. L. R. 1917—17 Cr.L.J. 414—35 I.C, 974.
(2) [1896] 23 Cal. 250.
(3) [1905] 28 All. 91—2 A.L.J. 589—2 Cr.L.J. 515—(1905) A.W.N. 198.
(4) [1916] 41 Bom. 47—18 Bom. L.R. 769—17 Cr.L.J.—529—36 I.C. 577.
(5) [1912] 23 M.L.J. 732—12 M.L.T. 170—(1912) M. W. N. 812—13 Cr. L.J. 714—16 I.C. 522.

✱ 1924 LAHORE 421

SCOTT-SMITH, J.

Manohar Das—Defendant—Appellant.

v

Kalyan Das — Plaintiff—Respondent.

Mis, F. A. No. 1246 of 1922, Decided on 11th November 1922, from the Order of Senior Sub. J., F. C. Montgomery, D/- 3rd May 1922.

✱ *C.P. Code, O.40 R. 1—Appointment is proper where putting one party in possession would give him advantage over the other—Appellate Court will not lightly interfere—C. P. Code, O.43 R. 1 (s).*

After the death of a *Mahant* of a shrine there was a scramble between two persons each of whom claimed succession to the office and each of whom got himself elected as successor. There was something to be said for the claim of each party and if one of them was put into possession and appointed *de facto Mahant* during the pendency of the suit it would have given him a great advantage over the other.

Held : that there was preeminently a case for the appointment of a Receiver and the High Court would not interefere with the order of the lower Court. A Court of Appeal will not, except in an extreme case, disturb the appointment or selection of a Receiver by the Court below, unless there be some overwhelming objection in point of propriety or choice or some fatal objection in principle. 17 C. W. N, 581 Ref. (P 422 C 2)

Sheo Narain—for Appellant.

Tek Chand, Lala Ramchand Manchanda and *Lala Anant Ram Khosla*—for Respondent.

Judgment—Gulab Das, the Mahant of the shrine of Kacha Pacca in the Montgomery District died on the 22nd December 1921. There are two claimants to succeed to the office of Mahant, Kalyan Das, plaintiff-respondent, and Manohar Das, defendant-appellant. Each claims to have been duly elected Mahant subsequent to the death of Gulab Das. There was a dispute as to mutation of the lands attached to the shrine before the Revenue Officer, and the mutation was effected in defendant's favour on the 3rd May 1922. Up to that time neither party was in possession and the Settlement Collector, on that date, ordered that the defendant should be put in possession of the lands attached to the shrine. On the same day the plaintiff filed a suit for a declaration that he is the Mahant of the shrine, and is entitled to the lands, houses, dera and samath relating thereto. One the same date he made an application that temporary injunction should issue under O. 39 R. 1 Civil Procedure Code, and the Court forthwith issued an injunction to the Revenue Authorities that they should not deliver possession to the defendant pending a decision by the Court as to which party was entitled to the gadi. This was followed on the 6th May by an order appointing a Receiver of the property under O. 40, Civil Procedure Code. From these orders the defendant has filed an appeal to this Court.

Somewhat lengthy arguments have been addressed to me by the parties' Counsel but the main points urged by Pandit Sheo Narain on behalf of the appellant are that the lower Court acted with great haste, that his client's objections were not disposed of, that the plaintiff has not made out a *prima facie* title to the property in dispute, and that it is absolutely necessary that there should be a *de facto* Mahant in order that all matters connected with the shrine should be looked after and should go on as usual. It appears that immediately after the death of the previous Mahant there was a regular scramble between the parties to the suit as to who should succeed him. Each of them got himself elected by certain persons. In these circumstances Mr. Tek Chand for the respondent urges that it is eminently a case in which it is proper to appoint a receiver. He also urges that the lower Court having exercised its discretion, this Court should not interfere unless very good grounds are shown. He has referred *inter alia* to the following authorities. JIBANESSA KHATUN v. MAJIDUNNESSA KHATUN (1), in which it was held that "where some provision for the management of a certain estate is urgently called for either by the appointment of a common manager or of a Receiver, there is no necessity for making out a strong case for the appointment of a Receiver, because the Court can hardly go wrong in making such an appointment. A Court of Appeal will not, except in an extreme case, disturb the selection of a Receiver by the Court below unless there be some overwhelming objection in point of propriety or choice or some fatal objection in principle"

RAJA RAM v. THAKURAIN SHEORANI KUER (2) in which it was held that: "Where the lower Court, in the exercise of its discretion after considering all the facts and evidence, has come to a conclusion, it is for the appellants to show that the Court exercised its discretion improperly."

The same view was taken in SANT RAM v. RAM CHAND (3) and KADIR BAKHSH v. GHULAM MOHAMMAD (4).

Now, it must be admitted that the lower Court acted in a somewhat summary manner, but the occasion demanded that prompt action should be taken, for the Revenue Authorities had ordered that possession should be forthwith given to the defendant. In my opinion it was preeminently a case where a Receiver should be appointed. The property is not private property, and there is something to be said for the claim of each party, and if one of them is put into possession and appointed *de facto*

(1) [1913] 17 C. W. N. 581—18 I. C. 398.
(2) [1910] 7 I. C. 344.
(3) [1910] 53 P.W.R. 1910—36 P. R. 1910—72 P.L.R. 1910—6 I.C. 659.
(4) [1920] 30 P.W.R. 1920—55 IC. 50.

Mahant during the pendency of the suit, it will give him a great advantage over the other. In my opinion there is no sufficient ground to interfere with the discretion which has been exercised by the lower Court. I dismiss the appeal with costs.

The *interim* order passed by this Court on the 23rd May last is hereby discharged.

Appeal dismissed.

✱ 1924 LAHORE 423

CAMPBELL, J.

Thakur Das—Defendant—Appellant

v.

Brij Lal—Plaintiff—Respondent.

S. A. No. 1304 of 1922, Decided on 3rd January 1923, from the decree of D. J. Sialkot, D/-31st January 1922.

✱ *Civil P. C., S. 11, Expl. 4—Plea not taken in previous suit is barred—Different subject matter has no effect.*

A obtained a decree against the estate of B and in execution of the same purchased an undivided share in a house alleged to have belonged to B. Afterwards A brought another suit against C, A's nephew and D, A's brother's wife for rent of the purchased share. The defence was that A did not purchase the share but there was no plea that the purchased share did not belong to B and this suit was decreed. Subsequently in a suit brought by C against A for possession of the share purchased by A on the ground that the share did not belong to B.

Held: that the question as to the ownership of B in the share purchased by A was *res-judicata* between the parties and the fact that the subject matter of the previous suit was different to that of this suit did not matter.

[P. 424 C. 2]

Mehr Chand—for Appellant.

Daulat Ram—for Respondent.

Judgment.—In 1910 Thakur Das obtained a decree against the estate of one Mulraj in a suit which was defended by the latter's widow *Mt.* Sukh Devi. In execution of his decree he attached an undivided share in house property which was alleged to have belonged to Mul Raj and in subsequent auction-sale purchased it. In 1919 Thakur Das brought a suit against Brij Lal, nephew of Mul Raj and *Mt.* Thakur Devi widow of a brother of Mul Raj, for rent of the purchased share. Other persons actually in possession as tenants were also joined. In his plaint Thakur Das asserted that he was owner by purchase in execution-sale, and attached to the plaint copies of certain documents which showed that he claimed to have purchased Mul Raj's share. Brij Lal as defendant denied that there had been any auction-sale, denied that Thakur Das had purchased any share in the house property or had got possession, and denied that he (Brij Lal) was a tenant of the plaintiff. On the pleadings an issue was struck whether the plaintiff Thakur Das, had purchased a share in the house property in suit and had obtained possession. Both the Trial Court and the Appellate Court found this issue in favour of Thakur Das and he was granted a decree in the Appellate Court for Rs. 59-10. The present suit was lodged on the 1st of July 1921 by Brij Lal for possession of the share sold to Thakur Das on the ground that Mul Raj was not the proprietor of that share. The suit had been decreed by the Trial Court and the decree has been upheld in appeal by the learned District Judge.

A second appeal has been preferred and it is urged that, under S. 11, Explanation IV of the Code of Civil Procedure, the question of Mul Raj's ownership rights in the share in suit is *res judicata*. This contention must, I consider, be sustained. The learned District Judge has disposed of the point in language which is by no means clear. He says that it would not appear that Brij Lal had much chance of effectively raising the question in the previous suit whether *Mt.* Sukh Devi had actually any saleable interest in the property sold. I cannot see how this was so. The plea was an obvious one for Brij Lal to raise, especially since the ultimate result proved that the plea which he did raise, namely, that there had been no auction-sale at all, was frivolous.

It is argued on behalf of Brij Lal before me that the plea that Mul Raj had no rights in the property was raised in the former suit, but that it was not put in issue and, therefore, was not heard and finally decided. I am referred in substantiation to a statement in the written pleas of Brij Lal and *Mt.* Thakur Devi that they are owners and not tenants and that

the houses are their ancestral property. Now Mul Raj was the uncle of Brij Lal and the brother of *Mt.* Thakur Devi's husband and a bare assertion by these two persons that their ownership rights were ancestral could hardly be taken to contain an implication that Mul Raj had no rights; any implication would be to the contrary.

The further argument that a decision in a former suit is not *res judicata* in a sub-sequent suit when the subject-matter is not the same has no force and has been disposed of in *Gobind Lal* v. *Rao Baldeo Singh* (1); a ruling which is distinctly in point here.

I accept the appeal with costs, set aside the decree of the Courts below and order that the plaintiff's suit be dismissed with costs throughout.

Appeal dismissed.

(1) [1914] 12 P. R. 1915—226 P.L.R. 1914—128 P.W.R. 1914 -24 I. C. 932.

✱ 1924 LAHORE 424

MOTI SAGAR, J.

Badlu—Defendant—Petitioner.

v.

Mt. Naraini—Plaintiff—Respondent.

Civ. Rev. No. 310 of 1923, Decided on 9th June 1923, from the order of D. J. Karnal, D/-8th February 1923.

✱ *Civil P. C., O. 22 R. 3—Plaintiff being dead application by legal representative is to be treated as under R. 9 (2)—Civil P. C. O. 22 R. 9 (2).*

Where no application had been made within time to bring up on the record the representative of the deceased plaintiff.

Held: the suit abated automatically and the application for substitution made after the expiry of the prescribed period must necessarily be considered an application under O. 22 R. 9 (2). 42 All. 540, 49 I. C. 501 and 67 I. C. 596 Foll. [P. 424 C. 2]

Makund Lal, Puri—for Petitioner.

Shamair Chand—for Respondent.

Judgment.—The facts of the case out of which this application for revision has arisen are shortly these. On the 22nd of March 1921, one Hans Ram brought a suit for the recovery of Rs. 1020 against Badlu petitioner in the Court of *Lala* Gulwant Rai. senior Subordinate Judge of Karnal. On the 19th of March 1922 while the suit was pending Hans Ram was murdered and shortly after Badlu was arrested on the charge of murder and committed to the Sessions to take trial under S. 302 of the Indian Penal Code. He was eventually acquitted by the Sessions Judge. On the 27th of July 1922, Mt. Naraini, the widow of Hans Ram made an application to the effect that she should be brought on the record in place of her deceased husband. The Senior Subordinate Judge rejected this application as barred by time under Act XXVI of 1920. An appeal was preferred against this decision to the District Judge of Karnal who set aside the abatement holding that under S. 5 of the Indian Limitation Act there was sufficient cause for extending the period of limitation.

The defendant has now come up in revision to this Court and it has been argued on his behalf that no appeal lay to the District Judge from an order rejecting the respondent's application to bring the legal representative of the deceased on the record and that the order passed by him on appeal was consequently without jurisdiction. In my opinion this contention has no force and must be overruled. The application made by Mt. Naraini on the 27th of July 1922 for substitution of her name in place of her deceased husband was in substance an application for setting aside the abatement under Order 22 rule 9 (2) of the Civil Procedure Code, and the order passed on her application was appealable under Order 43 rule 1 (k) of the Code of Civil Procedure. No application having been made within time to bring up on the record the representative of the deceased plaintiff, the suit abated automatically and the application for substitution made after the expiry of the prescribed period must necessarily be considered an application under Order 22 rule 9 (2) of the Code of Civil Procedure *vide* 42 All. 540, 49 I. C. 501 and 67 I. C. 596.

I do not see any force in this petition and I dismiss it with costs.

Petition dismissed.

✱ ✱ 1924 LAHORE 425

Full Bench.

SHADI LAL, C. J., LE ROSSIGNOL, BROADWAY, ABDUL RAOOF, AND MARTINEAU, JJ.

Firm Lal Chand Mangal Sain—Defendants—Petitioners.

v

Firm Behari Lal Mehar Chand—Plaintiffs—Respondents.

Civil. Rev. No. 844 of 1921, Decided on 25th February 1924, from the order of Munsif, 1st class, Batala Dist. Gurdaspore, D/-2nd August 1921.

✱✱ *Punjab Courts Act (III of 1914) S. 44—No revision lies from interlocutory orders—C.P. Code, S. 115.*

An interlocutary order cannot constitute a "case" within the meaning of S. 44, Punjab Courts Act and C P. Code S. 115. The High Court has no jurisdiction to entertain an application for the revision of an interlocutory order. 60 P.R. 1897 Dissent from. [P 426 C 1,2]

Sagar Chand, and *Amar Nath Chona*—for Petitioners.

Mehar Chand Mahajan—for Respondents.

Shadi Lal, C. J.—The question of law submitted to the Full Bench is whether an interlocutary order, from which no appeal lies, can be revised by the High Court under S. 44 of the Punjab Courts Act which corresponds to S. 115 of the Civil Procedure Code. The section so far as is material to the issue before us, is in the following terms.

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto." It is incontrovertible that the revisional jurisdiction of the High Court cannot be invoked unless a case has been decided by a subordinate Court, and the point which requires determination is whether an interlocutory order can constitute a "case" within the meaning of the section. The judgments of the High Courts in India which have been cited at the Bar, reveal great divergence of judicial opinion, and there can be little doubt that the decisions of the Judges in several cases were influenced by their desire to avoid the possibility of grave injustice which might result from placing a strict interpretation upon the word "case" as used by the Legislature. Neither the Civil Procedure Code nor the General Clauses Act defines the expression "case" and there is no other statute which can throw any light upon the subject. It is beyond question that "case" is not synonymous with "suit". While every suit is a case, it cannot be said that every case is a suit. The word "case" is a more comprehensive expression and includes not only a suit but other proceedings which cannot be described as suit, *e. g.* proceedings under the Guardians and Wards Act, Probate and Administration Act, Succession Certificate Act, Provincial Insolvency Act, Religious Endowments Act etc. But can a branch of a suit be regarded as a case within the meaning of the section?. I would answer the question in the negative. The scheme of the Code shows that while certain orders to which importance was attached by the Legislature are made appealable (these orders are enumerated in S. 104 and Order 43 rule 1 of the Code) other orders not included in that list can be interfered with by a superior Court only on an appeal from a decree provided that they affect the decision of the case, *vide* S. 105, Civil Procedure Code. It seems to me that the Legislature did not contemplate that an order made by a Court before the final judgment from which no appeal is allowed, should be contested on an application for revision and that the trial of the suit should be delayed pending the disposal of that application.

It is not difficult to cite instances in which grave injustice might result from an incorrect decision of a subordinate Court unless the mistake is rectified at once by a superior Court; and no such rectification is possible if the order in question does not belong to the category of appealable orders and is also excluded from the cognizance of the High Court in the exercise of its revisional jurisdiction. I recognise that some cases of hardship are bound to

arise and that it would be desirable to provide a remedy for correcting errors which may otherwise cause an irreparable injury. But hardship, however grave should not influence our interpretation of the Statute, and we must leave it to the Legislature to amend the section or to the High Court to add to the list of the orders enumerated in Order 43 rule 1, such other orders as may be considered to be sufficiently important to form the subject of an appeal before the final judgment.

The learned Vakils on both sides have invited our attention to numerous decisions in support of their respective contentions but it would serve no useful purpose to recite them here. It is common ground that the Judicial authorities are by no means agreed as to the meaning of the word "case" and that the various High Courts have expressed divergent views as to the scope of their revisional jurisdiction. There is, however, a judgment by a Full Bench of the Punjab Chief Court, reported as 60 P. R. 1897, to which I must make a brief reference. That judgment is certainly an authority for the proposition that the word "case" does not necessarily, in every instance mean the whole case but may mean a particular branch of a case for which an independent remedy or a different procedure is provided in the Code, and may include an interlocutory order". I have however, sought in vain for any reason in support of the view that a "case" may mean a particular branch of a case, except that the contrary view would sometimes lead to injustice and "that interpretation should be accepted which is most consonant to reason and justice and most subservient to the purposes for which the section was framed." With all due deference to the learned Judges I am unable to concur in their interpretation of the section. A beneficial construction may no doubt be adopted when the language is capable of more than one meaning, but I am not prepared to concede that the word used by the Legislature can reasonably bear the meaning assigned to it by the learned Judges. Nor do I think that any clear and definite line can be drawn to separate a branch of a suit which may be regarded as a "case" from another branch which is not a case within the meaning of the section.

I have given the matter my careful consideration and reached the conclusion that the High Court has no jurisdiction to entertain an application for the revision of an interlocutory order.

Le Rossignol, J.—The question submitted to this Bench may be narrowed down to the question whether the word "case" in S. 44 of the Punjab Courts Act and S. 115 of the Civil Procedure Code may be interpreted to mean branch of a case. My answer is unhesitatingly in the negative.

The scheme of the Code is to provide an appeal from decrees and from certain specified orders, and to allow revision in decided cases, which may not be challenged by appeal. It is not a part of the scheme to allow the revision of non-appealable orders passed in an undecided case.

Had any other course been adopted the lamentable delay now witnessed in the disposal of suits and cases would be still more pronounced.

It has been urged at the Bar that hardship will result in some cases if irregular and erroneous orders are not set right without delay, but the reply is that human ingenuity can devise hardly any law which will not operate harshly at times. 'Hard cases make the law' and it appears to me, that in most of the cases cited for the petitioner the Judges have interfered in oblivion of this maxim, certain it is that they have given no logical justification for their intervention.

De raris non curit lex, and my own experience leads me to the conclusion that far more hardship would result and has resulted from the interference of superior Courts during the pendency of a suit than would have been caused had the superior Court stayed its hand till the suit had been finally decided.

My conclusion then is that the interference of a Court by way of revision in an undecided case is not justified by the Code and it is generally inexpedient.

Broadway, J.—S. 44 of the Punjab Courts Act, which corresponds to S. 115 of the Code of Civil Procedure gives this High Court certain revisional powers.

The question referred to this Bench is whether these revisional powers are wide enough to allow this Court to interfere in the interlocutory orders passed by Subordinate Courts. This question was never argued at any length before me till now and hitherto I have felt bound by the Full Bench decision of this High Court reported as 60 P. R. 1897, but have held that though this Court had the power to interfere in such interlocutory orders it would exercise that power only in very exceptional cases where a refusal to interfere might occasion irreparable harm. After a careful consideration of the arguments and the authorities cited at the Bar, I have no hesitation in agreeing to answer the question in the negative.

A. Raoof, J.—I am entirely of the same opinion as the learned Chief Justice. The answer to the question referred to the Full Bench depends upon the determination of the question whether the expression 'any case which had been decided' can be so interpreted as to include the decision of a part of a case.

In the case of *Makhan Lal Parsotam Das* v. *Chuni Lal Brij Lal* (1) a similar question under S. 25 of the Small Cause Courts Act, arose for decision before me sitting alone as a Judge of the Allahabad High Court and I held that the decision of a case did not include the decision of an issue or part of a case. In the case of *Bhargava & Co.* v. *Jagan Nath Bhagwan Das* (2) Rafiq and Walsh JJ. took the opposite view. In consequence of a difference of opinion upon the point the question was referred to a Full Bench of five Judges. The majority of the Judges constituting the Full Bench, namely, Piggott, Ryves and Gokul Prasad JJ. agreed with my construction of S. 115 of the Civil Procedure Code. Mr. Justice Piggott, after referring to the various provisions of the Code bearing upon the question under consideration, delivered an exhaustive and well considered judgment, and came to the conclusion that "the word 'case' is a more comprehensive expression than 'suit' and includes suits as well as certain other proceedings, *e.g.*, those under the Guardians and Wards Act or under the Provincial Insolvency Act. Where the case in which the revisional jurisdiction of the High Court is invoked happens to be also a 'suit' then this suit is itself the 'case' referred to in S. 115 which requires to be decided before the record can be called for; the record of a suit, therefore, should not be called for under S. 115 until the suit has been decided. The fact that the Munsif elected to deal with the preliminary issue in a particular way and drew up a formal order did not make his finding on that issue 'a case decided within the meaning of the section". Ryves and Gokul Prasad, JJ. agreed.

The learned Chief Justice has expressed his opinion in almost similar terms. The construction put by the learned Chief Justice upon the expression 'case decided' is the only possible construction. I also answer in the negative the question referred to the Full Bench for decision.

Martineau, J.—I agree that the question referred to this Bench must be answered in the negative.

Answered in the negative.

(1) [1918] 41 All. 42—47 I.C. 610—16 A.L.J. 777.

(2) [1919] 41 All. 602—51 I.C. 331—17 A.L.J. 718.

1924 LAHORE 427

LE ROSSIGNOL, J.

Thi Raj and another—Defendants—Appellants.

v

Kheausi and others—Plaintiffs—Respondents.

Mis. S. App. No. 1909 of 1921, Decided on 9th February 1922, from the order of D. J. Hissar, D/- 16th July 1923.

Civil P. C., O. 32 R. 12—Limitation Act Ss. 6 & 8.

Minor must sue within three years of his becoming major, even to set aside a compromise decree sanctioned by Revenue Court.

[P 428 C 1]

Nihal Chand Mehra—for Appellants.

Jagan Nath—for Respondents.

Le Rossignol, J. - In the course of litigation between the parties in 1910, a compromise was arrived at and a decree issued upon the compromise.

At that time the plaintiffs were minors and were represented by their mother. The compromise was scrutinized by the Court which found it beneficial to the minors and gave leave to the guardian. In consequence of that compromise and decree, the present defendants paid a sum of money and were granted occupancy rights in the area now in dispute.

The present suit is brought by the *quondam* minors for possession of that area, which they alleged was alienated by their mother without necessity.

They ignored the decree of the Revenue Court in 1910.

The first Court found that the suit was time barred as the plaintiffs had not sued within three years of attaining majority, but the District Judge has disagreed and holds that the decree of 1910 can be ignored and finds that the limitation for the suit is 12 years.

He draws a distinction between a decree on adjudication and a decree by consent which I do not follow and refers to certain remarks in *Sant Kumar* v. *Deo Suran*, (1) which divorced from the facts of that case, quite different from those of this case, are robbed of their value.

I do not agree with the learned District Judge that the decree of 1910 can be ignored. Till it is set aside, it is binding on the plaintiffs and their suit to set it aside and so regain possession of the area in suit is barred by time.

I accept the appeal and dismiss the suit with costs throughout.

Appeal allowed.

(1) 2 All. 363.

1924 LAHORE 428

HARRISON, J.

Maula Dad—Appellant.

v

Wadhawa Singh and others—Respondents.

Mis. S. A. No. 2756 of 1921, Decided on 2nd June 1922, from the order of D. J. Jhelum, D/-22nd August 1921.

Contract Act, S. 128—C. P. Code O. 38 R. 6—Death of J. D. does not absolve surety.

Where a person stands surety and renders himself liable for any decree that might be passed against his principal, the mere fact that the principal has died before decree is passed does not absolve the surety from the liability. 41 B. 402 Foll.

S. A. Razaq—for Appellant.

A. N. Chona—for Respondents.

Judgment.—One Ghasita Singh brought a suit against one Kalu Khan and during the pendency of the suit applied for attachment before judgment of a cheque for Rs. 1,400 which the Canal Department was about to issue in favour of the defendant. The defendant objected and the Court decided that if he could furnish security to the value of the cheque the order of attachment would not be issued. Maula the present defendant gave security and made himself liable for the amount of the decree which might be passed against the defendant. Kalu Khan then died and a decree was passed against his estate. In execution of that decree the decree-holder applied to execute against the surety after having failed to realise anything from the estate. He, Maula, presented an objection which was decided against him both by the Subordinate Judge and the District Judge. He now presents this second appeal urging that the death of his principal has released him from all liability and the decree being against the estate and not against the man who has died, he cannot be held liable in any way.

Both questions are clearly and definitely decided in *Chandulal Dalsukhram* v. *Jeshangbhai Chhotalal* (1) which

(1) [1917] 41 Bom. 402—19 Bom.L.R 112—39 I.C. 88.

is a precisely similar case. The surety rendered himself liable for any decree which might be passed against his principal and in consideration for his doing so the plaintiff dropped his proceedings against the very tangible sum of Rs. 1,400. The mere fact that the principal has since died does not absolve the surety from performing his contract, and, following *Chandulal Dalsukhram* v. *Jeshangbhai Chhotalal* (1), I find that there is no force whatever in the objection, and I dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 429

SCOTT-SMITH AND FFORDE, JJ.

Jowala Ram and others–Defendants–Appellants.

v.

Hari Kishen Singh and others—Plaintiffs—Respondents.

S. A. No. 2269 of 1919, Decided on 10th October 1923, from the decree of D. J. Ambala, D/- 4th August 1919.

(a) *Civil P. C. O. 22 R. 9—If residence of deceased was not fixed there is sufficient cause.*

Where the deceased respondent had no stationary residence and the appellants and respondent were living at a long distance and in two different Native States.

Held : there was sufficient cause for not applying in time. [P 429 C 2]

(b) *Hindu Law—Alienation by widow—Gift of less than ¼ as dowry in daughter's marriage is valid.*

A Hindu widow can make an absolute gift of a reasonable portion of her deceased husband's estate upon the occasion of the marriage of her daughter as dowry. There is no distinction between a gift made upon the occasion of a daughter's *gowna* ceremony and a gift made as dowry upon the occasion of a daughter's marriage. 37 Cal. 1, Foll. Where the total value of gifted portion amounted to something less than ¼th of the whole estate, the gift was held both proper and reasonable. [P 430 C 2]

Tek Chand—for Appellants.

Gobind Ram Khanna for G. C. Narang—for Respondents.

Fforde, J.—A preliminary objection to this appeal has been raised namely, that the appeal has abated by reason of the death of Naurang Singh, one of the plaintiffs-Respondents.

Naurang Singh died on the 16th July 1922 and an application to make his legal representatives a party was not made until the 3rd April 1923. As the application was not made within the time limited by law the appeal has abated so far at least as Naurang Singh is concerned.

We are asked, however, to set aside the abatement on the ground that the appellants were prevented by sufficient cause from applying within the proper time to continue the appeal. It appears that the deceased respondent had no stationary residence. He sometimes lived in the Mukatsar tahsil of Ferozepore District and sometimes at Dayalpur in the Patiala State. The appellants live at Phagwara in Kapurthala State. We are satisfied that the appellants were ignorant of the death of this respondent and that they have shown sufficient cause for not making the application within the prescribed period of limitation. We accordingly overrule the preliminary objection and set aside the abatement.

The subject matter of the litigation which has resulted in this appeal consists of 70 *bighas* of agricultural land alleged to have been gifted by one *Mt.* Parmeshri upon the occasion of her daughter's marriage. The facts so far as it is necessary to state them for the purpose of making our judgment clear are briefly as follows :—

One Labh Singh died in 1907, leaving real estate consisting of 300 *bighas* proprietary rights and 700 *bighas* of which he was mortgagee.

He died sonless, leaving a widow *Mt.* Parmeshri and one daughter *Mt.* Malavi mentioned above. Upon his death life interest in the estate devolved on the widow under Hindu Law. In 1909 the daughter married Madan Gopal and it is alleged that upon the occasion of this marriage 70 *bighas* of the 300 was gifted by *Mt.* Parmeshri to her daughter as dowry. These are the 70 *bighas* in dispute. Mutation was entered on the 12th December 1909. *Mt.* Malavi died in October 1916, predeceasing her mother who died on the 17th June 1917. The plaintiffs-respondents' contention is that after the death of the widow and daughter the property

should revert to them while the defendants-appellants contend that the land having been given as dowry on the occasion of the daughter's wedding, the latter was entitled to it absolutely and that they (defendants) are entitled to succeed to it as her heirs. Mr. Gobind Ram for the plaintiffs-respondents contends, first of all, that there is no finding of the lower appellate Court to the effect that the land in dispute was in fact gifted to *Mt.* Malavi by her mother on the occasion of the former's marriage. There is clear finding to this effect by the Court of first instance and this finding has been adopted by the learned District Judge, who commences his judgment by stating that the facts of the case appear quite clearly from the lower Court's judgment with which he entirely agrees. The question of the factum of the gift and of the occasion upon which it was made do not appear to have been disputed in the lower appellate Court and we accordigly find against Mr. Gobind Ram's contention on this portion of the case.

The only other point left for our determination is whether *Mt.* Parmeshri could under Hindu Law validly gift any of the property which she inherited from her husband as tenant for life absolutely to her daughter. There are many circumstances under which a Hindu widow can make an absolute gift of a reasonable or moderate portion of her deceased husband's eatate and amongst them is the case of a gift upon the occasion of the marriage of a daughter provided that the gift is confined to a reasonable portion of the estate of the deceased. It has been held in *Churaman Sahu* v. *Gopi Sahu* (1) that it is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her deceased husband to her daughter on the occasion of the latter's *gowna* ceremony and that such a gift is binding upon the reversionary heirs of her husband. We can see no distinction between a gift made upon the occasion of a daughter's *gowna* ceremony and a gift made as dowry upon the occasion of a daughter's marriage. It has been held in the case of *Ramasami Ayyar* v. *Vengidusami Ayyar* (2) that a mother who had acquired the estate of her deceased son could make a valid gift of a portion of the property to her son-in-law on the occasion of his marriage with her daughter provided that the gift was not found to be otherwise than reasonable in extent.

We are entirely in agreement with the principle established by these two cases that a gift by the tenant for life of a reasonable portion of the estate of a deceased Hindu for the purpose of dowry is valid in law provided that it does not exceed a reasonable portion of the inheritance.

The only question which remains then is as to whether or not the amount gifted in the present suit exceeds a reasonable portion of the immoveable property of the deceased Labh Singh. The portion of the gifted land amounts to less than ¼th of the proprietary rights of land. The donee would have been entitled, had her mother predeceased her, to the entire of the property absolutely. We find that it is impossible under the circumstances of this case to hold that the portion gifted is not a reasonable portion of the whole inheritance. In the case of *Churaman Sahu* v *Gopi Sahu* (1) the property in dispute was found to have been a little more than ¼th and a little less than 1/3rd of the total value of the deceased's immoveable property of the estate. In the present case the total value of the gifted portion amounts to something less than ¼th of the whole estate. We accordingly hold that in the present case the gift of the land in dispute was both proper and reasonable and conferred an absolute title upon *Mt.* Malavi.

We accordingly accept the appeal and dismiss the suit with costs throughout.

Appeal Accepted.

(1) [1909] 37 Cal. 1—13 C. W. N. 994—1 I. C. 945—10 C. L. J. 545.

(2) [1899] 22 Mad. 113.

✱ 1924 LAHORE 431

SCOTT-SMITH AND FFORDE, JJ.

Ude Ram and another—Plaintiffs—Appellants.

v.

Atma Ram and others — Defendants—Respondents.

S. A. No. 801 of 1920, Decided on 13th November 1923, from the decree of D. J. Ambala, D/- 2nd February 1920.

✱*Pre-emption—Partial pre-emption should be allowed where vendee himself breaks integrity of the property.*

The principle of denying the right of pre-emption except as to the whole of the property sold is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. But where the vendee has himself broken up the property sold by parting with a portion of it he has no grievance when the plaintiff pre-emptors sue him for the remainder This is not a case where the plaintiff is seeking to the pick and choose part of the property in the possession of the vendee, The vendee himself having parted with a portion of the property does not suffer in any way whatsoever by plaintiffs not suing for the whole. 8 A. 462 Foll. [P. 431 C. 2; P. 432 C. 1]

Jagan Nath—for Appellants.

G. C. Narang—for Respondents.

Facts.—On the 18th March 1918 Ram Singh sold certain house property to Atma Ram and Janki Das. On the 16th July 1918 Janki Das sold his half share to Atma Ram and on the same day Atma Ram sold a portion of the property to Mukand Singh, defendant-respondent, on the latter asserting his right of pre-emption. Ude Ram and another then brought the present suit for pre-emption of the part which Atma Ram had not sold to Mukand Singh. The first Court decreed the claim, and both the parties appealed to the District Judge who held that Mukand Singh, who had a right of pre-emption, not having pressed his claim to the whole of the property sold, had lost his right as a pre-emptor and that the plaintiffs therefore could and should have sued for the whole of the property sold and that they were not entitled to pre-empt a part only. He accordingly dismissed the plaintiffs' claim, and they have come up on second appeal to this Court

Scott-Smith, J.—[After stating facts, the Judgment proceeded:—]

It is common ground that the general rule is that the pre-emptor must take over the bargain as a whole, and that he is not entitled to sue for a part only when he is entitled to sue for the whole Ellis in his Law of Pre-emption, 4th Edition, points out at pages 147 *et seq.*, that this general rule is limited to certain cases which he details. The Present case does not appear to be covered by authority. Counsel for respondents cites *Fatteh Chand* v. *Nihal Singh* (1) and *Ralla* v. *Dayal* (2) as authorities for the proposition that a pre-emptor cannot relinquish his claim to a part of the property sold, and that if in buying property to which he has a right of pre-emption he associates himself with a stranger who has not such a right, he loses his right of pre emption. In accordance with these authorities it appears that Mukand Singh, who had a right to pre-empt the whole property, by taking only a portion from Atma Ram, lost his right of pre-emption and therefore the plaintiffs could have brought the present suit for the whole of the property sold. The question however, is whether they were bound to sue for the whole of the property. Counsel for the appellants has cited the case of *Sheobharos Rai* v. *Jiach Rai* (3), in which Mahmood J. said that the principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. He said that the rule applied only to those transactions which, while contained in one deed, could not be broken up or separated, and that it should be limited to such transactions, and the reason of it does not

(1) [1880] 106 P. R. 1880.
(2) [1903] 34 P. R. 1903—34 P. L. R. 1903.
(3) [1886] 8 All. 462 —('886) A. W. N. 214.

exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers. In that case the sale was to persons having a right of pre-emption and to a stranger who had no such right, but the shares sold to each were distinctly specified and it was held that in such a case the suit could not be brought in regard to the portion of property sold to the persons who had a right of pre-emption. This case was followed in *Ram Nath* v. *Badri Narain* (4). Dr. Narang who appeared for the respondents admitted the force of these authorities, but said that they did not apply to the present case, because the original sale was not one of specified portions to Atma Ram and Mukand Singh. They are not on all fours with the present case, out in our opinion the principle of them should be made applicable to it. Atma Ram having himself broken up the property sold by parting with a portion of it to Mukand Singh who had a right of pre-emption has no grievance when the plaintiffs sue him for the remainder, of the property. He would not gain anything by plaintiffs suing not only for the portion of the property left with him but also for that sold by him to Mukand Singh. This is not a case where the plaintiff is seeking to pick and choose part of the property in the possession of the vendee. The vendee himself having parted with a portion of the property does not suffer in any way whatsoever by plaintiffs not suing for the whole of it. The reason for the rule that the pre-emptor must take over the whole of the property sold no longer exists. The giving of a decree to the plaintiffs will not involve any breaking up of the bargain as understood in the law of pre-emption because it has already been broken up by Atma Ram himself in selling a portion of the property to Mukand Singh.

We therefore accept the appeal and setting aside the decree of the District Judge remand the case to him for redecision of the parties' appeals lodged in his Court. Stamp in this Court will be refunded and other costs will be costs in the cause.

Case remanded.

(4) [1896] 19 All. 148—(1897) A. W. N. 20.

1924 LAHORE 432

BROADWAY AND ABDUL RAOOF, JJ.

Tafazzal Beg— Defendant—Appellant.

v.

Majid Ullah and others—Plaintiffs—Respondents.

F. A. No. 659 of 1920, Decided on 4th December 1923, from the decree of D. J. Delhi, D/- 21st January 1920.

(a) *Muhammadan Law—Wakif can be trustee if so provided in trust deed.*

Where the trustee had reserved the trusteeship for himself in the deed of wakf.

Held: that the wakif was entitled to manage the wakf property as its mutwalli. [P 435 C 1]

(b) *Muhammadan Law—Wakf—Two out of Rs. 22 was held not illusory dedication.*

Where out of an income of Rs. 22 and odd per month Rs. 2 per mensem were directed to be given to a relation of the wakif and the remaining income had been directed to be devoted to purposes of the mosque.

Held: it was impossible to hold that the wakf was an illusory one. [P 435 C 1]

(c) *Muhammadan Law—Wakf is public if public can enter without special permission.*

The argument that a dedication in favour of a mosque is a private wakf and not public, cannot stand where it is not alleged that the mosque was a private mosque and that the public had no right to congregate therein without special permission. 43 C. 1085 (P.C.) Ref. [P 435 C 1]

B. D. Kureshi—for Appellant.

Tirath Ram—for Respondents.

Abdul Raoof, J.—This was a suit brought under S. 92 of the Civil Procedure Code by three members of the Muhammadan community of the city of Delhi for the removal of the present mutwalli of a public wakf; for the appointment of a new mutwalli; for accounts from the present mutwalli and generally for the settling of a scheme for the management of the trust. One Kadir Bakhsh, a resident of Delhi, Kashmiri Gate, made a wakf of certain house property for the support and maintenance of a mosque.

He appointed himself the first mutwalli for his life and after his death he appointed Badshah Mirza alias Tafazzal Beg, his great grandson under the guardianship of his grandmother *Mt.* Ashraf-ul-Nisa, as the boy was a minor. He also appointed six naib-mutwallis to assist the mutwalli in the management and upkeep of the mosque. The dedicated house property yielded an income of Rs. 22-4-0 per month. Out of this Rs. 2 per mensem were provided under the deed to be paid to *Mt.* Barkat-ul-Nisa, daughter-in-law of the wakif, for her life. The rest of the income was directed to be utilised for the following purposes :—

(*a*) Remuneration of one of the six mutwallis who would undertake to collect the rents ; (*b*) Purchase of matting for the mosque ; (*c*) Providing *dols* (buckets), rope, etc., for the mosque and well, earthen pots and fuel *d*) Appointment of a Hafiz to teach the Quran ; (*e*) Appointment of a moazzan ; (*f*) Feeding the poor during the Ashra Muharram ; and (*g*) if any balance remained in the hands of the mutwalli after remunerating himself it was to be utilised for the purchase of property to be added to the endowed property.

Kadir Bakhsh acted as the first mutwalli and utilised the income for the objects mentioned in the deed. After his death the properties came under the management of the mutwalli and his assistants ; but it is stated in the plaint that they did not manage the wakf as directed in the wakfnama by the wakif. It is further stated in the plaint that after the death of the naib-mutwallis Badshah Mirza alone continued to realize the rents, but he did not spend a single farthing on the mosque and in connection with the management of the mosque and in carrying out other instructions contained in the wakfnama but that he had all along been spending the entire money for private purposes. The plaintiffs called upon him to render accounts of the income of the endowed property but he refused to do so. Thereupon the plaintiffs made an application under S. 92 of the Civil Procedure Code to the Deputy Commissioner for sanction to institute a suit against the mutwalli. Such permission having been granted, a suit was instituted on the 23rd of July 1919, but owing to non-payment of process fee it was dismissed on the 21st of August 1919 with permission to bring a fresh suit Hence this suit was filed on the 30th of August 1919.

The defendant Tafazzal Beg resisted the suit and put forward some contradictory pleas. In paragraph 1 of the written statement he totally denied the wakf of the property in favour of the mosque. In paragraph 3 he, however, alleged that the income of the wakf was not misappropriated but that he had been discharging his duties very honestly and in good faith. In paragraph 1 of the additional pleas he denied the public character of the wakf an l alleged that it was not enforceable under the Muhammadan Law owing to its being uncertain and vague. In paragraph 2 he further attacked the wakf on the ground of its being illusory because only a very small amount of the income was provided to be spent on the mosque. S. 92 of the Civil Procedure Code was alleged to be inapplicable owing to the private character of the wakf. In paragraphs 5 and 6 of the written statement he, however, admitted that he had been appointed the permanent mutwalli by the wakif on account of his near relationship and in paragraph 7 he pleaded that the property was managed properly and that there was nothing to justify the institution of the suit. The statement of the defendant was taken on oath before the framing of the issues in which he completely admitted the existence of the wakf but denied its public character. The substance of that statement is to be found in the follwing passage .--"The property is not mine, it is wakf but not a public wakf. The deed provides for certain expenditure connected with the mosque. This is not a public matter. I now spend money according to the wakfnama or rather more upon the mosque."

Of the assistant mutwallis only Muhammad Ishak has survived. He has been examined on behalf of the plaintiffs in the case as a witness. The following significant passage is to be found in his deposition :--"I am

a naib-mutwalli. Four other mutwallis are dead. I worked as mutwalli until about 12 years ago. The mosque had an income of Rs. 24 per mensem then. About Rs. 15 or 16 per mensem was spent on the mosque. We saved money enough to buy two shops and a kotha with balcony for Rs. 600 and added them to the mosque."

As to the present condition of the mosque he stated that the walls were broken down; that the mosque was badly in need of repair; that the property bought was in need of repair and that *Mt.* Ashraf-ul-Nisa herself had complained of the conduct of the defendant. In addition to this witness there were other witnesses called to prove the mismanagement of the affairs of the wakf by the mutwalli. The Court found against the defendant on all the points urged by him. It, however, refused to remove him from towliat for the present The gist of the findings of the Court below is contained in the following passage to be found in the judgment :—

"My conclusions are that this is a public trust of a religious nature, that the property described in the deed is wholly devoted to the trust with the exception of Rs. 2 per mensem, that the trust is explicit and not so vague as to be incapable of execution, that its instructions can readily be understood and followed by the mutwalli, that the mutwalli is bound to account for the whole of the income when called upon by an interested person, that the defendant has not faithfully executed the trust in the past, and that plaintiffs are entitled to ask for accounts."

The Court directed the defendant to hand over the accounts of the income from the wakf property and expenditure on the mosque and connected with it from the date he took over the trust to the plaintiffs within one month, and the plaintiffs were directed to submit a scheme within two months for the future management of the wakf. The Court further laid down that Muhammad Ishak would act as assistant mutwalli along with two other assistant mutwallis to be appointed hereafter. Against the decision of the Court below the present appeal has been preferred and Mr. B. D Kureshi has appeared on behalf of the defendant.

The first argument put forward by him is that, as the wakif remained in possession of the wakf property in spite of the execution of the document, the dedication never took effect and the property continued to be his private property. In support of this contention he has cited the case of *Muhammad Aziz-ud-Din Ahmad* v. *Legal Remembrancer to Government, N. W. P. & Oudh* (1). That case has no manner of application to the facts of the present case. In that case the wakf was never acted upon and the wakif continued to retain possession until his death of the property dealt with by the deed. In the present case the wakif constituted himself the first mutwalli and retained the property in his possession as such The evidence tendered in this case clearly shows that he acted upon the deed and carried out the objects of the wakf in his lifetime and that the subsequent mutwalli also carried out the objects of the wakf. According to the Hanafi Law a wakif can appoint himself the mutwalli of the wakf created by him. see Ameer Ali's Muhammadan Law, Volume I, IV Edition, page 441. The rule is thus stated there :—"The wakif may lawfully reserve the *wilayat* (the management of the trust) for himself; this is according to Abu Yusaf; and Hillal also had said the same. And the Sahib-ul-Hedaya (the author of the Hedaya) states this is the approved doctrine."

There is a slight difference of opinion between Abu Yusaf and Imam Muhammad, the two celebrated disciples of Imam Abu Hanifa, with respect to the *towliat* of the *wakif*. According to Imam Abu Muhammad "a *wakif* will not be the trustee unless he has reserved the trusteeship for himself at the time of consecration" but according to Abu Yusaf "consignment is not necessary in the case of the *wakif*, so even when he

(1) [1893] 15 All. 321—(1893) A.W.N. 109.

does not (expressly) reserve the trusteeship for himself, he will still be the trustee." In this case, however the trustee has reserved the trusteeship for himself in the deed of *wakf*. Thus, according to both the Imams the *wakif* was entitled to manage the *wakf* property as its *mutwalli*. The contention, therefore, has no force and must be overruled.

The next contention put forward before us by the learned counsel is that as only a small portion of the income of the *wakf* property has been directed to be utilised for the mosque, the *wakf* must be treated as illusory and ineffectual. In support of this contention the learned counsel has cited the case of *Pathukutti* v. *Avathalakutti*. (2). The facts of the reported case clearly show that it was designed by the so-called creator of the *wakf* to keep the property for the aggrandizement of his family. In the present case, as already shown, with the exception of Rs. 2 *per mensem* directed to be given to Barkat-ul-Nisa, the entire income had been directed to be devoted to the purposes of the mosque. It is impossible to hold in this case that the *wakf* was an illusory one. The statement of the defendant himself clearly shows that the entire income had been spent on the mosque. The surviving assistant *mutwalli*, namely Muhammad Ishak (P. W. 2), has also stated that after the death of the *wakif* he worked as *mutwalli* until about 12 years ago and that the major portion of the income derived from the dedicated property was spent on the mosque. The balance that remained in the hands of the *mutwallis* was utilised for the purpose of purchasing property to be added to the *wakf* property. There is other evidence also which shows that the *wakf* had been acted upon by Kadir Bakhsh, the first *mutwalli*, during his lifetime and afterwards by the *mutwalli* and the assistant *mutwallis*.

The argument that the dedication in favour of a mosque is a private *wakf* and not public is futile as no one ever alleged that the mosque was a private mosque and that the public had no right to congregate therein without special permission. The following remark of their Lordships of the Privy Council in the case of *Mahomed Ismail Ariff* v. *Ahmed Moola Dawood* (3) disposes of this plea:—" With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well known example, the *Kazi's* discretion is very wide."

From this it is clear that the *wakf* in question comes within the rule laid down in section 92 of the Civil Procedure Code.

In our opinion, the view taken by the learned District Judge is correct and no valid exception can be taken to the decree passed by him. We, therefore, affirm his decision, uphold his decree, and dismiss the appeal with costs.

Appeal dismissed

(2) [1888] 13 Mad. 66.
(3) [1916] 43 Cal. 1085—43 I. A. 127 14 A. L. J. 741—(1916) 1 M. W. N. 460—20 C. W. N. 1118—20 M. L. T. 110— 35 I. C. 30—18 Bom. L. R. 611—31 M. L. J. 290 —24 C. L. J. 198—4 L. W. 269—9 Bur. L. T. 141—8 L. B. R. 517 (P. C.)

1924 LAHORE 435

ABDUL RAOOF AND FFORDE, J.J.

Daulat Ram — Defendant — Appellant.

v.

Bharat National Bank Ltd. and others—Plaintiffs and Defendants—Respondents.

Civ. A. No. 993 of 1918, Decided on 23rd July 1923.

(a) *Limitation Act, Art. 36—Director of a Banking Company—Limitation Act, Art. 90—Limitation Act, Art. 10.*

Whether a director whose acts are the subject of construction was a trustee or a partner or an agent to the Company or to the body of shareholders is to be determined according to the circumstances of each case. [P. 437 C. 1

(b) *Limitation Act, Art 90 — Suit against Director of a Banking Company.*

The Director who was acting as a chairman of the local Board of Directors was in the circumstances of this case held to be an agent of

the bank and a suit against him for neglect and misconduct was held to be governed by Art 90. [P. 437 C. 1]

Badri Das—for Appellant.

G. C. Narang and *Har Gopal* for *Faqir Chand*—for Respondents.

Judgment.—The only question which has been fought in this appeal is as to the liability of Daulat Ram for certain losses incurred by the Hoshiarpur Branch of the Bharat National Bank Limited upon loans to the defendants 1 to 10.

An objection has been raised by Mr. Badri Das for the defendant Daulat Ram that the suit is barred by time under the provisions of Article 36 of Schedule 1 of the Indian Limitation Act which provides a two years period of limitation for "Compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for" the time starting from the date when the malfeasance, Misfeasance or nonfeasance takes place. In the present case the last item advanced by the Bank, and for which Daulat Ram, is alleged to be liable in tort was on the 17th July 1911. The suit was brought on the 25th August 1913, and, accordingly, if article 36 governs this case the suit was late and should be dismissed. In support of his contention Mr Badri Das relies on *The Bank of Multan Limited in Liquidation* v. *Hukam Chand* (1) where it was held that "an application under S. 235 of the Companies Act of 1913 to recover compensation from an ex-Director of a Company in respect of an alleged act of misfeasance or breach of trust is, by virtue of clause (3) of the section, governed by Article 36 of Schedule 1 to the Limitation Act, and is barred unless made within two years of the act complained of. It is true that an application under this section is in the same position as a suit for the purposes of the Limitation Act, and accordingly the decision in the case referred to does give support to Mr. Badri Das's contention. But it has to be borne in mind that the only question argued in that case on the matter of limitation was whether Article 36 or S. 10 applied. As the application in question was made in 1920 and the misfeasance complained of was committed in 1910 the only provision of the Limitation Act which could save the application from being barred is contained in S. 10 which enacts that no suit against express trustees and their representatives shall be barred by any length of time. As Directors of a Company are not express trustees. The assets of the Company not being vested in them, the Court held that S. 10 did not apply. Had the present question been presented to us as it was presented to the Court in *The Bank of Multan* case, we would have come to the same conclusion, namely, that this suit was barred by Article 36.

Dr. Narang, however, in his very able and forcible argument has contended that the matter of limitation is governed not by Article 36 or S. 10 but by Article 90 of the first Schedule of the Act which provides that in "Other suits," that is to say, suits other than those referred to in Articles 88 and 89—"by principals against agents for neglect or misconduct" the period of limitation is three years from the date when the neglect or misconduct becomes known to the plaintiff.

Article 358 of volume V of Halsbury's Laws of England states that "The true position of directors is that of agents for the Company," and in Palmer's Company Law (9th edition) at page 179 the position is stated as follows:—"Directors, whether they are called "directors" or a "council" or a managing committee, are in the eye of the law, agents of the Company for which they Act, and the general principles of the law of principal and agent regulate in most respects the relationship of the Company and its Directors."

It is true that there are many dicta of English Judges to the effect that Directors are not mere agents but may in certain cases be regarded as trustees, as for instances, of "assets which have come into their hands, or which are under their control, but they are not the trustees of a debt due to the Company."

(1) 1923 Lah. 58 (2).

In *Automatic Self Cleansing Filter Syndicate Co. Ltd.* v. *Cunninghame* (2) Cozens-Hardy L. J., observed "I do not think it true to say that the directors are agents. I think it is more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the shareholders." In the same case, however, at page 92 Collins M. R. says "No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the Company, which might be a principal, but you have to go behind that, when you look to the particular position of directors. It is by the consensus of all the individuals in the Company that these directors become agents and hold their rights as agents.

It is not necessary for the purpose of deciding the question before us to enter into an elaborate discussion of all the authorities which have dealt with this vexed question as to the exact relationship in law of directors to the Company and to the shareholders. In each case it is a question of fact as to whether the director, whose acts are brought into question, was under the circumstances of that particular case in the position of a trustee, a partner, or an agent, to the Company or to the body of shareholders.

Upon the facts of the case before us we have no doubt whatsoever that the defendant Daulat Ram, in acting as chairman of the local board of directors was so far as the transactions in respect of which he has been sued are concerned, acting as the agent of the Bank, and the suit, therefore, being, so far as he is concerned, a suit by a principal against an agent for neglect and misconduct, the provisions of Article 90 of the Limitation Act apply.

We accordingly hold that the suit is not barred by time, but though we agree with the finding of the learned Subordinate Judge on this point we do not agree with the ground of his decision. He has held that the question of limitation is governed by Article 120 of the Limitation Act. This Article, however, is only applicable to suits for which no period of limitation is provided elsewhere in Schedule I. In the present case as we have pointed out above, a period of limitation has been provided by Article 90.

Having considered the whole of the evidence in the case we are of opinion that the defendant in question has been proved to have been guilty of gross neglect in regard to the advance of Rs. 2,500. If he did not know that the sanctioned sum of Rs. 500 had been fraudulently altered in the Company's books to the figures Rs. 2500 he failed in an elementary duty to satisfy himself on this point and he must accordingly be held liable for the excess of Rs. 2000. We also find that he was grossly negligent in sanctioning the advance of Rs. 300 to Chhaju Mal Birju Mal. We are not, however, satisfied that the liability of this defendant has been established as regards the remaining items decreed by the Court below and we, therefore, allow his appeal to the extent of the balance above the sum of Rs. 2300.

The result is that with interest the amount decreed against Daulat Ram comes to Rs. 3000 which both Dr. G. C. Narang and *Rai Bahadur* Badri Das accept as correct.

The appeal is accordingly accepted to the above extent with proportionate costs.

Appeal partly allowed.

(2) [1906] 2 Ch. 45.

1924 LAHORE 437

ABDUL RAOOF AND HARRISON, JJ.

Emperor—Petitioner.

v.

Wasawi—Accused—Respondent.

Crim. Rev. No. 1655 of 1922, Decided on 8th September 1923.

Criminal P. C. S. 438—District Magistrate is not superior to Sessions Court,

The Court of the Sessions Judge is not an inferior Criminal Court to that of a District Magistrate. Therefore the latter cannot make a reference for enhancing the sentence passed by the Sessions Judge. [P. 439 C. 1]

Government Advocate — for Petitioner.

Nemo—for Respondent.

Facts

The accused Wasawi was wanted by the Sub-Inspector of Chaharkana in connection with the enquiry into a theft case. The lambardars and another man accordingly hearing that Wasawi was near the shop of one Jhandu went there and found him with a long stick in his hand. They asked him to stop and to go along with them to the thana at Chaharkana as he was wanted by the Sub-Inspector. He refused to stop and they arrested him. On being searched the head of a chhavi was found concealed in his loin cloth.

Ground for Revision

As the lambardars are public servants within the meaning of Indian Penal Code S. 21 the accused really committed an offence under S. 20 of the Arms Act, *vide* 3 P. R. of 1915. The maximum sentence for this offence is 7 years. The learned Sessions Judge reduced the sentence from one year to nine months on the ground that the accused was a young man of 25 and had been roughly handled at the time of his arrest. As regards the rough handling the medical evidence shows he had no injuries beyond a few scratches and in any case he would probably not have been roughly handled at all if he had not tried to escape. All this coupled with the fact that he was carrying about a chhavi head concealed on his person goes to show that he is probably a man of desperate character. A man of 25 years of age is not sufficiently young to be treated leniently. Violent crime of all kind is on the increase all over the Punjab. In this District in particular the chhavi is a very favourite weapon for murders, dacoities etc.; it is of the utmost importance, therefore, that deterrent sentences should be given whenever persons are convicted of the illegal possession of these dangerous weapons. In a somewhat similar case (Criminal Revision 522 of 1922) the High Court enhanced the sentence to 18 months' rigorous imprisonment. I venture to recommend that a similar enhancement be ordered in this case.

Abdul Raoof, J.—This is a reference made under S. 438, Criminal Procedure Code, by a District Magistrate asking this Court to enhance the sentence passed by a Sessions Judge in appeal. The facts are as follows :—

One Wasawi, son of Nawab, was convicted of an offence under S. 19 of the Indian Arms Act, 1878 and was sentenced to rigorous imprisonment for one year by Chaudhari Hussain Ali, Magistrate first class. On appeal Khan Bahadur Abdul Ghafur Khan, of Zaida, upheld the conviction but reduced the sentence to one of nine months' rigorous imprisonment for the reasons given in the judgment in the following words :—

"As to the sentence, taking into consideration the fact that the accused was roughly handled at the time he was arrested and he is a young man of 25 years of age, I regard the sentence rather excessive."

Mr. C. B. Barry. District Magistrate of Sheikhupura, has forwarded the proceedings for revision on the grounds set forth in his order of reference, dated the 24th of November 1922. The main ground therein set forth is that the maximum sentence provided for the offence being seven years the sentence of nine months is inadequate. He takes exception to the reasons given by the learned Sessions Judge, and remarks that "a man of 25 years of age is not sufficiently young to be treated leniently. Violent crime of all kind is on the increase all over the Punjab. In this district in particular the chhavi is a very favourite weapon for murders, dacoities etc; it is of the atmost importance therefore that deterrent sentences should be given whenever persons are convicted of the illegal possession of these dangerous weapons."

The matter came up for decision before a single Judge of this Court, and he by his order, dated the 9th

of February 1923, referred it to a Bench of two Judges for the decision of the preliminary question whether a District Magistrate is competent to make a reference under S. 438 of the Criminal Procedure Code, recommending a sentence passed by a Sessions Judge should be enhanced. We are unhesitatingly of opinion that a District Magistrate does not possess this power. In the case of *Queen Empress* v. *Jahandi* (1) it was held that the power conferred by this section read with S. 435 upon a District Magistrate to make a reference to the High Court refers clearly to "proceedings before any inferior criminal Court." By the words "or otherwise" in this section the Legislature never intended to give to a Magistrate the power to question the propriety of a judgment or sentence passed by a superior criminal authority such as a Sessions Judge. The learned Judges observed that it would be contrary to every principle to allow a District Magistrate to report against an order of the Sessions Court to which he is subordinate. The same rule was laid down by the Bombay High Court in 18 Bom. L. R. 796. In the case of *Emperor* v. *Jamna Bai* (2) the facts of which were almost similar to those of the present case Banerji and Richards, JJ., while adopting the rule laid down by the Calcutta High Court, made the following pertinent remark :—

"We are of opinion that we should not entertain this reference as such as we think that the District Magistrate ought not to have made a reference under S. 438 with regard to an order made by the Sessions Judge on appeal from the decision of a subordinate Magistrate."

In our opinion the rule laid down in the cases above mentioned is the correct rule. Accordingly we refuse to entertain the reference. Let the papers be returned.

Harrison, J.— I entirely agree and I would only add that if a District Magistrate were to be allowed to act in this way it would be open to him to report a case when a sentence passed by himself as a trial Magistrate had been reduced on appeal by the Sessions Judge, an obviously ludicrous position.

Reference not accepted.

(1) [1896] 23 Cal. 249.
(2) [1906] 28 All. 91.

✱✱ 1924 LAHORE 439

SCOTT-SMITH AND FFORDE, JJ.

Faqir Chand — Defendant — Appellant.

v.

Ram Dutt —Plaintiff— Respondent.

S. A. No. 2399 of 1922 Decided on 11th October 1923, from the order and decree of D. J. Gurdaspur, D/- 7th June 1922.

✱✱ *Court Fees Act, S. 7, (X)—Suit for recovery of sale deed is one for specific performance—Court Fees Act, S. 7 (IV)* (a).

A suit to have a sale deed executed and completed or for recovery of a sale deed already executed is a suit for specific performance of a contract though there is no prayer for possession of the property sold. 56 I. C. 323 Ref. [P. 440 C. 1]

Mehr Chand Mahajan—for Appellant.

Badri Das—for Respondent.

Judgment.—On the 30th of June 1921 an agreement was executed under which the defendant appellant agreed to sell a certain shop to the plaintiff respondent. On the 1st July 1921 a sale-deed was executed and handed over to the Sub-Registrar. Subsequently in the absence of the plaintiff the deed was returned to the defendant and was not registered. The defendant subsequently sold the shop to a third person who is not a party to the present proceedings.

Plaintiff in his plaint sought three reliefs:—(1) return of the original deed; or in the alternative, (2) execution of a fresh deed; and (3) registration of either deed mentioned in (1) or (2).

He valued relief (1) at Rs. 5 and paid a Court-fee of 0-6-0 thereon. The alternative relief he claimed to be included in relief (1) and on relief (3) he paid a Court-fee of Rs. 10. The trial Court held that the suit was in reality one for specific performance of a contract and that the Court-fee should be paid *ad valorem* on the

amount of consideration for sale, namely Rs. 1,200. It therefore ordered the plaintiff to make up the deficiency in the Court fee and on his not doing so, rejected the plaint. On appeal the learned District Judge held that the suit so far as relief (1) is concerned was governed by section (7) (iv) (a) of the Court-Fees Act; that the alternative relief was covered by the larger relief of restoration of the original sale-deed, and that the relief for registration was properly valued. He therefore accepted the appeal and set aside the order of rejection of the plaint.

The defendant has filed a second appeal to this Court; and it is argued that the suit was in reality one for specific performance of a contract. The plaintiff in the plaint alleges that he is in possession of the property sold and therefore he did not sue for possession. At the same time he appended a note to the plaint stating that if he is found to be not in possession then he might be allowed to amend the plaint.

In order to see what the plaintiff's suit really is it is necessary to understand what his cause of action is. His cause of action is obviously the agreement to sell together with defendant's refusal to complete the sale. In the case reported in 6 All. 231 it was held that a suit to have a sale-deed executed and completed, and for possession of the property was a suit for specific performance of a contract. The case reported in 38 All. 292 is similar. These cases are sought to be distinguished on the ground that in them there was a prayer for possession of property but in our opinion the mere absence of such a prayer makes no difference to the real nature of the suit. According to the agreement the plaintiff considers himself entitled not only to execution and registration of the sale-deed of the property agreed to be sold, but also to possession. He does not make the latter claim, because he says he is in possession. The case reported in 56 I. C. 3 3 shows that there may be a suit for specific performance of a contract without any prayer for possession. Plaintiff in the present case asks that the sale to him should be completed and his suit is therefore undoubtedly one for specific performance of a contract. The alternative relief sought by him is the larger one, and the lower appellate Court was not right in its view that the alternative relief was less than that for restoration of the original deed of sale if still in existence. Counsel for the respondent is unable to cite any authorities in support of his argument that the lower appellate Court's decision is correct.

We accept the appeal and reversing the order of the District Judge restore that of the trial Court rejecting the plaint with costs to defendant-appellant in all the Courts.

Appeal allowed.

✱ 1924 LAHORE 440

BROADWAY AND MOTI SAGAR, JJ.

Emperor—Appellant.

v.

Mihan Singh—Respondent.

Cr. A. No. 453 of 1923, Decided on 23rd July 1923, from the order of Sess. J. Ludhiana, D/-6th February 1923.

✱ *Criminal Law Amendment Act, Ss 15 and 17—Instigating the formation of an unlawful association and contributing towards it is an abetment of an offence under S. 17 (1) and if it is by a class of persons exceeding 10 it is an offence under S. 117 I. P. C.*

The accused was alleged to have stated that the British Raj had come to an end or at any rate was about to do so and exhorted the people to hold a Diwan and to take steps to establish an Independent State at Bagrian. After staying at Bagrian the accused went away and immediately after the departure an unlawful association was formed of which the accused's son was made the secretary. He also told the people that he had paid Rs. 2000 towards the movement. Subsequent to the formation the Diwans were held of a political nature.

Held, on these facts that the accused's act was not covered by S. 1 or 2, as he did not contribute to the funds or assist in the management of the existing association. But that he did instigate the formation of an association which was unlawful under S. 15 cl. (2) (a) and therefore abetted its formation and as any one becoming a member of that association or contributing funds to it would be guilty of an offence under S. 17 (1) accused's act amounted to an abetment of an offence, and as this abetment was of the commission of an offence by persons exceeding 10 the action came within the purview of I. P. C. S. 117.

[P. 433 C. 2; P. 444 C. 1]

Government Advocate–for Appellant.

Dasaundha Singh—for Respondent.

Broadway, J.— Sardar Bahadur Mihan Singh, his brother Sobha Singh, his Son Hari Singh and four other persons were tried together on a charge under S. 17 (2) of the Criminal Law Amendment Act, XIV of 1908. They were all convicted by the trying Magistrate and an appeal to the learned Sessions Judge was dismissed so far as all the appellants, other than Sardar Bahadur Mihan Singh, were concerned. The learned Sessions Judge, while holding that the unlawful association which formed the subject matter of the trial had come into existence at, and through, the instigation of Sardar Bahadur Mihan Singh, held that Mihan Singh had not become a member of the said unlawful association and came to the conclusion that he had not brought himself within S. 17 (1) or (2) of the Criminal Law Amendment Act. Without any real discussion of the oral evidence produced by the prosecution he held it to be unreliable. Sardar Bahadur Mihan Singh having been acquitted an appeal under S. 417. Criminal Procedure Code, has been filed by the Crown. The learned Government Advocate has been heard in support of the appeal while Mr. Dasaundha Singh represented Sardar Bahadur Mihan Singh.

The facts are detailed in the judgments of the Courts below and briefly stated are as follows :—

During the winter of 1921–22 a number of Akali Diwans were held at various villages in the Ludhiana District. Sardar Bahadur Mihan Singh has certain ancestral property in Bagrian. He is also a grantee of land in Hanumangarh in the Multan District. Apparently he lives at Hanumangarh although he draws a pension of about Rs. 150 a month from the post office at Malerkotla, the nearest post office to Bagrian. His ancestral property which, is, apparently, not of any great value is looked after by his son Hari Singh. It is in evidence that towards the end of December 1921 or the beginning of January 1922 Sardar Bahadur Bhai Arjan Singh of Bagrian learnt that certain persons in his village contemplated holding a political Diwan there. He accordingly sent for the leading spirits and remonstrated with them and was under the impression that he had succeeded in persuading them to give up the idea.

About the 17th of January 1922 Sardar Bahadur Mihan Singh came to Bagrian and, according to the evidence for the prosecution addressed the people at the village gate. He is said to have stated that the British Raj had come to an end, or at any rate was about to do so and exhorted the people to hold Diwan and take steps to establish an independent State at Bagrian. He called on them to refuse to pay land revenue and to decide all disputes among themselves without reference to the Courts of law. After staying at Bagrian for two or three days Sardar Bahadur Mihan Singh went away and immediately after his departure an unlawful association was formed of which Hari Singh, the son of the Sardar, was made the Secretary, and Sobha Singh, the Sardar's brother, the Vice-President, other office-holders being also appointed. It is also said that when he was exhorting the people to form this independent State he had told them that he had himself contributed Rs. 2,000 towards the movement which had been given to his son and the people could go to his son to have their names registered. Subsequent to the formation of this unlawful association Diwans were held of a political nature, and there can be no doubt whatever, that this association and its subsequent activities came within the purview of S. 17 (2) of the Criminal Law Amendment Act. The questions for decision are whether the prosecution has proved that Sardar Bahadur Mihan Singh was in the village on the 17th January 1922, secondly whether he made statements attributed to him at the village gate, and, finally whether his action in so doing amounts to an offence under the Criminal Law Amendment Act or the Indian Penal Code.

As to the first point, Sardar Bahadur Mihan Singh has strenuously denied having gone to Bagrian on the 17th

January 1922. The evidence on the record, however, leaves no doubt whatever that he did go to Bagrian on that date. The evidence for the prosecution as to Sardar Bahadur Mihan Singh's presence is really incontrovertible and the fact that he made a certain payment there on the 17th January 1922 to his son Hari Singh is beyond doubt. The story told by the Sardar that he was on bad terms with Hari Singh and that his daughter-in-law had sent a message to him at Multan through one Harnam Singh that she stood in need of money and that he had thereupon gone with Harnam Singh to Malerkotla and drawn his pension which he had made over to Harnam Singh to be conveyed to his daughter-in-law is utterly improbable and is further negatived by the fact that in Hari Singh's pocket book there is an entry dated the 17th January 1922 in which it is distinctly stated that his father (the Sardar) had brought his pension and money from the chak to the extent of Rs. 860.

As to the second point, there is, evidence to show that the Sardar exhorted the people to combine and establish an independent Raj, refuse to pay revenue and to register their names with his son to whom he had paid a contribution of Rs. 2,000. Doubtless some of the witnesses are partisans of Bhai Arjan Singh, nevertheless I am unable, after carefully examining their depositions, to see any reason to doubt the truth of their story, and in my opinion it has been established that the Sardar did exhort the people to combine for the purposes stated above. It has been argued very strenuously that it has not been proved that he paid Rs. 2,000 to his son. That is so, but that does not to my mind negative the story told by the witnesses: for not a single witness professes to have seen any payment made and whether the payment of Rs. 860 to his son on the 17th January was or was not intended as a contribution is not of importance at this stage. It is not the fact of the contribution so much as the assertion that it had been made that is of importance in this connection. I think therefore that it has been established on the record as held by the Magistrate that Sardar Bahadur Mihan Singh did as a matter of fact instigate the formation of this association as association which when formed was undoubtedly an unlawful one as defined by S. 15 of the Criminal Law Amendment Act.

In arriving at the above conclusions the defence evidence has not been lost sight of. That evidence is, however, wholly unworthy of credence and cannot be considered sufficient to rebut the prosecution evidence. Neither of the Courts below have been able to accept it and Mr. Dasaundha Singh obviously placed very little faith in it himself. Though he felt constrained to read it out and refer to it, he was unable to ask for its acceptance with any degree of conviction.

As to the actual payment of a contribution by the Sardar, as stated above, there is no direct evidence. That he announced his having subscribed Rs. 2,000, I have no doubt, and I think there is some force in the learned Government Advocate's contention that the statement that the subscription amounted to Rs. 2,000 was probably a little exaggeration.

The entry in Hari Singh's pocket book under date 17th January 1922 showing a receipt from Mihan Singh of Rs. 860 is of considerable importance in this connection and the palpably false evidence of this payment to Hari Singh is significant. There can be no doubt at all that father and son were on the best possible terms, and the payment to Hari Singh of this sum of Rs. 860 on that date, coupled with the announcement that a centribution of Rs. 2,000 had been made, point very strongly to the payment having been made as a subscription and for the purpose of being utilized for the objects of the association, the formation of which Mihan Singh was advocating. It was strongly urged that having regard to his previous excellent record in the Army, it was highly improbable that Mihan Singh would have spoken and acted as stated by the prosecution witnesses. Now Mihan Singh's record of service in the Army is an exceptionally good

one, nevertheless as pointed out by the learned Government Advocate, the situation was such that there is nothing really surprising in a man in Mihan Singh's position adopting the line of conduct attributed to him. The Akali agitation was in full vigour and Sobha Singh and Hari Singh had obviously come under its influence and it is therefore by no means improbable that he was carried away by the same forces that had influenced his brother and son.

The next point for consideration is whether Mihan Singh's words and actions constitute an offence either under the Criminal Law Amendment Act or the Indian Penal Code.

It was contended by the learned Government Advocate that by instigating the formation of the unlawful association which actually came into existence a few days after the 17th January 1922 and by contributing to its funds Mihan Singh became liable under S. 17 (1) and (2) of the Criminal Law Amendment Act. He urged that S. 17 (2) was applicable for the reason that by contributing to the funds of the said association he "assisted in the management" of the unlawful association and that the same facts also rendered him punishable under S. 17 (1).

On the other hand Mr. Dasaundha Singh contended that as, admittedly, no unlawful association was in existence at the time when the alleged instigation and payment of the contribution took place, neither clause (1) nor clause (2) of S. 17 had any application.

So far as S. 17 (2) is concerned, it seems clear that the phraseology postulates the existence of an unlawful association at the time when assistance in its management is rendered and therefore I do not think that this section has any application.

S. 17 (1) runs as follows :—

"Whoever (*a*) is a member of an unlawful association,

(*b*) or takes part in meetings of any such association.

(*c*) or contributes or receives or solicits any contribution for the purpose of any such association.

(*d*) or in any way assists the operations of any such association, " shall * * *

(*a*) and (*b*) clearly postulate an unlawful association being already in existence and I think that the same applies to (*d*). The position in regard to (*c*) is not quite so clear. A man who instigates the formation of an association, the purposes of which are such as to render that association unlawful and contributes to and solicits contributions for that association may, broadly speaking, be considered to have contributed to and solicited contributions for the purpose of such association, but a penal Statute has to be construed strictly and it may also be argued that before an association can have a purpose it must be in existence and that any contribution to or solicitation for such an association prior to its formation cannot render a person amenable to S. 17 (1) and after a careful consideration of the section in its entirety I think that the intention of the Legislature was to render punishable only such contributors, etc.. who contributed or solicited contributions for the purpose of an existing association.

In my opinion therefore Mihan Singh cannot be held to have committed an offence either under clause (1) or clause (2) of S. 17 of the Criminal Law Amendment Act.

Mr. Jai Lal next contended that inasmuch as an association "which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts" is an "unlawful association" [S. 15 (2) (*a*)], the instigation to the formation of sueh an association and the contribution and solicitation of money for the purpose of such an association amount to abetment of the offences made punishable by S. 17 (1) (2), Criminal Law Amendment Act; and further, inasmuch as the

abetment in this case was the abetment of an offence by a number or class of persons exceeding ten, the offence committed was one falling within the purview of S. 117, Indian Penal Code.

Now a person abets the doing of a "thing" who instigates a person to do that thing (S. 107, Indian Penal Code) and if the "thing" instigated is an offence, the instigator abets an offence (S. 108, Indian Penal Code) and if the offence is committed in consequence of the abetment, and no express provision is made by the Indian Penal Code for the punishment of such abetment, he is liable to the punishment provided for the offence.

A person is said to "instigate" another to an act when he actively suggests or stimulates him to the act, by any means or language direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement (1 Russ. 164). Again it has been held that the word "instigate" means—urge on, incite, bring about by persuasion, provoke [*In re Lakshminarayana Aiyar* (1)].

In the present case I have no hesitation in holding that Mihan Singh did instigate the formation of an association and therefore abetted its formation. Further inasmuch as the objects and purpose of this association were clearly (and to his knowledge) of such a character as to constitute it an unlawful one, and as any one becoming a member of it or contributing funds to it would be guilty of an offence under S. 17. (1), Criminal Law Amendment Act, Mihan Singh's act amounted to an abetment of an offence. Again, as this abetment was of the commision of an offence by a class of persons clearly exceeding ten Mihan Singh has brought himself within the ambit of S. 117, Indian Penal Code, and has rendered himself liable to the punishment provided therein.

I would, therefore, accept this appeal and convict Mihan Singh of an offence under S. 117, Indian Penal Code. Having regard to his previous excellent record and the fact that he has not been shown to have taken any further part in this affair and refrained from joining or taking part in any such movement in the Multan District, where he, for the most part resides, I think a sentence of fine would meet the situation. I would therefore sentence him to pay a fine of two hundred rupees or in default to undergo rigorous imprisonment for six months.

Moti Sagar, J—I concur.

Appeal allowed.

(1) [1917] 22 M. L. T. 373.

1924 LAHORE 444

BROADWAY AND FFORDE, JJ.

Wali Muhammad and others—Defendants—Appellants.

v.

Muhammad Bakhsh and others—Plaintiffs—Respondents.

F. A. No. 814 of 1923, Decided on 3rd January 1924, from the decree of Addl. J. Sheikhupura, D/- the 26th March 1923.

(a) *Punjab Land Rev. Act, S. 44—Presumption does not exist as regards devolution of land.*

Although a presumption of correctness attaches to the pedigree-table contained in the Record of Rights under S. 44 of the Land Revenue Act, that presumption does not extend to an entry made in the pedigree-table with respect to an extraneous matter entirely unconnected with the questions of the relationship, as for instance, devolution of lands in a village. If such entries appear on the face of them to be erroneous, a Court would be justified in not accepting them.

[P 446 C 2; P 447 C 1]

(b) *Civil P.C., O. 41, R. 27—Further evidence is not allowed in second appeal-Civil P.C. O. 42.*

Rule 27 of Order 41, Civil Procedure Code does not authorise an appellate Court to allow the production of additional evidence in second appeal. 2 Pat. 676 P. C. Dist.

[P. 441, C. 2]

Hasan Imam, Abdul Rashid and Badri Das—for Appellants.

Tek Chand, Noor-ul-Din and Niaz Muhammad—for Respondents.

Broadway, J.—The following pedigree-tables [vide page 446] will assist in the appreciation of this case:—

On the 17th of November 1920 the plaintiffs instituted a suit against the

defendants claiming possession, by redemption, of 200 ghumaons, 6 kanals, 11 marlas of land situate in Mauza Mehmmunwali in the District of Sheikhupura. They alleged that the land in question had been mortgaged by Muhammad Bakhsh and Sultan (Table A) to Miran Bakhsh (Table B) for Rs. 1,200 under a duly registered deed executed on the 15th of March 1880; that Miran Bakhsh had transferred his mortgagee rights to Wali Muhammad, Ali Muhammad and Muhammad Bakhsh (Table C); that the said transferees and their descendants had been since, and were still, in possession of the said land as mortgagees and refused to allow the plaintiffs to redeem the same on payment of the mortgage money.

Nur Ilahi, defendant No. 2 (Table B), and Hakim Ali, defendant No. 8 (Table A) put in no appearance. Allah Bakhsh, defendant No. 1 (Table B), admitted the allegations made in the plaint. The remaining defendants admitted that the land in suit had been mortgaged to Miran Bakhsh as alleged, but pleaded that they had purchased the land from Muhammad Bakhsh and Sultan in 1890 and had paid off the mortgagees a few months later since when they had held possession as owners and not as mortgagees. Their other pleas are immaterial so far as this appeal is concerned.

Five issues were settled by the trial Court of which the first and fourth were as follows:—

(1) Does the relation of mortgagors and mortgagees subsist between the plaintiffs and defendants Nos. 3 to 7?

(4) Was the land in suit sold to defendants Nos. 3 to 7 by Sultan and Muhammad Baksh?

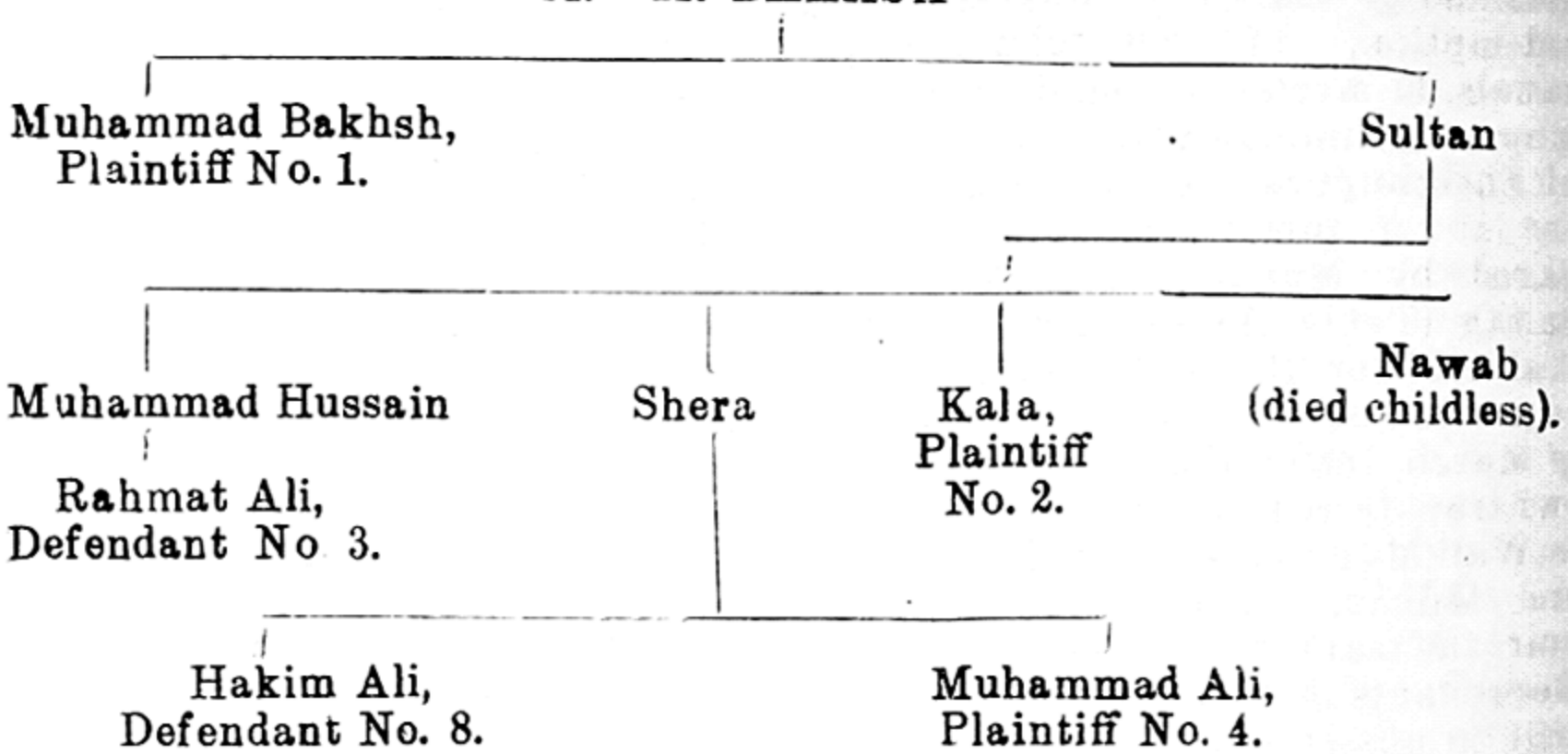
These were decided against the plaintiffs and their suit was consequently dismissed with costs.

The plaintiffs thereupon preferred an appeal to the Additional Judge who decreed their claim holding that the defendants Nos. 3 to 7 (Table C) had failed to discharge the onus of proving the fourth issue.

The said five defendants (Table C) have come up to this Court in second appeal and their case has been ably argued by Mr. Hassan Imam. Mr. Tek Chand appeared for the plaintiffs-respondents. Mr. Hassan Imam frankly conceded that the onus of proving issues Nos. 1 and 4 had rightly been placed on the plaintiffs-respondents and appellants, respectively. He also admitted that as the appellants had admitted the mortgage a presumption arose in favour of the plaintiffs-respondents, and that this presumption could only be displaced by the appellants proving the alleged sale in their favour. He claimed, however, that this duty they had discharged by proving that they had been entered as owners of the suit lands in such of the Revenue Records, since the settlement of 1892-93. as were forthcoming. He urged that the claim made by the plaintiffs-respondents was the outcome of the disturbances that occurred in Gujranwala in 1919 when a great part of the Revenue Records were burnt, and that among the Records thus burnt were the Mutation Registers which would have placed the appellants' case beyond all dispute. In the absence of these registers, however, reliance was placed on the Jamabandis of 1892-93, 1905-06, 1916-17 and certain entries in the pedigree-table of the village proprietors, and it was argued that the learned Additional Judge had not attached that weight to the presumption of their correctness that was due to them owing to the provisions of S. 44 of the Land Revenue Act. Now it cannot be denied that such Revenue Records as have been produced show the appellants as owners of this land and S. 44 of the Land Revenue Act undoubtedly enacts that entries in such records shall be presumed to be correct.

The learned Additional Judge has, however, fully realised this aspect of the case and has considered and weighed this evidence with all possible care.

In the pedigree-tables referred to there appear certain entries relating to the devolution of lands in the village, and it is on these entries that Mr. Hassan Imam lays stress. The learned Judge has examined these entries very carefully and has come



to the conclusion that no reliance can be placed on their correctness. It was contended that the learned Judge was not at liberty to come to this conclusion merely on an examination of the entries themselves, but was bound by S. 44 of the Land Revenue Act to hold them to be correct till some extraneous evidence had been produced showing their incorrectness. This view cannot be accepted. The pedigree-tables are, after all, pieces of evidence. They carry with them certain presumptions, but they can be examined and scrutinized with a view to determining their value without any such evidence as is suggested by the learned counsel. Mr. Tek Chand contended that the presumption of correctness attached only to the pedigree-tables so far as relationships were concerned, and that any entries relating to the devolution of property were unauthorised and, therefore, no presumption arose with regard to them. This contention is supported by the dictum of Martineau J. in an unreported case (Civil Appeal No. 2393 of 1920) in which it was held that "although a presumption of correctness attaches to the pedigree-table (which is part of the Record of Rights) under S. 44 of the Land Revenue Act, I do not think that that presumption extends to an entry made in the pedigree-table with respect to an extraneous matter entirely unconnected with the question of the relationship of the persons named in the table.". On the other hand Mr. Hassan Imam referred to Douie's Punjab Land Administration Manual

and the same learned author's Settlement Manual. In the latter of these treatises in Appendix VIII, page 24 is given the form in which pedigree-tables are to be prepared. Paragraphs 8 and 10 of this document seem to authorise the making of entries relating to the devolution of lands in the village, although Mr. Hassan Imam was unable to show under what authority that Appendix was promulgated or whether it was in force in 1891. Assuming, however, that these entries were made in accordance with the requirements of the law, an entry in a Record of Rights is not necessarily conclusive. It is an entry to which the presumption of correctness attaches under the provisions of S. 44 of the Punjab Land Revenue Act unless and until the contrary is proved by legal evidence. If the entries themselves are inconclusive or appear on the face of them to be erroneous, a Court would be justified in not accepting them. In the present case the learned Additional Judge has pointed out that the case of the appellants is opposed to the entries in the pedigree-tables and has declined to accept them. In other words he has held that the presumption of correctness attaching to them as entries in a Record of Rights has been rebutted. This is a question of fact which cannot be examined in second appeal.

Apparently recognising that his position in regard to the entries in the pedigree-tables was weak, Mr. Hassan Imam desired to be allowed to tender fresh evidence. This evidence consisted of certain remarks in the mislhaqqiat or Records of Rights. He contended that the appellants had only discovered the existence of this new evidence within the last three or four months and that they had then, without any undue delay, moved this Court to send for the said mislhaqqiat. It appears, however, that the Special Kanungo was examined and when he gave his evidence it is admitted that these particular documents were in his possession in Court. He was asked no questions in regard to them and apparently neither the appellants nor their counsel thought it worth while to make an examination of the Revenue Records until long after the learned Additional Judge had delivered his judgment.

Mr. Tek Chand contended that rule 27 of Order 41, Civil Procedure Code, did not authorise an appellate Court to allow the production of additional evidence in second appeal. Mr. Hassan Imam referred to *Inderajit Pratap Sahi* v. *Amar Singh* (1) where their Lordships of the Privy Council held that "the jurisdiction of an appellate Court under Order 41, rule 27 (1) (*b*) of the Civil Procedure Code, to admit additional evidence is not confined to cases in which the Court itself discovers a lacuna or defect and requires evidence to fill up or remedy it." They also held "that the Judicial Committee has unrestricted power to admit documents where sufficient ground is shown for their not having been produced at the initial stage of the litigation." In that case, however, as pointed out by Mr. Tek Chand the High Court of Patna was sitting as a Court of first appeal and the authority, therefore, is not in point.

Further, there seems to have been no valid reason for the delay in the production of this evidence. As stated above this evidence was actually in Court during the trial and the failure to produce it was obviously due to the slackness on the part of the appellants and their legal advisers in failing to inspect the records with proper care. This evidence was not tendered in the Lower Appellate Court and we cannot see our way to admit it at this late stage, even assuming we had power to do so.

Mr. Hassan Imam admitted that the onus of proving the sale lay on his clients. Whether a sale had or had not been effected is a question of fact and this question has been decided

(1) 1923 P. C. 128—2 Pat. 676—50 I. A. 183—21 A. L. J. 554—L. R. 4 P. C. 123—1 Pat. L. R. 345—4 P. L. T. 447—33 M. L. T. 233—28 C. W. N. 277—39 C.L.J. 318—25 Bom. L. R. 1259—45 M. L. J. 578—18 M. L. W. 728—L. R. 5 P. C. 8 (P.C.)

against the appellants by the learned Additional Judge. In comming to his decision the learned Judge has not contravened any legal principles, and we are not, therefore, competent to examine the correctness of his finding.

The appeal fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 LAHORE 448

SHADI LAL, C. J. AND
LE ROSSIGNOL, J.

The Lahore Bank, Limited, in liquidation—Decree-holder—Appellant.

v.

Ghulam Jilani minor *through Mt. Zaiwar Nishan*—Respondent.

L. P. A. No. 53 of 1923, Decided on 27th November 1923, from the order of Harrison, J. in C. A. No. 340 of 1922 D/- 6th January 1923.

✱ (a) *Minor—Decree against.*

A decree is not invalid merely because it is issued against a minor. 31 A. 572 (P. C.) Foll. [P. 448, C. 2]

✱ (b) *Execution—Executing Court cannot go into validity of decree.*

An executing Court has no jurisdiction to criticize or go behind the decree; all that concerns it is the execution of it. If the decree should be annulled that is not the function of an executing Court. 44 C. 627 Foll. [P. 448, C. 2]

Sohan Lal—for Appellant.

Abdul Ghani—for Respondent.

Le Rossignol, J.—This Letters Patent appeal arises out of the following facts.

The liquidation Judge Lahore made an order for payment of 1165-5-0 against 'Gulam Jilani minor son of Muhammad Zaman'.

That order is enforceable as a decree, but the executing Court refused execution on the ground that the minor had not been represented before the liquidation Court and therefore no decree existed.

The Hon'ble Judge in Chambers concurred on the ground that the decree was *ex facie* invalid and considered that *Jangli Ram* v. *Laddu Ram* (1) was an analogous case.

We are unable to accept either of the reasons adopted by the Court below. The decree is certainly in existence; it on the record for all who have eyes is to see; a decree is not invalid merely because it is issued against a minor.

A reference is made in *Jangli Ram* v. *Laddu Ram* (1) to a principle laid down in *Chuck* v. *Cremer* (2) that there must be a valid decree in existence, which has not ceased to be operative and is capable of execution, but this clearly means that the decree must exist and that it has not been satisfied and the relief granted is of such a nature that it is capable of execution.

It has no reference to the procedure of the Court which issued the decree.

With all respect, *Jangli Ram* v. *Laddu Ram* (1) appears to us to miss the real point, which is not whether a decree has no force, but how, and by what Court the decree is to be rendered of no force.

However, that may be, the matter is concluded by the decision in *Kalipada Sarkar* v. *Hari Mohan Dala* (3) and *Rashid-ud-Nissa* v. *Muhummad* (4) and there is no difference in principle between those cases and this.

The broad and clear rule is that an executing Court has no jurisdiction to criticize or go behind the decree, all that concerns it, is the execution of it. If the decree should be annulled, that is not the function of an executing Court.

We accept the appeal with costs throughout, set aside the orders of the Courts below and direct that execution be allowed.

Appeal allowed.

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(1) [1919] 4 Pat. L.J. 240—50 I.C. 529—(1919) P.H.C.C. 105 (F.B.)
(2) [1896] 16 L.J., Ch. 92—2 Ph. 113—1 Coop. C. C. 338.
(3) [1909] 44 Cal. 627.
(4) [1917] 31 All. 572.

1924 LAHORE 449

MOTI SAGAR, J.

Rehna and another—Petitioners.

v.

Emperor—Opposite Party.

Cr. Rev. No. 1026 of 1923, Decided on 22nd October 1923, from the Order of Dt. Mag. Gujranwalla, D/-27th April 1923.

* *Penal Code, S. 441—Trespass without the specified-intent is not criminal trespass though the act may be unlawful or may be a tort.*

A girl shortly before she was to be married disappeared from the house of her parents. The accused went to the house of complainant with whom she was said to be living after her disappearance. They also removed the girl who was not lawfully married to the complainant from that place.

Held: that no offence was committed as there was no ciminal intent as defined in S. 441 I. P. C. Every trespass is not criminal trespass. There must be an intent specified in S. 441. Although the Act may be unlawful and may be one which the civil law will restrain or which the Civil Court will compensate the injured party in damages still it does not necessarily constitute an offence under S. 441. [P.449 C.1,2]

Gobind Ram Khanna—for Petitioners.

Nemo—for the Crown.

Moti Sagar, J.—This is an application for revision of an appellate order of the District Magistrate of Gujranwala upholding the convictions and sentences imposed on the petitioners by the trial Magistrate under S. 448, Indian Penal Code. It appears that one *Mt.* Sultano disappeared from the house of her parents shortly before she was to be married and her whereabouts could not be traced for some time. Shortly after it was discovered that she was living with one Khanu who is the complainant in the present case and it is alleged that some of her relations, 12 in number, went to the house of Khanu in his absence and forcibly removed the girl from that place. After her return to the house of her parents *Mst.* Sultano instituted a complaint under S. 366, Indian Penal Code, against Khanu alleging that she had been forcibly kidnapped and she had been compelled to go through a form of marriage with Khanu against her will. This complaint was dismissed. Afterwards Khanu is alleged to have lodged a complaint to the police against the twelve persons who had removed the girl from his house in his absence with the result that four persons, namely, Rehana, Tariji, Sadu and Baqri were chalaned under S. 452, Indian Penal Code. Out of these four persons two, namely Rehana and Tariji, who are the petitioners in the present case, were then absconding and the other two Saddu and Baqri were convicted by the Tahsildar of Hafizabad and sentenced to a fine of Rs. 40 each. A year later Rehana and Tariji also were arrested and placed on their trial before *Lala* Harnam Das who had suecceded *Pandit* Gopi Kishen as Tahsildar of Hafizabad. They were found guilty and sentenced to three months' rigorous imprisonment and a fine of Rs. 20 each. Their appeal to the District Magistrate was dismissed and they have now come up on revision to this Court.

The only point urged before me is that the facts alleged do not constitute a criminal offence and that the petitioners are consequently entitled to an acquittal. After giving full consideration to the argument of the learned *Vakil* for the petitioners I am of opinion that this contention is sound and must prevail. In order to constitute an offence under S. 448, Indian Penal Code, it is necessary that it should be proved that the accused committed criminal trespass and that such criminal trespass was committed by making an entry into or remaining in a building, tent or vessel. Criminal trespass has been defined in S. 441, Indian Penal Code, as entry into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. It will be seen that the essence of the offence is the intent in committing the trespass and merely to trespass is not ordinarily an offence. It has been repeatedly held that it must be proved that some criminal intent was present in the mind of the accused and it does not at all follow that because an act is unlawful and is one that the civil law will restrain or for which it will compensate the

injured party in damages, it is necessarily criminal (Ratan Lal's Law of Crimes, page 941). In the present case there is nothing to show that the trespass was committed with one of the intents specified in the section. The girl had been removed from the house of her parents and when her whereabouts were discovered it was only natural that the parents should go to her and persuade her to return. There is nothing to show that the girl had been lawfully married to the complainant. In these circumstances I do not think that the facts alleged are sufficient to sustain the conviction. I accept the application for revision, set aside the convictions and acquit the accused.

Revision accepted.

1924 LAHORE 450

SHADI LAL, C. J. AND FFORDE, J.

Sohrab—Convict—Appellant.

v.

The Crown—Opposite Party.

Crim. Rev. No. 997 of 1923, Decided on 14th January 1924, from the order of Sess. J. Dera Ghazi Khan, D/-18th August 1923.

Penal Code, S. 302—The alleged offence must be proportionate to provocation.

On the morning of the day in question the appellant returned to his house from his field and found his one wife reproaching his second wife that her daughter was a loose woman and had contracted an intimacy with a Mochi. On hearing this conversation between the two women the prisioner who was holding an axe in his hand attacked and killed in quick succession his two wives and daughter.

Held: that the facts did not constitute any grave and sudden provocation such as is contemplated by law, and therefore the appellant had been rightly convicted of murder.

(P. 451 C. 1)

Sagar Chand and *Niaz Muhammad*—for Appellant.

Nemo—for the Crown.

Shadi Lal, C. J.—The appellant Sohrab, a *Biloch* of the Dera Ghazi Khan District, has been convicted of having, on the morning of the 11th May 1923, killed three persons, namely, his two wives *Mt.* Ghulam Fatima and *Mt.* Wasai and his daughter *Mt.* Bahar Khatun; and has been sentenced under S. 302. Indian Penal Code to the penalty of death.

The facts of the case are simple and do not admit of any dispute. There is ample evidence on the record that *Mt.* Bahar Khatun, who was an unmarried girl of 20 years of age, had contracted a liason with one Ramza *Mochi* who used to live in a house adjoining that of the prisoner. This intimacy led to the pregnancy of the girl. The paramour on hearing of the pregnancy absconded from the village about a fortnight before the date of the crime, and the girl in order to prevent a scandal procured an abortion about one week before the date in question. On the morning of the 11th May the prisoner returned to his house from his field, and found his wife, *Mt.* Wasai reproaching *Mt.* Ghulam Fatima that her daughter was a loose woman and contracted an intimacy with a *Mochi*. On hearing this conversation between the two women the prisoner, who was holding an axe in his hand, attacked *Mt.* Ghulam Fatima with the weapon and killed her on the spot. He then attacked in quick succession *Mt.* Wasai and *Mt.* Bahar Khatun with the same weapon, and killed them instantaneously.

The prisoner has admitted all along that he killed the three women by inflicting injuries with an axe, and unless he can bring his case within one of the exceptions to S. 300, he is clearly guilty of murder. The learned Vakil, who has argued the case on his behalf, contends that it was on the morning in question that the prisoner came to know for the first time that his daughter had contracted an intimacy with a *Mochi*, and that in a fit of anger he killed not only the daughter, but also his two wives who are alleged to have connived at the intrigue. The learned Vakil asks us to hold that the provisions of exception I to S. 300 are applicable to the case, and the offence committed is not murder but culpable homicide not amounting to murder. To this contention we are unable to accede. We entirely accept the principle

enunciated in *Reg.* v. *Welsh* (1) which has been cited with approval in *The King* v. *Lesbini* (2) that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and, so as to lead the jury to ascribe the act to the influence of that passion". There can be no doubt that the provocation must be such as will upset, not merely a hasty and hot-tempered person, but one of ordinary sense and calmness. Judged by this standard the facts relied upon by the accused do not constitute any grave and sudden provocation such as is contemplated by law. We must, therefore, hold that the appellant has been rightly convicted of murder and that the sentence of death is the only appropriate punishment which can be awarded to him.

Confirming, therefore, the sentence of death, we dismiss the appeal.

Appeal dismissed.

(1) [1839] 11 Cox. 336.
(2) [1914] 3 K. B. 1116—84 L. J., K. B. 1102—112 L. T. 175.

1924 LAHORE 451

ABDUL RAOOF AND HARRISON, JJ.

Emperor through Dadda — Complainant—Petitioner.

v.

Achhar Singh and others—Accused—Respondents.

Cr. Rev. No. 1182 of 1923, Decided on 10th September 1923, from Sess. J. Amritsar, D/- 16th June 1923.

Criminal P. C., S. 438—Revision from order of acquittal under S. 438 should not be allowed.

A reference under S. 438 should not ordinarily be entertained where the object is to set aside an order of acquittal passed by a lower Court. (P. 453, C. 2)

Government Advocate—for Petitioner.

Nemo—for Respondent.

Order of Reference.—The facts of this case are as follows :—

On 10th July 1922 in the morning, when Mangal *alias* Dadda was ploughing, the four accused Achhar Singh, Mula Singh, Vir Singh and Lakha Singh attacked him with chhavis, hatchets and dangs and thereby caused grievous hurt to him.

The accused were acquitted by Sardar Bahadur Sardar Arur Singh, Magistrate 1st Class, Amritsar, on 23rd January 1923.

The proceedings are forwarded for revision on the following grounds :—

Achhar Singh, Mula Singh, Vir Singh and Lakha Singh, Jats of Miran Kot, were Chalaned under S. 326, Indian Penal Code, for causing grievous hurt with sharp weapons to Dadda, Christian, of the same village on 11th July 1922. The first information report was made at 10 a. m. on the same day.

The medical evidence of Dr. Jamna Das shows that Dadda had the upper joints of the 3 middle fingers of his right hand clean cut off, an incised wound bone-deep on the right shoulder, and *lathi* marks on the left thigh and right hand. The Doctor said that the injuries to the fingers were "doubtful", as the thumb and little finger were uninjured.

Dadda stated that he was attacked by the four accused, while ploughing, because he would not allow to take his manure. He had a *prani* or stick in his hand, with which he carried the blow of Achhar Singh's Chhavi. The weapon struck his three fingers and cut them off. Mula Singh struck him with a Chhavi, Lakha Singh with a takwa, and Vir Singh with a dang.

The statement of the complainant was corroborated by Sidhu, and Sheru son of Shihan.

The accused pleaded that the case had been fabricated, because of the dispute about manure. Defence evidence was produced to prove that no fight actually occurred.

The Honorary Magistrate Sardar Arur Singh, relying mainly on the medical evidence held that the case was false. He presumably meant that Dadda's injuries were self-inflicted, or voluntarily suffered at the hands of a friend. The accused were accordingly acquitted.

Dadda applied for revision. I issued notice to the accused, overlooking the fact that they had been acquitted and not discharged. It is, I know, most

unusual for the High Court to interfere with an acquittal on the revision side. In the present case, however, I hold that there has apparently been a serious miscarriage of justice. It is unlikely that the Local Government would appeal in a private case of this kind, and I, therefore, consider that it should be reported to the High Court under S. 438 Criminal Procedure Code, with the recommendation that a retrial should be ordered, the acquittals being set aside.

The fact that on the 21st December 1922 Dadda applied for leave to compound the case, on the ground that he had not enough evidence, does not, in my opinion, affect the case.

A village Christian would naturally be subjected to every kind of pressure in order to induce him to give up a case against Jat proprietors. The application does not, therefore, show that the case was a false one.

It is practically impossible to suppose that a man would deliberately maim himself for life in order to support a case against four of his fellow-villagers. The medical evidence on the point is certainly "doubtful", but not in the sense in which the Magistrate uses the word. I see no difficulty in believing that three fingers of Dadda's right hand were cut off in a fight without injury to the rest of the hand. Dadda was grasping a stick at the time, and his thumb and little finger may very well have been out of the way of the blow. It is contrary to human nature to suppose that such serious injury would be self-inflicted or voluntarily suffered, out of mere spite. Dadda's statement is corroborated by evidence which there is no reason to disbelieve. A man in his position would not be able to produce a large array of witnesses: but the injuries themselves are his main evidence.

I accordingly submit the case to the High Court, recommending under S. 438, Criminal Procedure Code, that, as special case, the order of acquittal be set aside and a retrial ordered.

Order of the High Court.—Achhar Singh, Mula Singh, Vir Singh and Lakha Singh were Chalaned under S. 326, Indian Penal Code, for having caused grievous hurt with sharp weapons to one Dadda Christian. They were tried by Sardar Bahadur Sardar Arur Singh, Honorary Magistrate, 1st Class, Amritsar, and were acquitted for want of proof. Mr. W. Malan, Sessions Judge, Amritsar, has made a reference under S. 438, Criminal Procedure Code, recommending that as a special case, the order of acquittal be set aside and a retrial ordered. It has repeatedly been held by almost all the High Courts that ordinarily the High Court should not entertain a reference under S. 438, Criminal Procedure Code, the object of which is to have an order of acquittal passed by an inferior Court set aside, *vide* 24 All. 345; and 25 All. 128. The latest authorities on the subject are 68 I. C. (Mad. F. B.) 615 and 62 I. C. (All.), 869. There is no special reason why we should make an exception in this particular case.

We accordingly refuse to accept the recommendation. Let the papers be returned.

Revision not allowed.

1924 LAHORE 452

SHADI LAL, C. J. AND
LE ROSSIGNOL, J.

Mt. Raghi—Defendant—Appellant.

v.

Baza—Plaintiff—Respondent.

L. P. A. No. 39 of 1923, Decided on 12th November 1923, from the decree of Broadway, J., D/- 11th December 1922.

Custom (Punjab)—Alienation — Awans of Talgang Tahsil can dispose of ancestral property by gift or will.

Ancestral property can be gifted without any restriction by sonless Awans of the Talagang Tahsil consequently it can also be willed away. Such a presumption was, however, rebutted by an entry in the *riwaj-i-am* of 1901. [P. 453, C. 1]

Ghulam Mohiuddiin—for Appellant.

N. C. Mehra and *H. D. Bhalla*—for Respondent.

Judgment.—The sole question for determination in this appeal is whether a sonless *Awañ* of Kot Sarang in Tahsil Talagang is competent to make a testamentary disposition of his ancestral estate. Now, there are

several judgments to the effect that a sonless *Awan* of Talagang Tahsil has, an unrestricted power to make a gift of his ancestral property., Vide, *inter alia*, 46 P. R., 1900 and 8 P. R. 1906; and Mr. Ghulam Mohy-ud-Din, who has ably argued the case for the appellant, contends on the authority of 48 P. R. 1903 (F. B.) that, as the power of gift has been proved to exist in the case of *Awans*, an initial presumption arises that there is a co extensive power of testation. The presumption is, however, rebutted by an entry in the *Riwaj-i-am* compiled in 1901 which shows that *Awans* are not entitled to dispose of their ancestral property by will, vide answer to Question No. 78 at page 53 of Tribal Custom in the Jhelum District (Talagang was a part of Jhelum District at that time.)

Our attention has been invited to some judgments of the Punjab Chief Court in which it has been pointed out that the *Riwaj-i-am* compiled by Mr. Talbot is not a satisfactory document; but no adverse criticism has been or can be, levelled against the entry relating to the testamentary power of the *Awans*.

We accordingly concur in the conclusion of Mr. Justice Broadway and dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 453

MOTI SAGAR, J.

Harnam Singh—Petitioner.

v

The Crown—Opposite Party.

Cri. Rev. No. 1405 of 1923, Decided on 27th November 1923, from the order of Sess. J. Jullundur, D/-21st April 1923.

Penal Code, S. 378—Claim of right though unfounded is a good defence if the claim is bona fide.

Removal of property in the assertion of a *bona fide* claim of right, though unfounded in law and fact, does not constitute theft but a mere colourable pretence to obtain or keep possession of property does not avail as a defence. 44 C. 66 Rel. on. The fact that the things alleged to be stolen were removed secretly and were despatched by railway under wrong description is not sufficient to indicate, that the accused had any dishonest intention in removing them. [P 454 C 1]

Amolak Ram—for Petitioner.

Dalip Singh—for the Crown.

Moti Sagar, J. — One Harnam Singh, who was foreman of the Khalsa National Press in the City of Jullunder, has been found guilty by a Magistrate of having committed theft, and has been sentenced under S. 381, Indian Penal Code, to undergo one year's rigorous imprisonment and to pay a fine of Rs. 50. On appeal to the Sessions Judge his conviction and sentence have been upheld. He has now come up in revision to this Court. It is alleged on behalf of the prosecution that the petitioner removed several bags of type from the press without the consent and permission of his employers, that he despatched these articles by train to his house in the Rawalpindi District and that he thereby committed theft as defined in S. 381, Indian Penal Code. The removal of the articles is not denied by Harnam Singh, but it is pleaded that things belonged to him and that he removed them, because his employers failed to carry out their part of the contract, which was that they would either take him as a partner in their business or purchase those materials from him for their press. The learned Sessions Judge has not given any finding on the question as to whether the articles removed did, or did not belong to the complainants. He is of opinion that the *onus* of proving ownership of the property lay upon the complainants and that they have failed to discharge this *onus*. But he is also of opinion that the question of the ownership of the property is entirely immaterial for the decision of this case, in as-much as it was admitted by the petitioner that he had removed the articles from the complainant's possession, and that it must be presumed that the removal must have been made with a dishonest intention. In coming to the conclusion that the removal was dishonest, the learned Sessions Judge has taken two things into consideration (1) that the articles were removed clandestinely, and

(2) that they were booked from the Jullunder Station to Rawalpindi as locks and not as type. In my opinion the learned Sessions Judge has not taken a correct view of this matter.

It has been repeatedly held that the removal of property in the assertion of a *bona fide* claim of right, though unfounded in law and fact, does not constitute theft, but that a mere colourable pretence to obtain or keep possession of property does not avail as a defence [*Harendra Narayan Das* v. *Ramjan Khan* (1) and *Arfan Ali* v. *Emperor* (2)]. In this case it is clear that there was a *bona fide* assertion of right on the part of the accused with regard to the articles removed, and the claim was not a mere pretence. The fact that the things were removed secretly and were despatched, to Rawalpindi as locks and not as type is not sufficient, in my opinion, to indicate that the accused had any dishonest intention.

I do not, therefore, think that the conviction under S. 381, Indian Penal Code, can be supported. I set aside the conviction and acquit the accused.

Revision accepted.

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(1) [1913] 41 Cal. 433—18 C. W. N. 397—23 I.C. 506—15 Cr. L.J. 298.
(2) [1916] 44 Cal. 66—36 I. C. 136—20 C.W.N. 1270—17 Cr. L.J. 456.

1924 LAHORE 454

MOTI SAGAR, J.

Emperor—Petitioner.

v

Jawali and another—Respondents.

Cri. Rev. No. 1491 of 1923, Decided on 26th November 1923, from Dt. Magistrate, Gurgaon.

Criminal P. C., S. 562—Second class Magistrate can't pass any order under the section.

A second class Magistrate cannot pass an order under S. 562. He should in a fit case record his opinion to that effect and should submit to a Magistrate of the First Class or a Sub-Divisional Magistrate for orders.

[P 454 C 2]

Nemo—for Petitioner.

Sain Das—for Respondents.

Facts

The accused entered Chandan complainant's *choubara* in broad day light and stole a wooden box containing ornaments and clothes worth Rs. 156. The box was subsequently recovered by the police in fact and the accused were challaned in the Court of the Magistrate, 2nd class, Rewari. The Magistrate found both the accused guilty, and gave the sentence as noted above under S. 562, Criminal Procedure, Code.

The proceedings are forwarded for revision on the following grounds.—

1. That the order passed by the Magistrate, 2nd class, Rewari, is illegal, the punishment awarded not being permissible under S. 454, Indian Penal Code.

2. That a Magistrate of the 2nd class is not competent to award sentence under S. 562, Criminal Procedure Code Under the *proviso* to this section he can only submit the proceedings with his opinion for the orders of a competent authority.

3. That the offence committed by the accused is not of a trivial nature, the punishment awarded under S. 454, Indian Penal Code, being ordinarily three years and fine.

4. That the antecedents of the accused who are aged about 17 do not justify the sentence.

For these reasons I submit the file of the case to the High Court with the recommendation that the order be set aside and the Magistrate called upon to pass a fresh sentence in accordance with law.

Moti Sagar, J.—I agree with the District Magistrate in holding that it was incompetent for a 2nd class Magistrate to have passed orders under S. 562 of the Criminal Procedure Code himself, and that he should have submitted the case to a 1st class Magistrate or a Sub-Divisional Magistrate for orders with his report, if he was of opinion that the case was a fit one for the exercise of powers under that section. I set aside the order and remand the case to the Magistrate concerned with a direction that he should pass fresh orders in accordance with law keeping in view the provisions of S 562 in the new Criminal Procedure Code,

Case remanded.

✱ 1924 LAHORE 455

SCOTT-SMITH AND HARRISON. JJ.

Ram Mehr—Plaintiff—Appellant.

v

Pali Ram—Defendant—Respondent.

S. A. No. 967 of 1918, Decided on 4th February 1924 from D. J. Karnal, D/-7th January 1919.

✱ (a) *Civil P. C., O. 41 R. 25—Findings are conclusive in second appeals.*

The findings under O. 41 R. 25 are not open to attack on the evidence in second appeal, as they are in first appeal. [P 455 C 2]

(b) *Punjab Courts Act, S. 41—Finding as to custom.*

A finding under O. 41 R. 25 as regards custom can be challenged without a certificate referred to in S. 41. [P 455 C 2]

Sagar Chand and *Sheikh Niaz Mohammad*—for Appellant.

Shamair Chand—for Respondent.

Scott-Smith, J.—A return has now been made by the District Judge to this Court's orders of remand of the 13th January and 11th December 1922. The finding on the first issue is in the affirmative, on the second that the plaintiff's father had not an unfettered right of alienation with regard to these properties, on the third that there is a special custom in the locality in which the parties' villages are situate which makes ancestral property in the hands of the next holder liable, for the just debts of his predecessor, and on the fourth that the defendant has made improvements valued as follows :—

On property	B.	Rs. 2,500/-
On property	C.	Rs. 450/-
On property	D.	Rs. 821/-

At the hearing Mr. Shamair Chand on behalf of the respondent raised two preliminary points.

(1) That findings of fact by the District Judge upon the issues remanded to him cannot be challenged before us, and

(2) That the findings as regards custom cannot be challenged without a certificate, having regard to S. 41 (3) of the Punjab Courts Act.

As regards the first point it was held in 7 All. 765 (F. B.) that when the finding and evidence upon issues remanded under Order 41 R. 25 Civil Procedure Code are returned to the High Court the finding is conclusive and cannot be challenged on the evidence before the High Court as in first appeal. The *ratio decidendi* was, that a second appeal is not allowed on questions of fact. This was followed in a case reported in 42 Indian Cases 128, and in 24 Cal. 98 the same view was taken. We agree with the decisions in these cases and we hold that the findings of fact returned to us by the Lower Appellate Court cannot now be challenged.

As regards the second point it is pointed out that under S. 41 (3) of the Punjab Courts Act no appeal lies to the High Court from a decree passed in appeal by any Court subordinate to the High Court regarding the validity or the existence of any custom or usage unless the Judge of the Lower Appellate Court has certified that the custom or usage is of sufficient importance, and that the evidence regarding it so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify such appeal. It is urged that the finding on the 3rd issue sent down should be considered as part of the original judgment of the Lower Appellate Court and that therefore it cannot be challenged without a certificate. It was urged on the other side that the appeal was rightly instituted without a certificate because at that time there was no contention regarding the validity or existence of any custom. What was urged at the original hearing was that the Lower Appellate Court ought to have framed an issue upon a point of custom which it had not done and we were asked to frame such an issue and remand it for trial. In our opinion, the same reasons, which prevent a finding of fact by the Lower Appellate Court on an issue remanded to it from being challenged in this Court, do not apply to a decision on a question of custom so remanded. All that is laid down in S. 41 is that no appeal shall lie to the High Court regarding the validity or existence of any custom without a certificate by the Judge of the Lower Appellate Court. There is no provision that when once an

appeal has been properly filed, a certificate should be required at any subsequent stage of the hearing. The *proviso* to sub-S. (3) lays down that an application under sub-S. (3) shall not be received after the expiration of thirty days from the date on which the decree of the Lower Appellate Court was passed and this *proviso*, in our opinion, clearly shows that the provision as to a certificate was only intended to apply as a condition precedent to the filing of an appeal and not as condition precedent to the challenging of a finding on a question of custom remanded to the Lower Appellate Court. Once an appeal has been legally instituted in this Court, the appellant can contest at the hearing any findings of the Appellate Court which are against him so long as he has taken exception to them in his grounds of appeal.

This is his right and we do not think that it should be taken away from him unless there is a clear provision of the law to this effect. We do not find anything in S. 41 (3) which supports the position taken up by the respondent's counsel and we hold that the findings on a question of custom now submitted to us can be challenged in this Court.

The finding on the first issue and on the fourth issue as to the value of the improvements cannot be challenged before us ; that on the second issue is not challenged. The finding on the third issue, however, is challenged by counsel for the appellant who urges that it has not been proved that there is any special custom in this locality which renders ancestral property liable in the hands of an heir for payment of the debts of his predecessor. In our opinion the learned District Judge has arrived at his findings on this issue on insufficient materials. He says that 13 instances have been cited by the witnesses from the locality in question in which a decree has been obtained and either executed against the immoveable property of the judgment-debtor after the death of the latter without objection by his heirs or in which the heirs had compromised. The commissioner who made a local inquiry and recorded the evidence in which these instances were referred to, has pointed out that the evidence in support of them is defective. The learned District Judge says that some of them are supported by documents. But counsel has not been able to point out to us which of them are so supported, and in our opinion, they have not been properly proved. The learned District Judge also admits that many of the instances are not indeed instances of execution of a decree against ancestral landed property after the death of the original judgment-debtor. Under the circumstances we are quite unable to regard this evidence as sufficient to prove that in the locality where the parties reside ancestral immoveable property is liable in the hands of the next holder for the just debts of his predecessor.

We held in our original order of remand that the prior mortgages on the properties A and B had not been proved while those on C and D had been proved. B was a vacant site when it was mortgaged to the respondent in 1915 and he built a *pacca* house on it since that date, or it is possible that he began it just at the time of mortgage and completed it afterwards. He had no right under the terms of the mortgage to build a house at a cost of Rs 2500/- on the property of a minor and make it difficult if not impossible, to redeem it. As regards the property C it is clear from the old mortgage deeds that the materials belong to Jai Ram and it was agreed that at the time of redemption he could either remove his materials or claim the value of them. It is also probable having regard to the evidence of Sudan that the building was constructed prior to the mortgage of Jai Ram. The property D had been in mortgage for a great many years and the improvements thereon were also made very long ago and in the life time of the minor's father without any objection being made by him. In our opinion the mortgagee is entitled to the value of the improvements on these two properties.

We, therefore, accept both the appeals. In appeal No. 967 we decree the plaintiff's claim conditional on payment of the mortgage-money of Rs. 300/- plus Rs. 821/-, the value of the improvements. In appeal No. 968 we decree the claim conditional on payment of Rs. 200/-, mortgage money, plus Rs. 450/- the value of the improvements. Under all the circumstances of the case we direct that the parties shall bear their own costs throughout.

Harrison, J.—I agree with the conclusions and am of opinion that in this case the finding on the third issue can be impugned at this stage without a certificate. The remand is under Order 41, rule 25 and whether objections be presented or not, it is our duty as an appellate Court seized with the original appeal to proceed to determine that appeal after examining the correctness of the findings on the additional issues To this rule there is the important exception that it is not within our province to examine such findings when they deal with facts. The contention of the respondents is that in virtue of S. 41 (3) of the Punjab Courts Act questions of custom, if unsupported by a certificate, are, or must be treated as questions of fact. In a sense, this is true and for practical purposes in second appeals findings on custom unsupported by the certificate are treated as findings of fact. The wording of the section, however, makes it more correct to say that such questions are treated as questions of law subject to the proviso regarding the certificate, and therefore may be said to be penalised questions of law rather than privileged questions of fact. The difference is all important. Doubtless questions of custom may be and often are questions of fact; oftener they are questions of law, some times mixed questions of law and fact. Whatever may be their nature they are all classified under S. 41 of the Courts Act with questions of law and usage, which may be agitated as a matter of right on second appeal. A penal condition is then added making the presentation of a certificate an indispensable preliminary. Had the contrary procedure been adopted and had such questions been classified with questions of fact subject to privileged treatment being accorded on the production of a certificate the position would have been very differ ent. The finding would then have been a finding of fact unassailable until certain conditions had been observed; now it is more akin to a question of law which can be agitated as a matter or right subject always to the disabling provisions of S. 41 (3) so far as they may be applicable. This sub-section penalises an appeal from a decree. Here we have no decree and no appeal except the original decree from which the appeal was presented and which dealt with no question of custom. No certificate is therefore required. The penal condition does not in term apply and the question can be agitated in exactly the same manner as an ordinary question of law. This result may be due to a defect in the Act with which we are not concerned for the words are clear and in applying a penal provision the greatest strictness must be observed.

Appeals accepted.

1924 LAHORE 457

HARRISON AND ZAFAR ALI, JJ.

Kirpa and others—Plaintiffs—Appellants.

v.

Rabi Dutt and others—Defendants—Respondents.

F. A. No. 2378 of 1919, Decided on 20th November 1923, from the decree of the Senior Sub. J. Rohtak, D/- 18th July 1919.

(a) *Custom (Punjab)—Adoption.*

Amongst Bhitwaria Brahmins of the Beri village, of the Rohtak District daughter's son can be validly adopted.

In that part of the Punjab which adjoins the United Provinces the nomination of an heir on lines resembling the Kritama Hindu adoption is unknown, that is to say, even amongst people governed by agricultural custom the adoption that takes place is the full Hindu adoption by which a man is transplanted from his natural family to his new family and is entirely cut off from his past.

[P 458 C 2]

Faqir Chand and *C. L. Mathur*—for Appellants.

Jagan Nath and *Shamair Chand* for *Moti Sagar*—for Respondents.

Judgment. — The parties in this case are admittedly governed by Hindu Law. The plaintiffs being some of the collaterals of two men Ram Sarup and Jawahra, who both died childless, bring this suit against Rabi Datt, son of Sheo Sahai, and various pro-forma defendants claiming the whole of the property left by Ram Sarup and Jawahra, of which mutation has been effected in the name of Rabi Datt. Rabi Datt's father Sheo Sahai was admittedly the daughter's son of Mangat Rai and the two ancestors of Ram Sarup and Jawahra formed one branch of the family, being all three sons of Naina. It is alleged by the defendant that his father Sheo Sahai was duly adopted by Mangat Rai, that the adoption was valid because of a custom varying the strict Hindu Law on the subject and that anyhow the plaintiffs and their predecessors-in-title have all acquiesced in the adoption and have treated it as valid. The plaintiffs, on the other hand, deny the factum of the adoption, as also its validity and urge that they are in no way estopped from questioning it. Mangat Rai died in 1833 and on his death his widow was shown as in possession of his land until 1846. She then executed a registered deed by which she made a gift of the whole of Mangat Rai's property in favour of Sheo Sahai, her daughter's son, whom she described as the adopted son of Mangat Rai. In the revenue record of 1879, Sheo Sahai is shown as the adopted son of Mangat Rai. The adoption is said to have taken place in 1827. Sheo Sahai has throughout been treated by the whole family as the adopted son; the entry in the revenue records has not been questioned and taking everything into account we find that it is fully established that as a matter of fact he was adopted.

As to the validity of the adoption there is no doubt, as laid down in 21 All. 412, that in accordance with strict Hindu Law a man cannot adopt his daughter's son, although in ancient times such adoptions were recognised. The position is fully discussed in Mayne's Hindu Law and it is there explained how the present view, more especially in the Punjab, is veering round to the acceptance of an adoption of the daughter's son, although the theory no doubt exists that to qualify for adoptions a man must be the son of a woman, whom, the adoptive father could have married. It is true, as pointed out by counsel for the appellants, that no special custom was pleaded in so many words, but it was pleaded that there had been a valid adoption, an issue was framed on the point and the whole case has been fought out on the clear understanding that the validity of the adoption depended on the custom varying the strict Hindu Law being established. Now, no fewer than 11 instances including a contested case have been proved amongst the *Bhitwaria Brahmans* of this village. It is stated that there are one hundred families of such *Brahmans* in this village, and this very large number of adoptions of daughter's sons establishes in our opinion the existence of a custom varying the Hindu Law in this direction. Counsel for the appellants urges that even if a custom be held to be established, it only proves that a Kritama adoption of a daughter's son is allowed. In the first place, the Kritama form of adoption is confined for practical purposes to Behar and the West Coast of India, and both in the Customary Law edited by Mr. Joseph and in 3 P. W. R. 1908 it is explained that in this part of the Punjab, which adjoins the United Provinces the nomination of an heir on lines resembling the Kritama Hindu adoption is unknown, that is to say, even amongst people governed by agricultural custom the adoption that takes place is the full Hindu adoption by which a man is transplanted from his natural family to his new family, and is entirely cut off from his past. How much more so must this be the position among people governed by Hindu Law. Another most significant fact is that Sheo Sahai's *got* by birth was *Vat*

that Mangat Rai was a *Kanshik*, and that Sheo Sahai's grandson, the present defendants' son has been married to a *Vat* girl, which would have been impossible unless Sheo Sahai had been adopted into some other *got* than *Vat*. We find that it is fully established, that a valid custom does exist amongst these *Bhitwaria Brahmans* of the Beri village of the Rohtak District allowing the adoption of a daughter's son.

Upon the third point also the plaintiffs fail. The registered deed of 1846 was signed by four ancestors of the present plaintiffs including the real brother of Mangat Rai, Hem Raj, and it is also signed by Ramjas, the, Lambardar of the *Patti*. The plaintiffs have allowed Rabi Datt to treat the property as his own during the past 11 years; two of them, Jawahara and Mutsaddi, have actually cultivated a part of the land under him and from the time of the adoption onwards, the whole family has recognised Sheo Sahai and treated him as the full adopted son of Mangat Rai. We find, therefore, on all three points in favour of the defendant-respondent and we dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 459

CAMPBELL AND BROADWAY, JJ.

Zulfikar Ali and others—Defendants—Appellants.

v.

Nabi Baksh and others—Plaintiffs—Respondents.

F. A. No. 345 of 1920, Decided on 25th February 1924, from the order of Senior S. J. Multan, D/-5th December 1918.

(a) *Practice—Procedure—Hearing of a case prior to fixed date is illegal.*

The procedure of disposing of a case prior to the date fixed for hearing is unusual and vitiates the decree. [P. 460 C. 1]

(b) *Religious Endowment — Residue to be enjoyed by Mutwalli is a valid condition.*

Where the author of the trust provided that the income of the shops should be first applied to the upkeep of the mosque and then if there was any residue towards the remuneration of the mutwalli.

Held: that there was nothing illegal in such a trust. But if the order had been changed the situation would have been entirely different. 6 Pat. L. J. 218 Foll. P. 461 C, 1]

Badri Das and *Har Gopal* — for Appellants.

Muhammad Shah Nawaz—for Respondents.

Campbell, J.—This appeal is the outcome of a suit brought under S. 92, Code of Civil Procedure, by Nbi Bakhsh and others against Ghulam Mustafa Shah and Fateh Ali Shah, sons of of Hamid Shah.

The suit was instituted on the 15th April 1915, and the subject was a building in Multan City consisting of four shops with a mosque on the top of it. The plaint stated the defendants to be *mutwallis* of the mosque, and it prayed for their dismissal and the appointment, of new *mutwallis* and a scheme of management, and for an order to the defendants to furnish accounts of the income and expenditure of the alleged *wakf* property.

The defendants denied mismanagement and liability to render accounts, and stated that their father Hamid Shah had constructed the shops and the mosque which was originally a mere *masalla* or prayer plotform, and had arranged that a part of the income from the shops should be devoted to the upkeep of the *masalla*. and the remainder enjoyed by himself and his descendants. In an oral statement Ghulam Mustafa Shah defendant expressly said that the shops were not endowed property, but were the property of the defendants.

The suit was at first dismissed by the trial Court and was then remanded for re-decision by the District Judge. It is unnecessary to say more than this about the earlier proceedings. The issues upon which the trial Court has adjudicated after the remand are as follows:—

(1) Did the defendants' father build the mosque and shops?

(2) Did he make it *wakf alal aulad*? Is it valid under Muhammadan Law?

(3) Are the defendants proprietors of the mosque and shops, and are they in possession as such as and not *mutwallis*?

(4) Can defendants get any rights in the property or its income by their own previous acts or conduct?

(5) Do not the defendants make a proper arrangement for the repairs etc., of the mosque?

(6) Are the defendants, under any circumstances, liable to removal?

(7) How much is due from defendants out of the rent of shops?

Ghulam Mustafa Shah died before the 17th October 1917, and for him were substituted, as defendants, Zulfikar Ali Shah, his son, and *Mst.* Sardar Bibi, his widow. Fateh Ali Shah died before the 28th November 1918, and his representative was taken to be Zulfikar Ali Shah.

On the 5th December 1918 the lower Court decided the above issues. It held that Hamid Shah, father of the original defendants, had built the mosque and shops, but was not the founder of the mosque as there had been a mosque at the place before. Secondly, it held that the defendants were not the owners of the property, but had been in possession merely as *mutwalli* of the mosque, and that they had no rights as owners of the property. It held further that no decision of the 5th and 6th issues was necessary since the original defendants had died and Zulfikar Ali Shah, not being a descendant of the founder of the mosque, had no claim on the post of *mutwalli*. On the 7th issue a preliminary decree was passed ordering the defendant to submit accounts.

On the 3rd January the Court fixed the 15th January for a final decree. It proceeded to pass a final decree on the 13th January by which the defendants were ordered to pay Rs. 5 000 from the property of the original defendants, and a committee of 5 managers, including Nabi Bakhsh, one of the plaintiffs, was appointed. On the 15th January, the date fixed, the defendants submitted an application praying that a final decree should not be passed till the decision of their appeal from the preliminary decree. This was endorsed by a note that a final decree had been passed already on the 13th January. There is no explanation of the very unusual procedure of the lower Court in fixing the 15th January, and then disposing of the case two days earlier, and for this reason alone the final decree would have to be set aside.

The defendants have appealed against both decrees. The finding of the learned Sub-Judge on the Ist issue is based upon documents which have not been proved, and upon evidence recorded by his predecessor which does not appear to us to have been understood properly. There is no tangible proof of the existence of any previous mosque, and we must hold that Hamid Shah was the original founder of this religious institution. The learned Counsel for the plaintiffs-respondents does not dispute this conclusion.

The finding of the lower Court that the defendants were not owners of the shops is not challenged by the present appellants, and it is admitted that the whole premises are *wakf* property.

The question of mismanagement was not decided by the lower Court, but after examining the evidence we have no hesitation in holding that no mismanagement has been established. One of the plaintiffs' own witnesses, Din Mahomed, has admitted that the mosque is, and has been properly equipped with everything necessary. A criminal complaint made by Ghulam Mustafa Shah on the 24th February 1915 against Nabi Bakhsh and others has been put in by the plaintiffs and relied on by them. This complaint alleged that Nabi Bakhsh and others had interfered with repairs which were being carried out by the complainant at the mosque in question, and had declared that he would not allow the complainant to repair the place. If, therefore, there has been any neglect to carry out repairs the plaintiffs, or some of them, are responsible themselves.

Zulfikar Ali Shah is, we hold, the descendant of the founder, and he has first claim to be appointed manager. There is nothing to show that he is unfit. The two original defendants, admittedly, were *mutwallis*. There is no evidence that they were appointed by outside persons, and it is clear that they succeeded Hamid Shah, and that the *mutwalli-ship* has gone by descent. Zulfikar Ali Shah has now

succeeded as *mutwalli* and we see no reason why he should be removed.

There remains the question whether the plaintiffs have any right to call for accounts. As already stated, we hold that there has been no mismanagement, and it has been made clear in the evidence that Hamid Shah's disposition was that the income of the shops should be applied, in the first instance to the upkeep of the mosque, and that the residue, if any should be the remuneration of the *mutwalli*. There is nothing contrary to law in a trust of this nature. As pointed out in *Sayid Ismail Ali Khan* v. *Hamedi Begum* (1), the situation would have been entirely different had the dedication allowed the *mutwallis* to appropriate, in the first instance, whatever amount they pleased and obliged them only to apply the remainder, if any for the purposes of the mosque. In the present case, there is evidence that the late defendants have paid the *Imam* and have kept the mosque up on shop rents, which originally were not more than a few annas *per mensem*. There is also evidence, and it is a part of the plaintiffs' case, that the plaintiffs or their predecessors, some years ago, sunk a well for the use of worshippers at this mosque, either paying the costs themselves, or collecting subscriptions for it. Had there been a surplus from the rents of the shops to which the mosque was entitled, there is no doubt that the cost or part of the cost of the well would have been claimed from the original defendants, and it is clear that this was not done. No good cause has been established for the defendants being ordered to furnish accounts.

We accept both appeals, and order that the plaintiffs' suit be dismissed. In view of the defendants' original pleading we order parties to bear their own costs in the 1st Court. The appellants will have their costs in this Court.

Appeals accepted.

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(1) [1921] 6 Pat. L. J. 218.

1924 LAHORE 461

BROADWAY AND FFORDE, JJ.

Munshi Ramand another—Defendands—Appellants.

v.

Radha Kishen (deceased) and others-Plaintiffs—Respondents.

S. A. No. 484 of 1920, Decided on 11th December 1923, from the Decree of D. J. Ferozepore, D/-10th November 1919.

C. P. Code, O. 22 R. 9-Distant residence of parties is not sufficient cause.

The mere fact that the parties lived in different districts and that their residences were about 200 miles distant one from the other, is not a sufficient reason for exousing delay in making the application after a period of over 3 years. [P. 461 C. 2]

Nand Lal,—for Appellans,

Lala Ram Ch and Manchanda' —for Respondents.

Broadway, J. —On the 26th November 1923 the appellants' counsel was given a fortnight's time within which to complete and refile an application made by him on behalf of his clients under Order 22, rules 4 and 9, Civil Procedure Code. The application has been refiled within the time allowed and a reference to it shows that Radha Kishen, respondent, died on the 16th June 1920, and his son, Ishar Dass, on the 6th January 1923. The appeal had, therefore, abated on the 20th October 1923 when the application under rule 9 Order 22, was filed. Dr. Nand Lal for the appellant-applicant contended that the affidavit filed by Munshi Ram appellant disclosed such cause for the delay in making this application as should be regarded "sufficient" within the meaning of section 5 of the Indian Limitation Act, and that, therefore, the abatement should be set aside. The cause alleged in the affidavit is that the parties lived in different districts and that their residences were about 200 miles distant one from the other. This fact does not appear to us to be a sufficient reason in itself for failing to make the application for a period of over 3 years, in one case and nearly 9 months in the other. It seems to us that the delay in this case

amounts to grave negligence on the part of the appellants who for so long a period failed to make any enquiries whatever, as to the whereabouts of the most important respondents in their appeal.

We, therefore, dismiss this application.

The appeal having abated against Radha Kishen and his son, must of necessity, be held to have abated in its entirety inasmuch as the decree against the appellants was passed in favour of the plaintiffs in the case jointly. As the decree must stand so far as the deceased persons are concerned it is obvious that the appeal cannot proceed as against the remaining decree-holders.

The appeal therefore, is dismissed as having abated. The appellants, will pay respondents' costs.

Appeal dismissed.

1924 LAHORE 462

SCOTT-SMITH AND FFORDE, JJ.

Hindustan Assurance and *Mutual Benefit Society, Limited, Gujranwala*—Plaintiff—Appellant.

v.

Gurdit Singh and *another*—Defendants—Respondents.

S. A, No. 2235 of 1920, Decided on 14th November 1923, from the decree of the D. J. Gujranwala, D/- 17th July 1920.

(a) *Neg. Instr. Act., S. 118—Onus is on deft. to show that plff. is not a holder in due course.*

Under S. 118 it is a legal presumption that every negotiable instrument is made or drawn for consideration and that every transfer is also for consideration; further, that the holder of a negotiable instrument is a holder in due course. The onus is upon the person challenging the rights of the transferee to prove facts which would show that such transferee was not in fact a holder in due course. [P. 463 C 1]

(b) *Companies Act., S. 89—Manager can transfer a promissory note on behalf of the company.*

The ignorance of the Manager of the Bank of the terms of the Articles of Association does not affect his power to make a transfer of negotiable instruments. He is the agent of the Bank for performing all ordinary banking transactions, and a transfer of such an instrument is a very ordinary transaction. [P. 463 C. 2]

D. C. Ralli for *Bakshi Tek Chand*—for Appellant.

M. L. Puri for *Nand Lal* and *Gopal Chand*—for Respondents.

Fforde, J.—The plaintiff sues on the foot of a promissory note for Rs. 2,000/- bearing interest at the rate of 12 % per annum, made by the defendants Gurdit Singh and Nihal Chand in favour of the Empire Bank, Hafizabad, on the 30th June 1918 The plaintiff claims to be a holder in due course. The Court of first instance framed a number of issues on all of which it found in favour of the plaintiff Company and gave judgment for the Company for the sum of Rs. 3,160/-, being Rs. 1,997- principal and the balance interest.

On appeal to the lower appellate Court the District Judge reversed judgment of the Court below on a complete misapprehension of the law governing negotiable instrument of this kind. The defendants throughout appear to have based their defence on the contention that there was no valid consideration for the making of the promissory note. Unfortunately an issue was not framed in the Court of first instance as to whether or not the plaintiff was a holder in due course; but evidence was produced by the plaintiff which if belived would establish that the transfer of the promissory note to the plaintiff was for good consideration, the evidence consisting of the statement of Ganpat Rai, Manager of the Empire Bank, and the accounts produced from the custody of the liquidator. These accounts show that at the time of the transfer a sum of over R. 8,000/- was due by the transferor to the transferee and the item of Rs 1,997/- was debited to the plaintiff at the time of the transfer. It has nowhere been suggested that the circumstances surrounding the making of the promissory note were in any way tainted with fraud, still less has it been suggested that the plaintiff had any knowledge of any such fraud or of any other defect in the title of the payee of the promissory note. Under

S. 118, of the Negotiable Instruments Act, it is a legal presumption that every negotiable instrument is made or drawn for consideration and that every transfer is also for consideration; further, that the holder of a negotiable instrument is a holder in due course. The onus is, therefore, upon the person challenging the rights of the transferee to prove facts which would shew that such transferee was not in fact a holder in due course. The defendants have not attempted to produce any such evidence; nor have they attempted to rebut the evidence of Ganpat Rai supported by the accounts produced in Court. Their evidence having been produced subsequently they had every opportunity to do so. The mere fact that an issue on this point was not framed could not in the circumstances be held to prejudice the defendants. Apparently the learned District Judge did not consider the context of S. 43 of the Negotiable Instruments Act which provides that even though a negotiable instrument may be drawn without consideration if the payee has transferred that instrument to a holder for consideration such holder may recover the amount due on the instrument from the transferor or any prior party. Holder in due course is defined by S. 9 of the Act as any person who for consideration became the possessor of a primissory note, bill of exchange or cheque, if payable to bearer, or the payee or indorsee thereof, if payable to, or to the order of, a payee, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. As the onus lay upon the defendants under the provisions of S. 118 of the Act, to challenge the position of the plaintiff as "Holder in due course," it would have been necessary for them to show, in order to defeat the plaintiff's claim, that the plaintiff either received the promissory note without consideration or had sufficient cause to believe that there was a defect in the title of the Empire Bank to that instrument. As we have already pointed out, no such evidence has been attempted to be produced and the circumstances in our opinion show conclusively, that there was consideration for the transfer. Moreover, the circumstances in our opinion further show that there was perfectly valid consideration for the making of the primissory note in the first instance. The District Judge says, "It has not been proved whether any consideration was really due from the Empire Bank to the plaintiff, the Empire Bank having gone into liquidation." We must confess we do not quite understand the meaning of this somewhat cryptic sentence. There is clear unchallenged evidence of the transfer for adequate consideration of the promissory note from the Empire Bank to the plaintiff, which the Court appears to have completely ignored.

The Court below is under a further legal misapprehension in holding that a transfer of the instrument could not validly be made by the Manager of the Empire Bank. The reason he gives for this alleged disability is that the manager did not know whether under the rules of the association of the Empire Bank he could transfer promissory notes without special authority from the Bank and no Articles of Association were produced by the Plaintiff. The ignorance of the Manager of the Bank of the terms of the Articles of Association does not affect his power to make a transfer of negotiable instruments. He is the agent of the bank for performing all ordinary banking transactions, and a transfer of such an instrument is a very ordinary transaction. S. 89 of the Indian Companies Act (VII of 1913) expressly enacts that "a bill of exchange, *hundi* or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of the Company by any person acting under its authority, express or implied." It is of course absurd to suggest that the Manager of the Bank is not a person acting under such authority, when carrying out a transaction of this kind.

For the reasons that we have given we accept the appeal and setting aside the order of the lower appellate Court restore that of the Court of first instance with costs throughout.

Appeal allowed.

1924 LAHORE 464

ABDUL RAOOF AND MARTINEAU, JJ.

Arjan and others—Defendants—Appellants.

v

Hari Ram and others—Plaintiffs—Respondents.

F. A. No. 2455 of 1920, Decided on 29th January 1924, from the decree of Senior Sub. J., 1st Class, Sargodha, D/- 30th August 1920.

Hindu Law—Reversioner.

Where under the Hindu Law the daughter and her son are admittedly the next reversioners, and have given consent to the alienation, remote reversioners have no right to question it. [P 465 C 2]

Nand Lal and *A. R. Kapur*—for Appellants.

Mukand Lal Puri, *Nanak Chand*, *Jagan Nath* and *Amar Nath Chona*—for Respondents.

Abdul Raoof, J.—This was a suit for possession of land measuring 185½ *kanals* situate in *Mauza* Chaowal and 83 *kanals* situate in *Mauza* Hujjan under the following circumstances.

The land belonged to one Barkat, husband of *Mt.* Bhagan defendant No. 1, father of *Mt.* Ram Piari defendant No. 2, maternal grand father of Shiv Charan Lal minor defendant No. 3, brother of defendants Nos. 4, 5 and 6. and paternal uncle of Dewan Singh defendant No. 7. The said Barkat having died *Mt.* Bhagwan, his widow, a reversionary heir, came into possession of his estate and mutation was effected in her favour. On the 8th of February 1915, Arjan Das, defendant No. 4, filed a suit for the establishment of his right to succeed to the estate of the deceased Barkat on the allegation that the latter was a member of a joint Hindu family with his brothers and nephew and that the property had descended according to the rule of the survivorship. The suit was dismissed on the 28th of July, 1915 on the ground that Barkat deceased was separate from his brothers and that *Mt.* Bhagwan was his lawful heir and that after her death her daughter, defendant No.2, would have a right to succeed to the property. Defendants Nos. 5, 6 and 7 were parties to the said suit. A similar suit was brought subsequently by defendants Nos. 5, 6 and 7 for a similar relief on the allegation that the deceased Barkat was a member of a joint Hindu family and that defendant No. 1 had re-married. That suit was also dismissed on the same ground on which the first suit had been dismissed. Before the birth of defendant No. 3 (deceased's daughter's son) defendants Nos. 1 and 2 exchanged the land in question with an equal area of land from the plaintiff by a registered deed of exchange dated the 30th of August 1918. The mutation in respect of the land given by the plaintiff to defendants Nos. 1 and 2 in exchange was sanctioned in favour of the defendant No. 1 on the 23rd of August 1919 and she is shown to be in possession thereof. The land sued for, was not mutated in favour of the plaintiff owing to objections raised by defendants Nos, 4 to 7. This led to the institution of the suit for the recovery of possession of the land in dispute on the allegations above set forth. Defendant No. 2, and defendant No. 3, through his father and guardian admitted the claim; but the suit was resisted by defendants Nos. 4 to 7 mainly on the grounds on which they had preferred their claims on the death of Barkat. The plaintiff's suit was decreed. Hence this appeal by the defendants.

As many as 28 grounds have been taken in the memorandum of appeal. The main questions for decision on which alone Dr. Nand Lal has addressed arguments to us may be summarised as below :—

(1) That Barkat was a member of a joint Hindu family and the property came into the possession of the defendants by right of survivorship;

(2) That in any case the defendants have a right to question the exchange as reversioners of the deceased Barkat;

(3) That defendant No. 1 never obtained possession after the death of her husband and the defendants have been in possession of the property all along,

A feeble attempt was also made to contend that the parties were governed by custom and not by Hindu law; but the learned Counsel could not maintain this position in the face of the pleadings in this case and the allegations of the defendants themselves in their plaints in the previous suit. It is idle to contend that the parties are not governed by Hindu Law. Under the Hindu Law defendant No. 2 would be the next heir after defendant No. 1 and defendant No. 3 would come in as the next heir after his mother and would inherit the property as a full owner.

The evidence on the record on the question of separation is overwhelming. The defendants' suits were dismissed and it was found by the Court that they were separate from Barkat, vide Exs. P. 5 and P. 6. It is true that the land of the brothers was joint, but they were in separate enjoyment of their respective shares. In fact when Barkat's widow defendant No. 1, succeeded to the property she had to bring suits against defendant No. 4 for recovery of her share of the produce. Those suits were decreed, vide Exs. P. 9, P. 11 and P. 12. The *Patwari*'s report dated the 24th of May 1919 (Ex. P. 10) shows that all the cosharers were in joint possession of the land and that they paid the land revenue of their own shares. Exhibit P. 16 is the copy of a statement of defendant No. 4 dated the 1st of May 1920 to the effect that he was separate from Barkat and other brothers. Exs. P. 17 and P. 18 to 21 (extracts from the revenue papers) also establish *Mt.* Bhagan's separate possession. In the face of such overwhelming evidence no room is left for contention that Barkat was joint with his brothers and that his widow did not succeed.

As to the right of the appellants to contest the exchange it is enough to remark that they are not the next reversioners, as under the Hindu Law the daughter and her son are admittedly the next reversioners. These having given consent to the alienation the appellants as remote reversioners have no right to question it. If they had brought a suit for a declaration it would have been dismissed on the ground of remoteness, for they have very little chance of succeeding to the property.

The question No. 3 has already been discussed and the plea of adverse possession set up by the appellants is without any force.

There is no force in this appeal and we dismiss it with costs.

Appeal dismissed.

1924 LAHORE 465

SCOTT-SMITH AND FFORDE, JJ.

Mt. Basanti and another—Defendants—Appellants.

v.

Kabul Singh and others—Plaintiffs—Respondents.

S. A. No. 2285 of 1920, Decided on 19th November 1923, from the order of D. J., Ambala at Simla, D/-26th July 1920.

(a) Custom (Punjab) — Alienation — Gift by widow.

Reversioners are bound to prove affirmatively that their common ancestor occupied the land in suit where they sue for a declaration that the gift of the land by the widow of the last male owner to her daughter shall not effect their reversionary rights. [P 466 C 2]

Civil P. C. S. 100—Finding on mere conjectures can be upset in Second appeal.

A finding not based upon evidence but upon conjectures and presumptions is liable to be upset even in second appeal. [P 466 C 2]

M. L. Puri for *Bakshi Tek Chand*—for Appellants.

G. C. Narang—for Respondents.

Scott-Smith, J.— The plaintiff-respondents sued for a declaration that the gift of certain land, dated the 22nd July 1918, by *Mussammat* Sobhi, widow of Kaula, to her daughter *Mussammat* Bishni should not affect the reversionary rights of the plaintiffs. There were two points for decision (1) whether the plaintiffs were reversioners of Kaula; and (2) whether the

land was their ancestral property. The first Court dismissed the suit holding the plaintiffs had not proved that they were Kaula's reversioners, but it did not decide the question whether the land was ancestral or not. The learned District Judge decided both points in plaintiffs' favour and decreed their claim.

In second appeal by the defendants it is urged that the finding of the District Judge that the land is the plaintiffs' ancestral property is based upon no evidence. A finding of fact by a lower appellate Court if based upon evidence is no doubt binding upon this Court, but if it is not based upon any evidence it is not binding. The only evidence referred to by the learned District Judge in support of his findings is in the *kaifiyat deh* of 1888 when the proprietors of *Patti* Sudh Singh where the land in suit is situated, stated that Kuman, Sukhia and Dhuman were their ancestors, and that Dhuman's branch held one plough and Kuman and Sukhia half a plough each. Kaula is the descendant of Sukhia and the plaintiffs are the descendants of Kuman and Dhuman. These three, it has been held by the learned District Judge, are the sons of Shamira, and he appears to have considered that because these three brothers held the land in the *Patti* in the shares above stated, it must have descended to them from their father. The *kaifiyat deh* shows that Phanu was another proprietor in this *Patti* and that his share in the land was proportionate to two and a half ploughs. We do not see how it is legitimate from these facts to draw the inference that the father of Kuman, Sukhia and Dhuman must have held the land. In the case reported as *Jivan Singh* v. *Har Kaur* (1) the learned Judges said that the express mention of the common ancestor in the pedigree table was presumptive proof that the land had descended from him. But Shamira's name does not appear in the pedigree-table of the village and, therefore, even this amount of proof that the land descended from him is wanting. We have been referred to the case reported as *Bhagwan Das* v. *Shamsher Singh* (2) where it was held that a judgment based upon mere conjectures and presumptions was liable to be set aside even in second appeal. In that case on the death of an occupancy tenant his collaterals claimed to succeed to his tenancy, and it was held that the onus lay on them to establish affirmativel that their common ancestor occupied the land. Here also, it lay upon the plaintiffs to prove that their common ancestor Shamira occupied the land. Bahadur Singh, the father of Kaula, is shown in the Settlement record of 1852 as owning some land at that time, but no attempt has been made to show that he was in possession of the land now in suit. If this had been shown, it would have been a piece of evidence in favour of the plaintiffs' case. We hold that the mere fact that the ancestors of the plaintiffs and of Kaula were formerly in possession of the lands in this *Patti* is not sufficient on which to base a finding that their father was in possession of the land in suit.

We, therefore, accept the appeal and, setting aside the order of the lower appellate Court, restore the order of the first Court, and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

(1) [1914] 41 P. R. 1914.

(2) [1918] 33 P. L. R. 1918.

1924 LAHORE 466

MOTI SAGAR, J.

The Shop of Megh Raj-Tej Bhan—Defendant—Appellant.

v.

The Shop of Tulsi Ram-Devi Ditta Mal and others—Plaintiffs—Respondents.

Mis. F. A. No. 3100 of 1922, Decided on 14th January 1924, from the decree of Senior S. J. Jhang, D/-12th October 1922.

C. P. Code, O. 43 R. 1 (m)—Order refusing to record compromise followed by decree is appealable—C. P. Code O. 23 R. 3.

The mere fact that an order recording a compromise or refusing to record a compromise has been followed by a decree does not

deprive a party of his statutory right to prefer an appeal against such order 96 P. R. 1914 Reld. on. [P 468 C 1]

Nand Lal—for Appellant.

Ram Chand Manchinda—for Respondents.

Moti Sagar, J.—This was a suit for the recovery of Rs. 5,046-12-9, principal and interest, on the basis of a bahi account. The plaintiffs were Messrs. Tulsi Das-Devi Ditta Mal a firm of merchants carrying on business at Gojra in the Lyallpur District. The plaint was signed by one Kala Ram and another person Sawaya Ram, who are alleged to be two of the partners of the aforesaid firm. It is alleged and not denied by the defendants that the firm consisted of three partners, namely, Kala Ram, Sawaya Ram, and one Sakhir Chand, who, however, did not actually reside and carry on business at Gojra. On the 14th of June 1922 before the issues were framed the defendants made an application to the Court that the case had been compromised for Rs. 5,000 and that the plaintiffs had agreed to accept a house belonging to the defendants in full satisfaction of their claim. A deed of sale for Rs. 5,000 in respect of this house was executed in favour of the plaintiffs but not registered. It was prayed that the compromise be given effect to, and recorded under Order 23, rule 3, Civil Procedure Code. Kala Ram, who was really conducting the case on behalf of the plaintiffs and used to be present on all hearings, stated that the case had been compromised for Rs. 5,000 but denied that he had agreed to accept the defendants' house in full satisfaction of the claim. He alleged that the house had been agreed to be transferred to the plaintiffs for a sum of Rs. 3,000 and that it was agreed that the balance of Rs. 2,000 would be paid in cash. He further alleged that the sale-deed for Rs. 5,000 had been executed by the defendants without his knowledge and contrary to the wishes of the plaintiffs. On these pleadings the following issues were framed :—

1. Whether the case had been lawfully compromised under Order 23, rule 3, Civil Procedure Code. If so, what were the terms of the compromise ?

2. If there had been a compromise, how far it was binding upon the plaintiffs ?

Sawaya Ram, the second partner in plaintiffs' firm, was examined by the Court and stated that he had neither himself agreed nor authorised Kala Ram to enter into a compromise. It was therefore contended that the compromise was wholly unauthorised and not binding upon the plaintiffs. A large number of witnesses were examined on both sides, but their evidence was of a most inconclusive character. The trial Court found that the case had been compromised for Rs. 5,000 but did not come to a definite finding on the question as to what was to be the mode of payment. It, however, held that Kala Ram had not been authorised by the firm to enter into a compromise and that it was consequently not binding upon the plaintiffs. As a result of this finding it refused to record the compromise but all the same passed a decree for Rs. 5,000 against the defendants, holding that as all the parties agreed to a settlement having taken place for that sum, it would under the circumstances be "unnecessary and useless to re-open a settled point and to put the parties to the expense and worry of an endless litigation."

Against this decision the defendants have appealed to this Court and it has been urged on their behalf that the learned Senior Subordinate Judge was wrong in refusing to record the compromise and in holding that it was not binding upon the parties. It is further contended that in any case the Court was not justified in passing a decree for Rs. 5,000 against the defendants and that if the compromise was found not binding the defendants ought to have been given an opportunity to fight out their case on the merits.

A preliminary objection is taken by the respondents that as the order refusing to record the compromise has been followed by a decree, an appeal ought to have been filed on full court-fees against the decree and that the order refusing to record the

compromise, which has now been merged in the decree, is not appealable as an order. This contention, in my opinion, has no force and must be overruled. Under Order 23 rule 3, Civil Procedure Code, a Court is bound to record a compromise and to pass a decree in accordance therewith so far as it relates to the suit if it is proved to its satisfaction that a suit has been adjusted wholly or in part by a lawful agreement or compromise. Under Order 43, rule 1 (*m*), Civil Procedure Code, an appeal is competent from an order under rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. The mere fact that an order recording a compromise or refusing to record a compromise has been followed by a decree does not deprive a party of his statutory right to prefer an appeal against such order. In *Mohomed Rashid* v. *Rahmatullah* (1) a compromise had been arrived at between certain parties and a decree passed in accordance therewith. The defendants appealed to the Chief Court and it was held that the order of the Court below was one directing the compromise to be recorded within the terms of Order 23, rule 3 and an appeal against it was competent under clause (*m*) of Order 43, Rule 1, notwithstanding that the order directed at the time that a decree be passed in accordance with the compromise and that such a decree was accordingly passed. This authority, in my opinion, is exactly in point and I hold that the order passed by the learned Senior Subordinate Judge was one under Order 23, Rule 3, refusing to record the compromise and that an appeal lies from it under Order 43, Rule 1 (*m*). I overrule the preliminary objection.

On the merits I am unable to agree with the contention of the learned counsel for the appellant that the alleged compromise should have been given effect to, in its entirety. The burden of proving what the terms of the compromise were, was upon the defendants and after carefully going into the evidence produced I am of opinion that they have entirely failed to discharge it. All what is proved is that the parties agreed to settle the case for Rs. 5,000, but on the question relating to the mode of payment the evidence is most conflicting and I must therefore hold that the alleged compromise has not been established. In view of my finding that the terms of the alleged compromise have not been fully established, it is unnecessary to give a finding upon the second question, namely, as to whether it would or would not in law be binding upon the plaintiffs. I am, however, of opinion that the compromise not having been established, the Court was not justified in passing a decree for a sum of Rs. 5,000 against the defendants. The compromise should either have been accepted as a whole, or should have been rejected altogether. The defendants' allegation was that the plaintiffs had agreed to accept a conveyance of their house in full satisfaction of their claim. This not having been established, the parties should have been allowed to proceed with the suit in the ordinary manner. The learned Vakil for the respondents concedes that the procedure adopted by the learned Senior Subordinate Judge in this case was not in accordance with law. I accordingly accept the appeal and setting aside the decree remand the case to the Lower Appellate Court under Order 41, Rule 23, Civil Procedure Code, for trial and decision, in accordance with the law. No order as to costs.

Case remanded.

(1) [1914] 96 P. R. 1914—134 P. W. R. 1914—24 I. C. 630—212 P. L. R. 1914

1924 LAHORE 468

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Wazir Chand and others — Appellants.

v.

Nathu Ram and others — Respondents.

L. P. A. No. 10 of 1923, Decided on 4th October 1923 from the order of Broadway, J. D/- 5th December 1922.

(a) *Limitation Act. Arts. 134 and 148—Only bona fide transferee is protected under Art 134 otherwise Art. 148 applies — Lim. Act, Art. 148.*

Art. 134 applies only against a transferee with a *bona fide* belief at the time of the alienation while as against other tranferees a suit for redemption is governed by Art. 148. 9 Bom. 475, 15 Bom. 583, 45 I. C. 975, 68 I. C. 734 not Foll. [P. 469, C. 2]

(b) *Letters Patent (Lahore) cl. 10 — New plea involving new evidence is not permissible.*

A new plea that the suit is barred by Art. 144 cannot be permitted in appeal since its decision would involve a finding of fact whether the appellant's possession was adverse to the knowledge of the respondent. [P. 469, C. 2]

Sheo Narain—for Appellants.

M. L. Puri—for Respondents.

Le Rossignol, J.—The date of the mortgages with which these appeals are concerned is not a matter which can be re-opened in second appeal, and the sole point on which we have to come to a finding, is whether these suits to redeem are barred by Article 134 of Limitation Act.

The learned Judge in Chambers has held that the recital in the appellants' sale-deeds that their vendors' title reposed on a mortgage put them to inquiry, and they cannot be regarded as purchasers in good faith of an absolute title, such as their sale-deeds purported to convey.

Article 134 of the Limitation Act fixes a period of 12 years for a suit.

"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration."

Now if the Article alone were regarded, and the matter were *res integra* it would be hard to resist the conclusion that the transferee from a trustee and the transferee from a mortgagee are placed in the same position, and as, admittedly, the trustee's transferee comes within the shelter of the Article even in the absence of good faith, the mortgagee's transferee in spite of the knowledge of the defect in his absolute title would appear to be safe from attack from the mortgagor after the lapse of 12 years.

On the question whether Article 148 and Article 134 are in conflict, there has been some divergence among the High Courts, and for the appellants chief reliance is placed on two Madras rulings reported as *Muthaya Shetti* v. *Kanthappa Shetty* (1) and *Narayanasami* v. *Periasamy* (2), but an examination of these rulings reveals the fact that the point was dealt with *obiter* and in a very cursory manner, and the same is true of *Bhaiva Khan* v. *Bhiku Sazba* (3) and *Yeso Ramji* v. *Balkrishna* (4).

An examination of the other authorities cited at the Bar indicates that the almost universal view is that only a transferee with a *bona fide* belief at the time of the conveyance can claim the protection of Article 134 and that in other cases the suit to redeem against him is governed by Article 148. We bow to the weight of authority and reject the appellants' contentions.

Finally it is urged that the suit is barred by Article 144, but this is a new point, and its decision would involve a finding of fact, *viz.*, whether the appellants' possession was adverse to the knowledge of the respondents. It cannot be heard at this stage.

For these reasons, we dismiss the appeals with costs.

Appeals dismissed.

(1) [1918] 34 M.L.J. 431.
(2) [1922] 68 I.C. 734.
(3) [1885] 9 Bom. 475.
(4) [1891] 15 Bom. 583.

1924 LAHORE 469

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Nihal Singh —Defendant-Appellant.

v.

Narain Singh and another—Paintiff & Defend nt —Respondents.

L. P. A. No. 21 of 1923, Decided on 17th December 1923, against the Order of Broadway J. D/-6th December 1922.

(a) *Civil P. C., S. 11—Final decision.*

Where there is no express adjudication on a particular point there is no *res judicata*. [P. 470, C. 2]

(b) *Evidence Act, S. 115 — Strict construction.*

Estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel. [P. 470, C. 1]

Nand Lal and *Sagar Chand* — for Appellant.

Jagan Nath—for Respondents.

Le Rossignol, J.—The plaintiff respondents' suit is for a declaration that a gift of land by Mussammat Gujri in favour of Nihal Singh shall not affect his reversionary rights.

The plaintiff failed to prove his *locus standi* by evidence in this suit but it has been held that the matter is *res judicata* because in litigation in 1914 between plaintiff and Mussammat Gujri wherein plaintiff alleged that he was the brother of Mussammat Gujri's husband, the parties had compromised and plaintiff had been granted a decree for some land. The date of the gift to Nihal Singh is in dispute but, assuming that it was made after the compromise of 1914, we have to determine whether the relationship alleged by the plaintiff is *res judicata.*

Now, the proceedings of 1914 contain no clear admission of Mussammat Gujri that plaintiff was her husband's relative; all that she admitted was that plaintiff should have at once a fraction of the property in suit and should succeed her.

This admission so far as it goes creates an estoppel binding on Mussammat Gujri, but we doubt that it closes the mouth of her representative to deny that plaintiff is the brother-in-law of Mussammat Gujri.

The estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel.

Mussammat Gujri and her representatives cannot deny that plaintiff is entitled to the area surrendered to him in 1914, nor can they deny that he is entitled to take her succession when it opens out, but there was no adjudication on her express admission of the alleged relationship.

It cannot be asserted that there was of necessity an implied admission, for Mt, Gujri may have yielded out of weariness or fear.

For these reasons we think the point is not *res judicata* and accepting the appeal dismiss the suit with costs throughout.

Appeal allowed.

1924 LAHORE 470

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Sri Ram—Appellant.

v

Mt. Chando—Respondent.

L. P. A. No. 122 of 1923, Decided on 18th March 1924, from the Order of Moti Sagar, J., in Civl. App. No. 2545 of 1922, D/- 14th March 1923.

Civil P. C., S. 100—Finding based on wrong admission of evidence can be challenged.

A finding of fact can be challenged in second appeal, where the finding is vitiated by the fact that a document relied upon by the lower Court in support of its conclusion had not been proved according to the Evidence Act. [P. 470, C. 2]

Fakir Chand—for Appellant.

Shamair Chand—for Respondent.

Shadi Lal, C. J.—The question raised in this appeal under clause 10 of the Letters Patent is that the learned Judge, who heard the second appeal preferred by the plaintiff, was not satisfied in interfering with the finding arrived at by the District Judge, that the pro-note in favour of the plaintiff, was executed in 1911 and not in 1915. It is true that the finding was one of fact and could not be challenged in second appeal. We have however considered the matter fully and have reached the conclusion that the finding of the District Judge was vitiated by the fact that the entries in the school register, which were relied upon by him in support of his conclusion, had not been proved by any evidence such as is required by the Indian Evidence Act. If we exclude this documentary evidence from consideration, the rest of the evidence is wholly inconclusive and cannot support the contention of the defendant that the pro-note has been subsequently altered in order to bring the suit within limitation.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 471

MOTI SAGAR, J.

Nand Kishore and others—Petitioners.

v

Narain Singh and others—Respondents.

Civ. Rev. No. 367 of 1923, Decided on 22nd January 1924, from the order of D. J. Delhi, D/- 23rd February 1923.

(a) *Civil P. C., S 115—Other remedy being open revision will ordinarily be refused.*

Where an aggrieved party has the remedy of a suit open to it, the High Court will not interfere in revision though the lower Court's order is in exercise of a jurisdiction wrongly assumed. [P. 473 C. 1]

(b) *Bengal Regulation (XVII of 1806)—Scope.*

An order by the District Judge in a proceeding under Regulation XVII of 1806 rejecting the plea that the Regulation was not in force is revisable. [P. 471 C. 2 ; P. 472 C. 2]

Shamair Chand—for Petitioners.

Bakshi Tek Chand—for Respondents

Judgment.—This is an application for revision of a order passed by the District Judge of Delhi in a proceeding under Regulation XVII of 1806. The facts are briefly these :—

The petitioners, who are resident of Shahdara, own some landed property in the village Mandauli which was formerly a part of the United Provinces of Agra and Oudh. In 1920 they mortgaged this property to the respondent Sardar Narain Singh by way of conditional sale for a sum of Rs, 1,50,000/-. The mortgage not having been redeemed within the stipulated period Sardar Narain Singh applied to the District Judge for the issue of a notice for foreclosure under Regulation XVII of 1806. The notice having been served upon the petitioners they appeared before the District Judge and filed certain objections. Their main objection was that Regulation XVII of 1806 was not in force in the village Mandauli and that the issue of the foreclosure notice under that Regulation was, therefore, clearly illegal. Now, Delhi was constituted as a separate Province under Government Notification No. 911 dated the 17th of September 1912. In 1912 an Act called the Delhi Laws Act (XIII of 1912) was passed by which all laws and regulations in force in the Punjab were made applicable to that Province. In 1915 certain villages, in which the village of Mandauli was also included, were taken out of the Meerut District and added to the Delhi Province. By Act VII of 1915 the Delhi Laws Act of 1912 was extended in its entirety to this added area with this reservation, however, that certain enactments, which are specified in Schedule III to that Act, were ordered to remain in force, as before, in this new territory. One of the enactments specified in Schedule III was the Transfer of Property Act (1882). Now, S. 2 of the Transfer of Property Act provides that " in the territories to which this Act extends Regulation XVII of 1806 will not apply but shall be considered to have been wholly repealed." The petitioners' contention before the learned District Judge was that as the Transfer of Property Act still continued to be in force in the village Mandauli the Regulation aforesaid was not applicable and that consequently he had no jurisdiction to issue a notice of foreclosure The learned District Judge disallowed the objections, holding that the Regulation of 1806 and the Transfer of Property Act were both in force in Mandauli and that the procedure followed by the mortgagee was therefore, not illegal.

Against this decision the mortgagors have come up in revision to this Court, and it has been contended on their behalf that the order passed by the learned District Judge is wholly without jurisdiction and that his opinion that both the Regulation and the Transfer of Property Act are in force in the added territory is erroneous. A preliminary objection has been taken by *Bakhshi* Tek Chand that the revision is not competent inasmuch as the order, which is sought to be revised, has not been passed by the learned District Judge in his judicial capacity. It is further contended that it is not the practice of this Court to interfere in revision when another remedy is open to an aggrieved party. It is pointed out that the petitioners may challenge

the validity of the notice either in a suit for redemption or in a foreclosure suit which the mortgagee may bring against them after the year of grace has expired.

The first contention in my opinion has no force. It is true that the functions to be exercised under the Regulation are ministerial, and not judicial, but there can also be no doubt that the District Judge assumes judicial function when he proceeds to determine whether he has or has not the jurisdiction to issue a notice. In 119 P. R. 1892, the District Judge refused to issue a notice under Regulation XVII of 1806, holding that the mortgage-deed propounded was not a mortgage by conditional sale and therefore not within the scope of the Regulation. An application for the revision of this order was made in the Chief Court, and it was held, on the authority of 3 All. 576, that the order was open to revision. The learned Judges observed as follows while disposing of this question :—

" It would be anomalous if a mortgagee had no remedy where the District Judge had refused to act in accordance with law, as in the present case, without any apparent justification. The functions to be exercised under the Regulation are no doubt ministerial rather than judicial. But we consider that a District Judge assumes judicial functions when he proceeds to construe and interpret the document as mortgage by conditional sale, and that at least in such case his proceedings are open to revision if he declines jurisdiction on clearly erroneous grounds."

The facts of the present case in my opinion are in no way distinguishable from those of the case cited above. In the present case the learned District Judge instead of construing a document has construed a certain Act of the Legislature and the contention is that his proceedings are open to revision inasmuch as he has assumed jurisdiction on clearly erroneous grounds

In 107 P. R. 1890, the mortgagors tendered a certain sum of money to the District Judge as being all that was due on a mortgage made by their predecessor-in-title. Notice was issued by the District Judge to the representatives of the original mortgagee who appeared and contended that a much larger sum was due to them than that admitted by the martgagors. The District Judge summarily tried the question and ordered redemption on payment of the sum admitted by the mortgagors to be due to the mortgagees. An application for revision was filed against this order in the Chief Court on two grounds :—(1) under S. 2 of the Regulation I of 1798 the District Judge was competent to take action in the manner prescribed by the Act only when the mortgage was by way of conditional sale ; and (2) that he had no authority to enter upon questions of right that may be in dispute between the parties. The mortgage was admittedly not a mortgage by way of conditional sale but an ordinary mortgage with possession. The Chief Court entirely set aside the proceedings and held that the proper remedy for the mortgagor was by civil suit in the ordinary form for redemption of mortgage. It will be observed, that in this case the District Judge had assumed jurisdiction on clearly erroneous grounds, and though it was held that the functions of a District Judge acting under the Regulation were ministerial and not judicial yet the proceedings were set aside obviously on the ground that he had assumed jurisdiction which was not vested in him under law. I do not, therefore, think that there is any force in the first ground and I overrule it.

The next ground, however, appears to be fatal and must be upheld. It is admitted by Mr. Shamair Chand that suit for redemption certainly lies ; but it is urged that such a suit would cost a great deal of money which his clients are not in a position to afford. He further argues that if his clients were to wait till a suit is instituted against them by the mortgagee, the year of grace would expire and if in that suit the question of the validity of notice is decided against them their right of redemption would be gone and the property mortgaged which is of considerable value will be lost to them for ever. In my opinion, none of these reasons are sufficien

to induce me to depart from the ordinary rule that where an applicant has other remedies by way of suit or otherwise the intervention of the High Court under S. 115 of the Civil Procedure Code is not called for. It has been held in 37 I. C. 348, that where a Court's order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed, and where it is not shown how the party aggrieved will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. This case, in my opinion, is exactly in point, and I decline to interfere on the revision side.

The result is that the petition fails and is dismissed. I make no order as to costs.

Petition dismissed.

1924 LAHORE 473

ABDUL RAOOF AND CAMPBELL, JJ.

Gokal Chand — Defendant — Petitioner.

v.

Sanwal Das and others — Pre-emptors—Respondents.

Civil Mis. No. 730 of 1923, Decided on 25th February 1924.

Civil P. C, S. 110—Substantial question of law is one wherein there is difference of opinion.

The question whether the evidence produced to establish certain custom is sufficient though technically a question of law is not a substantial question of law justifying grant of certificate for appeal to Privy Council. A substantial question of law is one in respect of which there may be a difference of opinion. 43 All. 513. [P. 473 C. 2, P. 474 C. 1]

Shamair Chand—for Petitioner.

Sardha Ram—for Respondents.

A. Raoof, J.—This is an application under Order XLV, rule 2, and S. 109 and 110 of the C. P. Code for leave, to appeal to His Majesty in Council, and we are asked to grant a certificate to the effect that the case fulfills all the requirements of S. 110 of the Code and is fit for appeal to His Majesty in Council. The decree of the Lower Court decreeing the suit has been affirmed by this Court. The last paragraph of S. 110 provides that "where the decree or final order appealed from, affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law." We have, therefore, to see whether this requirement is fulfilled in the present case.

The suit was one for pre-emption, and was based on an alleged custom prevailing in the locality in which the property claimed was situated. The Lower Court held that the alleged custom of pre-emption existed in the entire city of Delhi. A large number of instances were cited affirming the alleged custom. The defendant vendee was not able to cite any single instance in which a claim for pre-emption was ever disallowed on the ground that a custom of pre-emption did not prevail in Delhi. This Court, after the examination of the evidence on the record, agreed with the Trial Court as to the effect of the evidence in support of the alleged custom and held that the custom set up had been established by overwhelming evidence.

Against this decision the petitioner proposes to appeal. On the face of it no substantial question of law arises. The proposed appeal really questions the finding of fact relating to the existence of custom; but it is contended by Mr. Shamair Chand, the learned counsel for the applicant, that the question whether the evidence produced to establish a certain custom is sufficient is a question of law. Technically it is so; but can it be said to be a substantial question of law? We are clearly of opinion that it cannot be said to be so. What is a substantial question of law has been often considered by the various High Courts in reference to such petitions. In a recent case (*Parshotam Saran* v. *Hargu Lal* (1), decided by a Division Bench of the Allahabad High Court the following opinion was expressed:—

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(1) [1921] 43 All. 513—63 I. C. 837—19 A. L. J. 462.

"In order to justify the grant of a certificate, for leave, to appeal to His Majesty in Council, the High Court must be satisfied that a substantial question of law is involved in the case; that is to say, a question of law in respect of which there may be a difference of opinion."

This gives an indication as to the nature of the question to be raised.

In our opinion no substantial question of law arises in this case. Accordingly we dismiss the application with costs.

Application dismissed.

1924 LAHORE 474

MOTI SAGAR, J.

Ram Gopal Bhagwan Das—Defendants—Petitioners.

v

Parmeshri Das — Plaintiff—Respondent.

Civil Revision No. 759 of 1923, Decided on 27th February 1924, from the order of Small Cause Court, Delhi, D/-27th August 1923.

(a) *Landlord and Tenant—Notice intimating that premises are vacated is good.*

The defendants-tenants gave a notice to the plaintiff and the other co-sharers in the property, that they had vacated the demised premises and that the owners should take possession of the same. It was further stated in that notice that they would not be liable to pay rent any longer if the owners did not take possession.

Held : that the notice was an absolute and an unqualified notice in terms and was therefore a good notice of relinquishment in law. (P 474 C 2 P 475C 1)

(b) *Landlord and Tenant—Tenant not liable if one co-sharer takes possession.*

Where, after the defendants left the premises at the unqualified disposal of the co-sharer landlords after giving due notice of relinquishment, one of the co-sharers allowed the other to take possession of the whole, the defendants, cannotin law be held responsible for his neglect, and are not liable for rent or damages.(P 475 C2)

Shamair Chand—for Petitioners.

Lala Sardha Ram, — for Respondent.

Moti Sagar, J.—This was a suit for the recovey of five months' rent in respect of a one-half share of a certain shop in bazar Khari Baoli, in the City of Delhi, alleged to have been occupied by the defendants as tenants of the plaintiff. The shop originally belonged to two sisters *Mst.* Ladho and *Mst.* Jaindo in equal shares, but it appears that the half share owned by *Mst.* Jaindo was sold in execution of a decree against her and purchased by the present plaintiff. It is alleged that the defendants executed a lease in favour of the plaintiff in respect of this half share after the same had been purchased by him in the execution proceedings but the lease has not been placed on the record and its execution is denied by the defendants. On the 7th June 1922, the defendants gave a notice to the plaintiff and to *Mst.* Ladho, the other co-sharer in the property, that they had vacated the dimised premises and that the owners should take possession of the same. It was further stated in that notice that they would not be liable to pay rent any longer if the owners did not take possession. It appears that after the receipt of the notice *Mst.* Ladho took possession of the whole of the property and gave it on rent to a third person to the exclusion of the plaintiff.

On the 24th October 1922 the plaintiff brought this suit for the recovery of five months' rent ending the 21st October 1922, alleging that the defendants having failed to deliver possession were still tenants in the eye of the law, and that they were liable to pay rent to the plaintiff till such time as the latter was not able to recover possession of the demised premises. The learned Judge of the Court below, was of opinion that the suit for rent was not competent in as much as a valid notice of relinquishment had been given by the defendants but that the latter were liable for damages. The suit having been decreed in full the defendants have now come up in revision to this Court, and the first question to be determined is whether the notice was or was not a sufficient notice of relinquishment. On this question the finding of the trial Judge as already observed, is in favour of the appellants, and this finding has not

been challenged in arguments by the learned *Vakil* for the respondent. There can be no doubt that the notice was an absolute and an unqualified notice in terms and was therefore a good notice of relinquishment in law.

The next question to be considered is whether possession of the demissed premises had been surrendered to the plaintiff. So far as the law upon this question is concerned there can be no doubt, that a tenant giving up the demised lands to his landlord is bound to give him vacant possession. It has been held in the well known case of *Henderson* v. *Squire* (1) that where there is no express stipulation to that effect made at the time of the letting of the land it will be implied as one of the terms of such letting. In the present case the contention of the petitioners is that so far as they are concerned they left the premises at the unqualified disposal of the landlords and that if one of them allowed the other to take possession of the whole, they, the defendants, cannot in law, be held responsible for his neglect. It is pointed out that the shop which is the subject-matter of dispute in the present case was really a single shop having two doors and that as partition had not been effected among the co-sharers it was impossible for the defendants to deliver separate possession. The learned Judge of the lower Court has appreciated the difficulty under which the defendants were labouring in this respect, but has held that the difficulty was not insurmountable inasmuch as joint possession could have been delivered and the co-sharers could have been required to attend at a specified hour on an appointed day to take over such possession from the defendants. I do not see how this course could have been adopted. If instead of two co-sharers there were a hundred or more co-sharers living in different parts of the world it would be impossible for a tenant to relinquish possession of the demised premises until all the co-sharers had received notice to the effect that they were required to attend at a specified hour to take over joint-possession. This course, in my opinion, would be most unreasonable and would result in subjecting the tenant to an altogether unnecessary hardship. The law only requires that vacant possession should be surrendered to the landlord. If there are more than one landlord and a partition has not been effected between them, possession on the part of one landlord would be tantamount to possession of all. It is not denied that *Mst.* Ladho is in possession of the whole of the property nor is it denied that the plaintiff is a co-sharer. In fact a suit for partition of the property has already been lodged by the plaintiff against *Mst.* Ladho and is now pending in the Court of the Subordinate Judge at Delhi. There can be no doubt that if *Mst.* Ladho has taken possession and is realizing the rent in respect of the whole of the property, the character of her possession is that of a co-sharer and she would be liable to the extent of one-half to the plaintiff. In my opinion, vacant possession of the demised premises having been delivered to one of the joint landlords and the notice being a sufficient notice of relinquishment the tenancy came to an end and the plaintiff had no cause of action to maintain a suit either for rent or for damages against the defendants.

I accept the revision and dismiss the plaintiff's suit with costs throughout.

Revision accepted.

(1) L.R. 4 Q. B. 170—10 B. & S. 183—38 L. J., Q. B. 73—19 L. T. 601—17 W. R. 519.

1924 LAHORE 475

ZAFAR ALI, J.

T. W. V. Elvers—Defendant—Petitioner.

v.

The American Motor Company, through Latif Ahmad — Plaintiffs—Respondents.

Civil Revision Petition No. 657 of 1922, Decided on 20th January 1923, from the decree of the Small Cause Court Judge, Rawalpindi Cantonment, D/-6th May 1922.

C. P. Code, O. 9 R. 13—Deft. residing more than 200 miles—Deft. himself his only witness—Examination on commission refused—Decree must be set aside—C. P. Code, O. 26 R. 4.

Where deft. was residing in a Native State more than 200 miles from the Court trying the suit and there was no other evidence on his behalf and his examination as his own witness on commission was refused and an *ex parte* decree was passed against him.

Held: that the *ex parte* decree must be set aside and the suit decided afresh after deft's examination on commission.

M. Obedulla for O'Connor—for Petitioner.

Sheikh Hassan Din—for Respondent.

Judgment.—This is a petition in revision by a defendant-judgment-debtor for an order to set aside an *ex parte* decree passed against him by the Judge of the Cantonment Small Cause Court, at Rawalpindi, on the ground (1) that he erred in refusing to examine him as his own witness and (2) that he had no jurisdiction to try the case.

(2) is not pressed before me, but as regards (1) the facts are as below.—

The defendant at the time of the trial of the case resided in Kishtwar in the Kashmir State, at a distance of more than 200 miles from Rawalpindi, and so his Counsel presented an application to the Court below to issue a commission to examine him at Kishtwar. This application was eventually rejceted and as the defendant could produce no evidence in defence, the suit was decreed. I am of opinion that, under the circumstances stated above, the lower Court was wrong in refusing to issue a commission for the examination of the defendant as his own witness. He had no other witness, nor could he be expected to come all the way from Kishtwar to defend the action personally, or to appear in the witness-box. Therefore, I accept this petition, set aside the *ex parte* decree with the direction that the suit should be decided afresh after examining the defendant as his own witness. A commission must be issued for his examination as he does not reside within British India, and his place of residence is more than 200 miles by road from Rawalpindi. Parties to bear their own costs in this Court.

Petition accepted.

✱ 1924 LAHORE 476

BROADWAY AND ABDUL QUADIR, JJ.

Lachhman Das and another—Defendants—Appellants.

v

Jowahir Singh—Plaintiff — Respondent.

First Appeal No. 900 of 1918. Decided on 27th March 1922, from a decree of the Senior Sub-J. Lahore dated the 6th December 1917.

✱ *Contract Act, S. 65—Vendor unable to complete sale because of his defective title—Defect known to buyer—Buyer is entitled to refund of earnest money paid to vendor but not to interest thereon—Sp. Rel. Act S. 18* (d).

Where under an agreement for the sale of immoveable property the vendee pays to the vendor a sum of money as earnest money, and the vendor is subsequently found to be unable to convey a valid title because of the property being ancestral and there being a minor coparcener concerned in the property and the transaction falls through for this reason, the vendee though aware of the defect in the title of the vendor is entitled to refund of the earnest-money but is not entitled to claim interest or damages in lieu of interest on the earnest money. [P. 478, C. 1, 2; P. 479, C. 1]

Moti Sagar, and Prem Lal—for Appellants.

Tirath Ram—for Respondent.

Judgment.—The plaintiff in this case agreed to purchase certain landed property measuring 2,928 *kanals* and 5 *marlas* for Rs. 70,000 from the defendants Lachhman Das and Daya Ram, sons of Mathra Das. who are Khatris by caste, residing in the Lahore District.

The defendants presumably form a joint Hindu family along with a minor son of defendant No. 1.

The agreement to sell (marked as Exhibit P1) was executed by Lachhman Das and Daya Ram in favour of the plaintiff on the 8th April 1916. The defendants received Rs. 1,000 as earnest-money from the vendee, and about the payment of the remaining sale money it was agreed that Rs. 4.000 were to be paid about ten days later for house-hold necessity, and Rs. 55,000 were to be kept by the vendee with himself in trust for the vendors. Out of this sum, Rs. 16,500 were to be paid with interest to Aslam Khan, a previous mortgagee, other creditors were also to be paid by the vendee out of

this said sum, and it was agreed that the balance left after payment of debts was to be spent in purchasing and acquiring immoveable property and that the vendee was to make payments at the instance of the vendor from time to time for the purposes above indicated. It was further stipulated that, if the vendee refused to carry out the contract, he would not only forfeit Rs. 5,000 paid by him, but would also be liable to pay Rs. 5,000 as damages, and that similarly, the vendors would be liable to pay the same amount of damages, if they failed to perform their contract. The sale-deed was to be executed and registered within four months from the date of this agreement. Four months expired but the contract was not performed and the defendants, first of all, gave a notice on the 10th August 1916, to the plaintiff asking him to pay the money and to get the deed registered. The plaintiff replied to the notice that he was not expected to pay the money to the vendors, but was to pay according to the terms of the agreement to other persons to whom the money was owed by the vendors or from whom they would purchase any landed property. Several other letters and messages were exchanged between the parties in which each tried to blame the other for delaying the completion of the bargain and, eventually, on the 6th December 1916, the plaintiff filed a suit alleging that the defendants had refused to execute the sale-deed according to the conditions agreed upon, and giving additional reasons for his not desiring to purchase the land in question, because he had learnt that it was ancestral, that there was no lawful necessity for the sale, that defendant No. 1 had a son whose existence was not known to the plaintiff before, and that defendant No. 2 was a simpleton of unsound mind, and incapable of passing a valid title. He claimed a refund of Rs. 5.000 already paid by him and asked for Rs. 5,000 as damages *i. e.*, Rs. 10,000 in all. The defendants pleaded that they had not broken the contract in any way ; that the objections now raised by the plaintiff were futile because all these facts were within his knowledge when he entered into an agreement with the defendants. and that defendant No. 2 was not of unsound mind. They added that it was the plaintiff who had backed out of his promise, because he had no money and that he was not entitled either to the refund of the money paid by him or to any damages. They also urged that they had suffered considerable loss, because, on the strength of the arrangement they had made with the plaintiff, they had made some bargains with other people to purchase property, and those bargains had fallen through, because the plaintiff did not supply them with money. The Trial Court has found that defendant No. 2, though not insane, was not mentally fit to enter, into a contract. It has found that the plaintiff was aware of the facts that the land was ancestral and that the defendant No. 1 had a son and that he probably entered into the contract with his eyes open. It has been held, however, that, though the plaintiff is not entitled to any damages, because he knew the defects in the position of the vendors, yet he was within his rights in demanding that the vendors should give him a clear title to the land. The vendors not being in a position to do this, it has been decided that the plaintiff could repudiate the contract and get back, at least, the money he had paid to the vendors. A decree for Rs. 5.000 has therefore, been passed in favour of the plaintiff against the defendants and the parties left to bear their own costs. Against this decree the defendants have appealed to this Court, urging that no refund of money should have been allowed, while the plaintiff has filed cross-objections claiming interest on the sum of Rs. 5,000 decreed from the date, on which the sum was paid to the defendants, and asking for costs proportionate to the claim decreed. We have heard Mr Moti Sagar on behalf of the appellants and Lala Tirath Ram for the respondent as well as in support of the cross-objections.

Mr. Moti Sagar contends that it was the plaintiff who backed out of the contract on false pretexts. He relies on the findings of the Court below that the plaintiff knew very well that the property was ancestral, and that

defendant No. 1 had a minor son. He refers in this connection to the evidence of Mr. Dina Nath, Bar-at-law, among others, showing the plaintiffs' knowledge of these facts. As to the alleged unsoundness of mind of defendant No. 2 Mr. Moti Sagar argues, in the first place, that the said defendant, though somewhatsimple-minded, was quite capable of understanding the nature of the transaction which he had entered into. He adds that defendant No. 2 was present when the agreement was executed and put his thumb-mark on it and was again present when the receipt for the earnest-money was executed and the plaintiff had every opportunity of seeing and knowing all about him. He says that the defects pointed out subsequently by the plaintiff were not such as amounted to a defect in the titles of the defendants. Another argument advanced by him in the alternative, is that if it is held that the defendant No. 2 was of unsound mind then the contract entered into by him was void and there could be no suit on the basis of that contract. He refers to *Kamola Ram* v. *Kaura Khan* (1) as an authority for the view that a claim for refund of a sum advanced to some person of unsound mind must fail, because the contract with him was void under section 12, of the Contract Act.

Lala Tirath Ram, in reply to the above arguments, urges that his client did not know that the property was ancestral or that there was a minor son who could impugn any alienation by defendant No. 1, or that defendant No. 2 was of unsound mind and that, therefore, he was fully entitled to repudiate the contract when the above facts came to his knowledge. We must say, however, that we are not impressed by the arguments addressed to us by Lala Tirath Ram on this point, and we see no reason to disbelieve the evidence given by Mr. Dina Nath in this connection. We agree with the findings of the Court below, that the plaintiff was aware of the facts above alluded to, when he entered into the contract in dispute, though it is not unlikely that subsequently the latter, on changing his mind, decided not to run any risk. We agree also with the view that, in spite of these findings, he was entitled to a refund of what he had actually paid. Lala Tirath Ram has referred to a Full Bench decision of the Madras High Court in *Adikesavan Naidu* v. *Gurunatha Chetti* (2), where it has been held that the knowledge of the purchaser as to the defects of title in his vendor does not deprive him of his right to recover damages, and it also has been laid down that a manager of a joint Hindu family, who has agreed to sell immoveable property belonging to himself and the minor members of the family, is personally liable for failure to perform the contract when it is found that it is not binding on the minors. He argued that in the present case the vendor, Lachhman Das, as the eldest member of the family, was practically its manager and agreed to sell land in spite of the fact that he had a minor son who could object to an alienation by him, and a half-witted brother who was not in a position to pass any valid title to the vendee. It is argued, therefore, that the plaintiff was entitled to insist that the said vendor should be in a position to give him a valid title free from any defect, or should, at least, restore the *status quo* between the parties, by giving back the money actually received by him. He draws our attention to the facts that the conduct of the vendors was not in any way free from blame, because, while professing to be willing to execute the sale deed, they were asking for payment of the money to them instead of abiding by the condition expressly laid down in the agreement of the 8th of April 1910, that the money was to remain in trust with the vendee, for the purpose indicated in the agreement. It is urged that it was really on account of this breach on their part, one of the most important terms of the agreement, that the transaction remained incomplete. We think there is force in this argument

(1) [1912] 14 P.R. 1912- 15 I.C 404--117 P.W.R. 1912--149 P.L.R. 1912.

(2) [1917] 40 Mad. 338—32 M.L.J. 180—(1917) M.W.N. 171—39 I.C 358—5 L.W. 425—22 M.L.T 300.

Mr. Moti Sagar says that they did not demand payment of money to themselves till after the expiry of the four months within which the contract was to be completed, but this is not correct, as the notice given by the defendants to the plaintiff on the 10th August 1916 shows that the payment of money had been demanded by them on several occasions before, through Mr. Dina Nath. Moreover, it is noteworthy that, even in their written statement, they demand the payment of money by the plaintiff as a condition precedent to their executing the deed. We think that their conduct is not free from blame and, on equitable consideration, they have no right, in such circumstances to retain the money which was paid to them by the plaintiff. We hold that the Court below has rightly ordered them to refund the money and agreeing with that view, we dismiss that appeal.

We do not see any force in the cross objections, in which the plaintiff has demanded interest at 12 per cent. per annum on Rs. 5,000 and dismiss the cross-objections. We see no reason to interfere with the order of the learned Subordinate Judge with regard to costs and direct that in this Court as well the parties will bear their own costs, because both the appeal and the cross objections have failed.

Appeal and
Cross-objections dismissed.

✱ 1924 LAHORE 479

MARTINEAU, J.

Mt. Jamna Bai—Appellant.

v.

Gonda Ram—Respondent.

S. A. No. 786 of 1923, Decided on 13th October 1923, from the Decree of the Dt. J. Dera Ghazi Khan D/- 6th January 1923.

✱ *Hindu Law—Conversion.*

A co-parcener by conversion to an alien faith such as Mahomadanism ceases to be a co-parcener and separation is caused immediately on conversion. 9 Moo. I. A. 199 and 57 P. R. 1916 foll. [P. 479, C. 2]

Mukund Lal Puri—for Appellant.

Zafar Ullah Khan—for Respondent.

Judgment.—The plaintiff is the widow of one Sidhu Ram who underwent a sentence of imprisonment and died without returning home. The defendant was Sidhu Ram's brother, and they formerly constituted a joint Hindu family, but the defendant became a Muhammadan and the plaintiff in consequence brought the present suit to have her half share in the house partitioned off. The first Court passed a preliminary decree for partition, but the District Judge on appeal dismissed the suit, holding that the defendants' conversion to Islam did not effect a (P. 2 of the J. S.) partition of the co-parcenary property and that the defendant became the sole owner on his brother's death. The plaintiff has preferred a second appeal.

The learned District Judge has taken a wrong view of the law. 9 M. I. A. 199 their Lordships of the Privy Council held that a member of a Hindu family who had become a convert to Christianity became at once severed from the family. In Gour's Hindu Code, 2nd Edition, paragraph 143 (4) it is similarly laid down that the conversion of a co-parcener to an alien faith has the effect of separating the convert *ipso facto* from the co-parcenary. This principle is also stated in Mulla's Hindu Law, 2nd Edition, at page 280, and there is a ruling of the Chief Court, namely 57 P. R. 1916, to the same effect.

The defendant's conversion therefore effected a severance of the joint family and his learned counsel has not been able to support the view taken by the lower appellate Court. He contends that his client's conversion took place more than 12 years ago, and that he has been in adverse possession of the property since that time.

This contention is clearly unsustainable; for after the defendant's conversion, when he and his brother ceased to be co parceners, they held the property as tenants in common and the defendant's possession cannot be regarded as adverse.

The plaintiff is entitled to a decree. As pointed out by the first Court the house in suit is the only one available

for partition, for of the other two houses owned by the parties one is in the possession of a mortgagee and the other is in the possession of the plaintiff's mother-in-law, who has a right of residence.

I accept the appeal, reverse the decree of the lower appellate Court, and restore that of the first Court. The respondent will pay the appellant's costs throughout.

Appeal accepted.

1924 LAHORE 480

ZAFAR ALI, J.

Chhanga and another—Plaintiffs—Appellants.

v.

Jai Lal—Defendant —Respondent.

S. A. No. 1000 of 1923, Decided on 15th January 1924. from the decree of D. J. Karnal, D/- the 29th January 1923, affirming that of the Munsiff, Sonepat, Dt. Rohatak.

(a) *Hindu Law — Adoption does not divest estate already vested in the adopted son.*

The rule of Hindu Law or custom according to which an adopted son is deprived of right of inheritance in his natural family cannot apply where succession to the natural father's estate precedes the adoption, unless a contrary custom is proved. [P. 480 C. 2]

(b) *Hindu Law—Adoption of married orphan and only son is invalid.*

Obiter : The adoption of a married orphan who is the only son of his natural father is not valid according to Hindu Law. [P 480 C 2]

Mukand Lal Puri —for Appellants.

Shamair Chand —for the Respondent.

Judgment.—It can hardly be said that a question of law is involved in this second appeal and if there is a question of custom, the appeal is not competent as there is no certificate. The facts are few and simple and are briefly as below:—

The plaintiffs who are jat agriculturists are the surviving brothers of Hira the father of the defendant Jai Lal. On the death of Hira, Jai Lal his only son succeeded to his estate which was duly mutated in his name. Sometime after that Nihal a first cousin of Hira adopted Jai Lal as his son by a registered deed dated the 19th April 1917. Jai Lal's uncles the plaintiffs then moved the Revenue authorities for mutating his land in their names stating that he had lost his right to his natural father's inheritance in consequence of adoption by Nihal, but the mutation was refused. In the order refusing the mutation Jai Lal's reply to his uncles' claim was stated to be that he could give up Hira's land on succeeding to Nihal's estate which he had not so far done. Nihal died in 1921 and Jai Lal then succeeded to his estate. The plaintiffs brought this suit for possession of Hira's land on the old ground that Jai Lal had lost his right to succeed to it. But he had succeeded to it before the adoption and therefore there was no question of losing the right of succession. The real question was, whether by virtue of the adoption which took place subsequently to the succession he could be divested of the property which had already devolved upon him on the death of his natural father. The rule of Hindu Law or custom according to which an adopted son is deprived of the right of inheritance in his natural family cannot apply where succession to the natural father's estate precedes the adoption. The plaintiffs in order to succeed in their suit should have established a special custom by which the defendant was liable to be divested of the property that had devolved upon him before the adoption. On this point they examined only two witnesses either of whom had been adopted after the death of his natural father and deposed that he gave up the lands of his natural father on being adopted. This evidence coupled with Jai Lal's own statement before the Revenue Officer cited in the order of mutation has been considered, by the courts below, insufficient, to establish a general rule of custom and that finding cannot be interfered with. Further it may be remarked that the adoption of a married orphan who was the only son of his natural father was not valid according to Hindu Law.

The appeal fails and is dismissed with costs.

Appeal dismissed.

1924 LAHORE 481

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Khushi Muhammad and others—Convicts—Appellants.

v.

The Crown—Respondent.

Cr. A. No. 862 of 1923, Decided on 12th December 1923, from the order of S. J. Sialkot, D/- 19th July 1923.

Cr. P. Code, S. 164 — Failure to question accused whether his statement was voluntary, is fatal.

Where before recording the confession the Magistrate, although he stated that he was satisfied that the confessions were made voluntarily, failed to question the confessants whether they were making a voluntary statement.

Held : that provisions of S. 164 are not complied with and the confessions are therefore not admissible. 2 Lah. 325. Foll. [P. 482, C. 1]

J. L. Kapur and *M. L. Puri* — for Appellants.

The Public Prosecutor — for Respondent.

Le Rossignol, J.—On the night of the 27th December 1922 one Jan Muhammad of Begowala was called away about mid-night by a person alleging himself to be a *chaukidar* who stated that the *thanedar* wanted Jan Muhammad at Kotli Chanun. Thereupon Jan Muhammad wrapped himself up in his *khes* or plaid, followed him and he was not again seen alive. His brother Muhammad Din reported his disappearance to the police on the 2nd of January 1923 and the police made fruitless enquiries until on the 22nd January 1923 a human leg was found in the bed of the canal which runs at a short distance from the village. It is said that the leg was identified as one of Jan Muhammad's by the shape of the toes and nails. The next morning a human head was discovered a short distance, up-stream, of the spot where the leg had been found. The features were much distorted by decomposition but the lobule of the left ear was found to be torn and that circumstance permitted the relatives to identify the head as that of Jan Muhammad. Suspicion fell upon Khushi Muhammad, Nabi Bakhsh, and others by reason of the fact that they were inveterate enemies of the deceased, and the police enquiry concluded in the guilt of six persons four of whom were sent up for trial. The other two were tendered a pardon and have given evidence on behalf of the Crown. The result of the trial was that Khushi Muhammad, Allah Ditta son of Bhola and Jani, son of Qadar Bakhsh have been sentenced to death while Nabi Bakhsh has been acquitted. The convicts have appealed to this Court and the death-sentences are before us for confirmation.

The medical evidence shows that the head found in the canal was very much decomposed, but the tear of the lobule of the left ear was visible. The fact that one of Jan Muhammad's ears was torn was mentioned long before the discovery of the head, in the first report to the police and the head has been definitely identified by his relatives, including his widow, as that of Jan Muhammad ; that evidence, we see no reason to reject and we conclude that Jan Muhammad is no longer alive.

The evidence in the case is meagre. There was no satisfactory identification of the person who, personating a *chaukidar* called Jan Muhammad away from his house and the only evidence in the case is that dealing with the enmity which existed between Khushi Muhammad etc : and the deceased, the statements on oath of the approvers, the retracted confessions of the convicts, Allah Ditta and Jani, and the evidence that the dead man's *khes* was recovered on information supplied by Khushi Muhammad.

There is further the evidence of Najam-ud-Din Tahsildar to the effect that Khushi Muhammad produced a *toka*, showed him the scene of the murder and made certain damaging statements. For reasons to be stated later on, we do not think that evidence is relevant.

After a careful scrutiny of the statements of the approvers we see no reason to doubt that, although they display marks of elaboration which are inevitable in the circumstances and although the approvers award to themselves a comparatively insignificant part in the murder, the statements are in the main true.

It now remains to consider what material corroboration of the statements there is as against each of the convicts. The cases of Allah Ditta and Jani are identical. As against each of them the only corroboration is a confession made by them at the scene of the enquiry to the Tahsildar. Unfortunately before recording these confessions the Magistrate, although he stated that he was satisfied that the confessions were made voluntarily, failed to question the confessants whether they were making a voluntary statement. This defect might possibly have been made good by the Magistrate, when called as a witness before the Sessions Court, if he had stated on oath that he had questioned them and on consideration of their answers had come to the conclusion that their confessions were made voluntarily. Unfortunately, although reiterating the fact that he believed and was satisfied that the confessions were voluntary, he did not state that before recording their confessions he had questioned the confessants and had in this way reached the conclusion that their confessions were voluntarily made. The effect of this omission has been dealt with in 2 Lah. 325, and as the conditions set forth in S. 164. Criminal Procedure Code, were not satisfied, we must exclude these conclusions as irrelevant.

In the absence of any corrobarative evidence, following the well-known rule of practice, we hold that it would be unsafe to maintain the conviction of Allah Ditta and Jani upon the mere statements of the approvers. We accept their appeal and acquit them.

With regard to Khushi Muhammad there is some corroboration which though slender appears to us to be sound. There can be no doubt that bitter enmity had existed between him and the deceased for many a year and the approvers' story shows that Khushi Muhammad was the arch instigator of the plot. The damaging statements made by him to the Tahsildar are not relevant. Those statements were recorded by the Tahsildar but they were not recorded in accordance with the provisions of S. 164 of the Criminal Procedure Code and the Tahsildar himself states that Khushi Muhammad refused to make a formal confession unless he was first tendered a pardon. The statements made by Khushi Muhammad to the Tahsildar were reduced to writing by the officer, though in an informal manner, so that no question arises whether an oral statement to the Tahsildar which had not been recorded by that officer in writing would be relevant. The production by Khushi Muhammad of a *toka* is not a matter of any importance for a *toka* is an implement found in almost every agriculturist's house and the *toka* produced in the case bore no blood stains. Khushi Muhammad's information to the police was that the *khes* had been taken bv Jani convict. From Jani it was traced to the approver Karm Singh who took it to his brother in the Sheikhupura district and left it there. It was recovered from that brother's possession by the police. The *khes* has been identified as that of Jan Muhammad, which he wore on the night of his disappearance, by his widow Mt. Hussain Bibi who recognized her own stitch.

In our opinion this corroboration though slender is reliable and sufficient to justify us in maintaining the conviction. We accordingly dismiss the appeal of Khushi Muhammad, and confirm the sentence of death passed upon him.

Against the acquittal of Nabi Bakhsh, the brother of the deceased has put in a petition for revision but for reasons which will be patent from this judgment we refuse to interfere and dismiss that petition.

Appeal partly allowed.

1924 LAHORE 482

CAMPBELL, J.

Saadullah and others—Appellants.

v.

The Crown—Respondent.

Criminal App. No. 1093 of 1923, Decided on 22nd December 1923, from the order of Sessions J. Montgomery, D/- 30th August 1923.

Penal Code, S. 147—Evidence conflicting—No descrimination between parties is possible.

Where the evidence in a riot case was so conflicting and unsatisfactory that individua

responsibility for the death of one of the party could not be fixed upon any one and there was no reliable information available about the manner in which that death was caused but the evidence against both parties established clearly that they were guilty of rioting and neither side had been able to establish any justification for their attack upon the other.

Held: there were no grounds for discriminating between the two parties. [P. 484, C. 1 2,]

Nand Lal—for Appellants.

Sagar Chand—for Respondent.

Campbell, J.—This appeal is the outcome of a breach of the peace which occurred on the 16th July 1922 at Chak 37/14-L in the Montgomery District. The combatants were two parties of Muhammadan Jats, the Wehniwals and the Baghelas. On the Wehniwals' side Allu, Naman, Allia, Yara, Farid, Basara and Gahra were committed for trial before the Court of Sessions on charges under S. 302, 326, 148 and 149, Indian Penal Code. At the same time four Baghelas, Hasta, Saadulla, Agra and Ibrahim were similarly committed for trial on a charge under S. 147 Indian Penal Code. To the Wehniwals' party is alleged to have belonged another person Turez who is shown as absconding. Three Bhagelas are also said to be absconders — Bakha, Murad and Muhammad. The person whose death was the subject of the charges against the Wehniwals was Turez, Baghela.

In the trials before the Sessions Judge Hasta Baghela was acquitted Saadullah, Agra and Ibrahim Baghelas were found guilty under S. 147, Indian Penal Code. Allu and Farid Wehniwals were convicted under S. 302 and were sentenced to death. Farid was also convicted under S. 325. The remaining Wehniwals Naman, Yara, Allia, Basara and Gahra were convicted under S. 147 Indian Penal Code.

All these convictions were set aside by this Court on account of illegalities of procedure committed in the trials and new trials were ordered. The result of these has been that the Sessions Judge has now acquitted Farid and Allia Wehniwals altogether and has acquitted Allu and the remaining Wehniwals on all charges other than that under S. 147, holding that nothing had been proved beyond the occurrence of a riot in which the Baghelas were "on the whole" the aggressors. Allu, Naman Basara, Yara and Gahra have been convicted under S. 147 and have been sentenced each to one year's rigorous imprisonment and three Baghelas (for Hasta was not placed on his trial again) have again been convicted under S. 147 and have been sentenced each to two years' rigorous imprisonment.

These three Baghelas have appealed through their Advocate Dr. Nand Lal. They have also presented a revision application for enhancement of the sentences of the Wehniwals. The Wehniwals have not appealed but have been served with notice to show cause against enhancement.

The learned Sessions Judge has found the origin of the affair to be somewhat obscure. He has rejected the prosecution story against the Wehniwals that Turez was murdered in cold blood before the general battle took place and he has held that Turez's death was the result of injuries sustained in that battle. The cause of dispute appears to him to have been the love affairs of a certain *Kumhar* woman, named *Mt.* Bhago, who was first intimate with Farid Wehniwal then with Agra Baghela and finally with Allu Wehniwal. He has accepted evidence that the start of the affair was an exchange of abuse between Agra and Allu in connection with this woman. He has found that the fight took place in front of Allu's house and he has inferred from this that after the quarrel between Agra and Allu, Agra went way, collected armed supporters, and brought them to Allu's house. In regard to the weapons used, the learned Sessions Judge considered it not absolutely established that the fatal wound on the head of Turez was caused with a sharp weapon but he has noted the fact that Hasta is stated definitely by the medical witness to have been injured by an edged weapon and thus he appears to accept the Baghelas' assertion that the Wheniwals had at least one axe.

The injuries on the various survivors were the following:—

(1) Hasta Baghela — an incised wound on the right shoulder—grievous hurt.

(2) Agra Baghela—four contusions on the head and others on the thighs and the left forearm.

(3) Gahra Wehniwal—two contused wounds on the head, one on the shoulder one on the left forearm.

(4) Basara Wehniwal — two contused wounds on the head and two on the right forearm.

(5) Allu Wehniwal—two contused wounds on the head and three others on the arm.

(6) Yara Wehniwal—one contusion on the left hand.

(7) Allia Wehniwal—one contused wound on the head.

(8) Naman Wehniwal—an abrasion on the left arm.

The medical witness stated that the injuries on the persons of the Wehniwals were so slight that in his opinion they might have been self-inflicted or at least manufactured for the purposes of this case. This view has not been accepted by the learned Sessions Judge and I agree that on the evidence it must be held that the injuries were inflicted by the Baghelas.

Dr. Nand Lal, on behalf of Saadullah, Agra and Ibrahim, urges in the first place that the Sessions Judge was wrong in holding that Turez was not killed in a separate transaction and he argues that, if his clients as a consequence attempted to retaliate and inflicted on the murderers some slight injuries their action was justified. He also relies upon the Civil Surgeon's opinion of the nature of the injuries sustained by the Wehniwals, He does not deny that his three clients were concerned in what occurred.

I consider that the learned Sessions Judge was right in holding it not proved that Turez was murdered before the fight, in holding that the evidence was so conflicting and unsatisfactory that individual responsibility for Turez's death could not be fixed upon any one, and also in holding that there was no reliable information available about the manner in which that death was caused. The evidence on the other hand, against both parties establishes clearly that they were guilty of rioting and neither side has been able to establish any justification for their attack upon the other. I do not consider that there are any sufficient grounds proved for discriminating between the two parties. The plan shows that Allu's house is quite close to that of Agra and there is no safe basis for a surmise that the Baghelas were the aggressors in violence. The Wehniwals had certainly one weapon of the nature of an axe among them and they did more damage to their opponents than their opponents did to them.

Looking to the result of the riot it cannot be regarded otherwise than a serious one and I am not prepared to reduce the sentences of the Baghelas appellants. I dismiss their appeal, and for the reasons above stated I accept the revision application to the extent of enhancing the sentences under S. 147, Indian Penal Code, of Allu, Naman, Yara, Basara and Gahra to sentences of two years' rigorous imprisonment each.

Appeal dismissed.

1924 LAHORE 484

MOTI SAGAR, J.

Piroze Khan and others—Plaintiffs—Appellants.

v.

Kanhiya Ram — Defendant — Respondent.

S. A. No. 1424 of 1923, Decided on 22nd January 1924, from the decree of D. J. Dera Ghazi Khan, D/- 8th March 1923.

(a) *Limitation Act. S. 19—Admission after limitation is of no avail.*

Admission of mortgage by mortgagee in a suit for possession against mortgagors does not extend period of limitation for redemption when the admission was made after the 60 years had run out. [P. 485, C. 1]

(b) *Limitation Act. S. 20—Does not extend the period of redemption.*

S. 20 applies only to cases where the suit is for the recovery of a debt or legacy, and does not operate to enlarge the period allowed by law to the mortgagor to redeem his property. 26 A. 167; 37 P. R. 1883. Ref. [P. 485, C. 2]

(c) Limitation Act, S. 19—Acknowledgment must be signed.

Where a certain acknowledgment said to have been made at the time of the settlement by the predecessors in title of the defendant was relied on and it was contended that under S. 19 of the Limitation Act a fresh period of limitation arose from the date of that acknowledgment.

Held: the acknowledgment under S. 19 in order to be operative must be signed by the party against whom any particular right is claimed, and if there was no evidence to show that the alleged acknowledgment was ever signed by any of the predecessors in-title of the present defendant, it was not operative as such. [P 486 C 1]

Niaz Muhammad—for Appellants.

M. L. Puri—for Respondent.

Moti Sagar, J.—This appeal has arisen out of a suit for redemption of a mortgage alleged to have been effected by one Allah Dad, the predecessor-in-interest of the plaintiffs, in favour of one Wasawa Mal who is now represented by the present defendant. In the plaint the date of the mortgage was not mentioned, but the learned District Judge has found as a fact that the mortgage in question had been effected on the 7th of November 1818. He has also found that the plaintiffs have failed to establish that their right to redeem was subsisting. It is contended on behalf of the plaintiffs-appellants that in 1904 the predecessors-in-title of the defendant brought a suit against the present plaintiffs for possession of this land as mortgagees, and that it was admitted by them in their plaint that the mortgage was then subsisting. That suit was decreed in 1905 and the argument is that the existence of the mortgage having been admitted in that year the defendant is now estopped from denying its existence and fro n contendin ; that the plaintiffs have no right to redeem. It is clear that the suit was instituted more than 60 years after the mortgage had been effected, and the admission made in the plaint cannot, therefore, serve as a valid acknowledgment under S. 19 of the Indian Limitation Act. It is however, argued that the allegation made in the plaint amounts to an admission of the plaintiffs' rights and that the defendant is not entitled now to set up an adverse title. This argument, however, entirely loses sight of the fact that the defendant is not in any way denying the plaintiffs' title. He still admits that he is the mortgagee and that the plaintiffs are the mortgagors. His contention simply is that the plaintiffs' right to redeem, though they are undoubtedly the mortgagors, is not subsisting. I do not think that the admission made by the defendant's predecessors-in-title in 1905 of the existence of the mortgage can in any way improve the position of the plaintiffs so far as their right to redeem the property is concerned. It was for the plaintiffs to prove that they had a subsisting right of redemption at the date of suit, and they are not relieved of the burden by showing that the fact of mortgage was admitted by the predecessors-in-title of the present defendant when more than 80 years after the mortgage was effected had expired. In my opinion, there is no force in this contention and I must overrule it.

It was next contended that the mortgage having been admitted in 1905 the defendant is now estopped from contending that it would not be redeemed. I do not see how the doctrine of estoppel can apply to the facts of the present case. The admission made by the defendant in 1905 has not made the plaintiffs change their position in any way, and I am clearly of opinion that the defendant is not estopped from challenging the plaintiffs' right to redeem.

The next contention was that the mortgagee has been paying a certain share of the crops to the mortgagors as a kind of *malikana* called *lichh walwi* up to 1905 and that this brings the suit within limitation under S. 20 of the Indian Limitation Act. S. 20, however, applies only to cases where the suit is for the recovery of a debt or legacy, and does not operate to enlarge the period allowed by law to the mortgagor to redeem his property see *Anwar* v. *Husain Lalmir Khan* (1

(1) [1903] 26 All. 167—(1903) A. W. N. 223.

and *Khilanda Ram* v. *Jinda* (2).

Lastly a certain acknowledgment said to have been made at the time of the settlement of 1872 by the predecessors-in-title of the present defendant was relied on, and it was contended that under S. 19 of the Indian Limitation Act a fresh pericd of limitation arose from the date of that acknowledgment. The acknowledgment in order to be operative, however, must be signed by the party against whom any particular right is claimed. In the present case there is no evidence to show that the alleged acknowledgment, even if it did amount to an acknowledgment under S. 19, was ever signed by any of the predecessors-in-title of the present defendant. It appears from the Settlement Record of 1872 that Malkhain, son of Wasawa Mall, mortgagee, was alive at that time. He is, however, not a signatory to the statement alleged to have been made by the proprietors and the mortgagees on that occasion, and the alleged acknowledgment cannot, therefore, be held to be a valid acknowledgment in law so as to be binding upon the defendant.

There is no force in this appeal and I dismiss it with costs throughout.

Appeal dismissed.

(.) [1883] 37 P.R. 1883.

✱ 1924 LAHORE 486

MOTI SAGAR, J.

Ralya Singh — Defendant—Appellant.

v.

Tunia Mal—Plaintiff—Respondent.

Mis. C. A. No. 1522 of 1923, Decided on 29th January 1924.

✱ *Civil P. C., S. 144—Mesne profits and interest.*

On reversal of a money decree the judgment debtor is entitled to mesne profits for the period during which the decree holder auction purchaser remained in possession as also interest thereon, so also the commission paid to the auctioneer. [P. 487 C. 1]

Devi Dayal—for Appellant.

Nand La—for Respondent.

Moti Sagar, J.—This is an appeal from an order of the Senior Subordinate Judge of Ludhiana made on an application under S. 144 of the Civil Procedure Code. On the 29th of March 1917, the respondents obtained a decree from his Court for Rs. 5,705 against the present appellant. In execution of that decree the moveable and immoveable properties of the appellant were attached and put to sale. Some of the properties were purchased by the respondents while the rest were purchased by certain third parties. On an appeal by the appellant the decree was set aside by the High Court on the 4th February 1921, and the respondents' suit dismissed with costs throughout.

The appellant then made an application for restitution to the Court below under S. 144 of the Civil Procedure Code. The properties which were purchased by the respondents themselves were restored to the appellant, while in respect of the others, which had been purchased by third parties, the respondents stated that they had realised a sum of Rs. 2,320 by the sale thereof, and that they were prepared to refund it to the appellant. The money was accordingly deposited in Court and withdrawn, in due course by the present appellant. In the application out of which the present appeal has arisen it was stated by the appellant that the properties had been sold at much, below their proper value, on account of the illegal action of the respondents and that he was entitled to be fully recouped for the loss which he had, without any fault of his, sustained at their hands. The details of the loss claimed by the appellant are fully stated in the application, dated 4th of April 1921, made in the Court below, and it is not necessary that they should be recapitulated in this judgment.

A certain amount of oral evidence was produced in support of the contention that the value of the property was much more than what it had fetched at the time of the sale but this evidence has not been believed by the learned Senior Subordinate Judge and rejected on the ground that

the witnesses were biased and therefore not worthy of credit. I have carefully read this evidence and have no hesitation in holding that it is worthless and that the learned Senior Subordinate Judge was right in discarding it. I, however, do not see why the appellant should not have been allowed interest at a reasonable rate for the period during which the money realised by the sale of the properties remained in the hands of the respondents. A sum of Rs. 40 has been claimed on account of mesne profits for the houses which were purchased by the respondents themselves and subsequently restored to the appellant. No satisfactory reasons have been shown by the respondents for disallowing this item. The sum claimed is very reasonable and in my opinion, ought to have been allowed. Another item which, in my opinion, ought to have been allowed to the appellant is the commission which the respondents say was paid to the auctioneer on account of the sale of the properties and which of course was not included in the sum of Rs. 2,320 deposited by the latter for payment to the appellant. The property was sold at the instance of the respondents and on the decree having been set aside they were bound to restore the property to the appellant in its original condition. This of course was impossible on account of the property having been purchased by the third parties, but there is no reason why the actual price at which the properties were sold and which of course included also the commission paid to the auctioneer should not have been paid to the appellant. The contention of the learned Counsel for the respondent is that the fees paid to the auctioneer were not kept by his clients and that they have paid what was actually recovered. But, as already pointed out, it was on account of the illegal action of the respondent that the property was sold, and it is therefore only reasonable that they should pay the commission of the auctioneer out of their own pockets.

I accept the appeal and return the case to the Senior Subordinate Judge for fresh orders in the light of the observations above made. Parties shall bear their own costs throughout.

Appeal accepted.

1924 LAHORE 487

MOTI SAGAR, J.

Wisakhi Ram-Plaintiff-Appellant

v.

Alawal and another—Defendants—Respondents.

Mis. S. App. No. 1479 of 1923, Decided on 23rd January 1924.

Civil P. C, O. 41 R. 23—Order of remand under inherent power, is not appealable—Civil P, C. O. 43 R. 1 (u).

An order under the inherent power of the Court under S. 151 of the C. P. Code and not under O. 41 R. 23, is not appealable. (P. 487 C. 2

Nawal Kishore—for Appellant.

Shamair Chand—for Respondents.

Judgment.—This is an appeal from an order of remand made under section 151, Civil Procedure Code. A Preliminary objection is taken that no appeal lies from such an order and 43. I. C. page 959 and 58 I. C. page 900 are relied on in support of this objection. An appeal from an order of remand of course lies under Order 43, rule (1) (u), Civil Procedure Code, but the remand according to that rule must be under Order 41, rule 23, Civil Procedure Code. There is no appeal Provided in the Civil Procedure Code against an order made under the inherent power of the Court conferred by section 151, Civil Procedure Code, to remand a case for retrial. The preliminary objection prevails, and the appeal must therefore be dismissed with costs.

Next it is prayed that if no appeal lies, the petition of appeal may be treated as a petition for Revision. I am unable to accede to this prayer. The petitioner can impugn the validity of the order of remand when he comes up in second appeal to this Court against any decision which may subsequently be passed by the Lower Appellate Court on appeal from the decree of the Court of first instance, and there is ample authority for holding that when an aggrieved party has another remedy open, this Court will not interfere in revision.

Appeal dismissed.

1924 LAHORE 488

MARTINEAU, J.

Ganga Ram and another—Plaintiffs-Appellants.

v.

Sita Ram—Defendant—Respondent.

S. A. No. 1525 of 1923, Decided on 21st November 1923, from the order of Addl. D. J. Gurdaspur, D/- the 27th March 1923.

(a) *Easements Act, S. 13 (b)—Right of way is not continuous easement.*

S. 13 (b) relates to a continuous easement which a right of way is not.

(b) *Easements Act, S. 19—Does not apply where easement never existed.*

S. 19 lays down only that when the dominant heritage is transferred the easement passes to the transferee. But where no easement at all existed while the two tenements belonged to the same person, S. 19 does not apply. [P 489 C 1

(c) *Words and Phrases.*

The words in the sale deed "*mai jumala hakuk mutaallika har kism*" are not sufficient to convey the right of way.

(d) *Civil P. C., S. 100—Question of fact.*

A finding that no right of way was granted is a finding of fact.

(e) *Specific Relief Act, S. 54—Permissive use does not justify injunction.*

The mere fact of the defendant expressing his readiness to permit the use of the door whenever there was occasion does not entitle the plaintiffs to an injunction to restrain the defendant from preventing them from passing through the door. [P 489 C 2]

Badri Das and *Faqir Chand*—for Appellants.

Mukand Lal Puri—for Respondent.

Martineau, J.—In 1919 Dholan Das, the adopted father of the present defendant, sold a house (described as Nos. 1554 to 1558) to Behari Lal, who sold it to Ram Chand-Raja Ram, who in 1912 sold it to the plaintiffs. To the south of that house are shops belonging to the defendant, those on the east being separated from those on the west by a roofed passage (marked "P" in the plan) leading from the plaintiffs' house, and on the southern end of that passage there is a door (marked "D") which opens on to a private street belonging to the defendant. The plaintiffs sue for an injunction for the demolition of a building which the defendant has erected on the roof of the passage 'P', and also for an injunction to restrain the defendant from preventing them from passing through the door, 'D' into the street on the south.

The first Court found that the passage 'P' belonged to the plaintiffs, and granted an injunction for the demolition of the building erected on the roof, but dismissed the suit in regard to the door, finding that the plaintiffs had no right to pass through it into the street, which was the defendant's private property.

Both parties appealed, and the District Judge dismissed the claim for an injunction for the demolition of the building over the roof of the passage and also held that the plaintiffs were not entitled to an unrestricted use of the way through the door. But as the defendant had expressed his willingness to permit the use of the door whenever there was occasion he ordered that the defendant should not prevent the members of his community and other desirable persons occupying the house for *bona fide* purposes from using the doorway in good faith whenever there was need or occasion for it. The plaintiffs have preferred a second appeal and the defendant has lodged cross-objections.

The decision of the claim for an injunction for the demolition of the building over the roof of the passage depends upon the question whether the passage belongs to the plaintiffs or to the defendant. It would appear that the passage was sold by Behari Lal to Ram Chand-Rajaram, by the latter to the plaintiffs, but the important question is whether it had originally been sold to Behari Lal by Dholan Das in 1909, for if not, plaintiffs have acquired no title to it. It is argued for the appellants that the Lower Appellate Court has not given a clear finding on this point. But there appears to me to be no doubt that the finding was intended to be in the respondent's power. In the sale-deed executed by Dholan Das there was no mention of the passage or of the doorway, and only the defendant's shops were entered as the southern boundary of the house sold. The learned District Judge, after

mentioning this, and pointing out that the southern boundary was not properly described, whether the passage was sold or not, goes on to say "If the passage or the right of way had been sold then it should have been used sometime or other by the inmates of house No. 1554, but there is reliable evidence that it has remained closed and locked for several years past." Further on he says "Defendant has every right to build over the roofing of the passage for, in the absence of an express sale of the passage and its roofing, the implied grant of the right of way through the passage under the roofing could not prevent defendant from building over what has always belonged to him. Plaintiff therefore has no right to ask defendant to remove the structure built over the roofing. The Lower Court's finding on this point is obviously incorrect." From these passages of the judgment of the Lower Appellate Court, it seems clear that the Court's finding was, that the passage was not sold by Dholan Das. That finding cannot be disturbed in second appeal, and the result is that the plaintiffs are not entitled to an injunction for the demolition of the building over the roof.

As regards the claim to a right of way through the door what the Lower Appellate Court has found is that although the grant of a right of way through the door was in contemplation in 1909 the right was not in fact granted, and the plaintiff has therefore no right of way although he can use the passage for such purposes as storage to which the defendant has no objection. Mr. Badri Das has argued that the plaintiffs have a right of way because their house formerly belonged to the defendant's predecessor-in-title, Dholan Das, who used to pass through the door into the street. In this connection he relies on Ss. 13 (*b*) and 19 of the Easements Act, but neither of those sections has any application. (*a*) S. 13 (*b*) relates to a continuous easement, which a right of way is not, and (*b*) S. 19 lays down only that when the dominant heritage is transferred the easement passes to the transferee, whereas in the present case, no easement at all existed while the two tenements belonged to the same person, before the sale of one of them in 1909. It is also argued that (*c*) the words in the sale-deed *mai jumla hakuk mutaallika har kism* are sufficient to convey the right of way, but I do not agree with this contention and *Venkiah* v. *Krishnamoorthy* (1), which is cited in support of it, does not help the appellants. The Lower Appellate Court's (*d*) finding that no right of way was granted is a finding of fact, and cannot be challenged. The appeal therefore fails.

The cross-objections must succeed, as the mere fact of the defendant expressing his readiness to permit the use of the door whenever there is occasion does not entitle the plaintiffs to an injunction even in the modified form in which it has been given by the learned District Judge.

I dismiss the appeal with costs, and accepting the cross-objections I dismiss the suit with costs throughout.

Appeal dismissed
Cross-objections allowed.

(1) [1913] 38 Mad 141 — (1913) M.W.N. 317—13 M.L.T. 313—19 I.C. 80—24 M.L.J. 552.

1924 LAHORE 489

BROADWAY, J.

Dwarka Das and others—Accused—Petitioners.

v.

The Crown—Respondent.

Criminal Rev. No. 1560 of 1923, Decided on 20th November 1923, from Ss. J. Shahpur, D/- 25th August 1923.

(*a*) *Companies Act (VII of 1913) S. 134—Fine imposed on Company cannot be realised from Directors.*

An order directing the Directors individually to pay the fine imposed on the company is illegal.

(*b*) *Limitation Act, S. 5—If order is illegal delay should be excused.*

Where the order against which the application for revision is preferred is illegal, the delay which is excusable to a certain extent should not operate as a bar. [P 490 C 2]

M. L. Puri and *Hukam Chand* — for Petitioners.

Nemo—for Respondent.

Reference. — The accused on conviction by Pandit Lekh Raj Trikha, exercising the powers of a Magistrate of the 1st Class in the Shahpur District, were directed by order dated 7th July 1922 to pay rateable fine of Rs. 250 imposed on the Chabba Cotton Company Limited, Phularwan, whose Directors the accused were.

The proceedings are forwarded for revision on the following grounds.

Revision No. 8,42 and 43 of 1923 may be disposed of by one reference.

The facts shortly are, that M. Muhammad Abdullah a Clerk, joint Stock Companies' Office, Lahore, on behalf of the Crown prosecuted the Chabba Cotton Company, Limited, Phularwan and its five Directors, named Rai Surjan Das retired Executive Engineer (applicant in Revision No. 43), Bhagat Ishar Das and his son Bhagat Mukand Lal (applicants in Revision No. 42) and Lala Dwarka Das and Lala Diwan Chand (applicants in revision No. 8) under S. 134 of the Indian Companies' Act with the result that Company and Bhagat Mukand Lal were fined Rs. 250 each. Bhagat Mukand Lal appealed and his fine was remitted. The Magistrate issued warrants to realize the fine from the Company's estate but in vain. The Company owned a cotton factory at Phularwan which was sold to Sardar Kartar Singh at whose representation, dated 23rd April 1921 the Magistrate ordered on 7th July 1922 that the fine which had to be realized from the Company be rateably realized from the Directors. This order was passed *ex parte i.e.*, without issuing a notice to the Directors. Lala Dwarka Das, Bhagat Ishar Das, Bhagat Mukand Lal and Rai Surjan Das have paid the fine under protest and a warrant has been issued against Lala Diwan Chand.

The applicants urge that the order is illegal and *ultra vires*. The Public Prosecutor agrees but says that the applications by Bhagat Ishar Das and Rai Surjan Das have been unnecessarily delayed and should be thrown out for this reason. The facts are that Bhagat Ishar Das and Bhagat Mukand Lal on receipt of a warrant paid their fines under protest on 2nd April 1922, but without knowing anything what it was about. After this all the Directors moved Pandit Lekh Raj Trikha's successor Sardar Bishen Singh to have the order set aside but he rejected their application. Bhagat Ishar Das, Bhagat Mukand Lal and Rai Surjan Das appealed against the order and I held that no appeal lay. Hence the present applications for revision.

I am of opinion that as the order was illegal, the delay which is excusable to a certain extent should not operate as a bar. It is recommended, therefore that order dated 7th July 1922 directing that the fine of the Company be realized from the Directors be set aside.

Broadway, J.—For the reasons recorded in the order of reference I accept the recommendation of the learned Sessions Judge and set aside the order directing the Directors individually to pay the fine imposed on the Company. The property of the Company should be proceeded against if it is sought to recover the fines.

Revision accepted.

1924 LAHORE 490

MOTI SAGAR, J.

Firm Shiv Dayal Ram Ditta Mal—Appellants.

v.

Muhammed Khan and another—Respondents.

Civil App. No. 1664 of 1923, Decided on 23rd January 1924, from the order of D. J. Shahpur, D/- 11th April 1923.

Civil P. C., S. 145—Surety for appearance is liable personally for decree debt, if he undertakes and fails to produce judgment-debtor in Court on any day of hearing.

Where the surety for judgment-debtor had given an unconditional undertaking to the effect that he would produce the judgment-debtor in Court on all the hearings until the case was finally decided and in case of default to pay the decretal amount and in spite of it, failed to produce him on one of the dates of hearing.

Held : that the surety had become liable under S. 145 for payment of the decree debt which could be realised from his property.

[P. 491, C. 2 & P. 492, C. 1]

Mukand Lal Puri—for Appellants.

Zafarullah Khan—for Respondents.

Moti Sagar, J.—On the 14th of July 1922 the decree-holders obtained a warrant for the arrest of the judgment-debtor in execution of a money decree from the Court of the Senior Subordinate Judge at Sargodha. The case was fixed for a hearing for the 11th of August 1922. The judgment-debtor was arrested on the 15th of July and brought before the Senior Subordinate Judge on the same date. The respondent Mohammad Khan offered to stand surety and on his executing a surety bond, the judgment-debtor Sardar Khan was released. The surety was ordered by the Court to produce the judgment-debtor on the 11th of August and he was warned that if he failed to do so the decree would be executed against him. On the 11th of August both the surety as well as the judgment-debtor were present in Court and on the latter expressing an intention to apply to be declared an insolvent the case was adjourned to another hearing. No fresh security was taken from the judgment-debtor and there is nothing on the record to show that the surety was discharged. The judgment-debtor failed to appear on one or two hearings in the month of December 1922, and the decree-holders thereupon made an application to the Senior Subordinate Judge that the decree be realised by the attachment of the surety's property. This application was accepted and the surety was called upon to pay up the decretal amount.

An appeal was preferred against this order and the learned District Judge held that the surety was not liable for the following reasons:—

(1) That he had not stood surety under S. 55 (4) of the Civil Procedure Code and that, therefore, no attachment could be levied against him;

(2) That the only undertaking given by him was that he would produce the judgment-debtor on the 11th of August 1922 and that he did produce him on that date; and

(3) That Order 21, rule 40, sub-clause (3) of the Civil Procedure Code, under which the Senior Subordinate Judge had purported to pass the order in question, did not apply and that the order for the attachment of the surety's property was, therefore, illegal.

The learned District Judge was further of opinion that S. 145 of the Civil Procedure Code had no application and that the surety could not therefore be made liable under that section. The appeal was accordingly accepted and the surety was discharged.

The decree-holders have now come up in second appeal to this Court and it has been contended on their behalf that the learned District Judge has entirely overlooked the provisions of the surety bond under which the surety had given an unconditional undertaking to the effect that he would produce the judgment-debtor in Court on all the hearings until the case was finally decided. In my opinion this contention is well founded and must prevail. S 55 (4) and Order 21, rule 40, sub-clause (3) of the Civil Procedure Code have no application to this case, and the learned District Judge is entirely wrong in holding that the orders of the Senior Subordinate Judge were passed under any of the above two sections. A reference to the terms of the surety bond makes it clear that the surety had become liable under S. 145 of the Civil Procedure Code and I fail to understand how the learned District Judge has come to a contrary conclusion. The important words in the surety bond under which the surety became liable are to the following effect:—

"*Jo ke mukudma mundarja unwan men madyun bazaria warant griftar ho kar adalat men hazar kiya gaya ha aur madyun se zamanat hazri baqada zar-i-mutaliba talab hui hai lehaz main zaman ho kar ikrar karta hun k madyun ta faisla mukadama haza adalat hota rahega, agar madyun haer adalat men kisi kism ka kasur karega to main zaman baqadar zar-i-mutalib adalat men dakhal kar devega jis ka wasuli ka ikhtiar adalat ko mujh se wa jaidad har kism meri se hoga*".

These words clearly indicate that surety has undertaken a liability for the payment of the decretal amount in case the judgment debtor failed to appear in Court on any hearing till

the final decision of the case. Under S. 145; clause (c) of the Civil Procedure Code the liability can clearly be enforced against the surety and the amount due under the decree realized by the attachment of his property. The contention that the surety had undertaken to produce the judgment-debtor on the 11th of August only and that the orders passed by the Court on the 15th of July 1922 were also to the same effect has no force in face of the clear terms of the surety bond and must be overruled.

I accept the appeal and, setting aside the order of the learned District Judge, remand the case under Order 41, rule 23 of the Civil Procedure Code for decis on on the other points that may arise in the case Costs to abide the result.

Appeal accepted.

✱ 1924 LAHORE 492

MARTINEAU, J.

Mangat Ram—Plaintiff—Appellant.

v.

Siraj-ul-hasan and others — Defendants—Respondents.

S. A. No. 1988 of 1923, Decided on 7th February 1924.

✱ *Easement—Burial ground.*

An easement by which one person gets a right by prescription to bury the dead in land belonging to another is unknown to law.

[P. 493, C. 1]

Shamair Chand—for Appellant.

Ghulam Rasul—for Respondents.

Judgment.—In this case the plaintiffs, as members of the proprietary body of Karnal, sued for an injunction to restrain defendants 1 to 3 from burying their dead in a certain plot of land 4 Bighas 12 biswas in area, which the plaintiffs said was *Shamilat*, as well as for a mandatory injunction for the removal of dead bodies already buried there.

The defendants pleaded that they had been in possession of the land for a long time and had always been using it as a grave-yard.

The first Court found that the land belonged to the plaintiffs, that it was not a public graveyard and that the existing graves were not more than 10 years old. It granted an injunction forbidding defendants 1 to 3 to inter their dead in the land in future.

The District Judge on appeal found that the place had been used for burying purposes for probably about 20 years. He held that the plaintiffs had not proved any circumstances beyond bare ownership entitling them to an injunction and he accordingly dismissed the suit. The plaintiffs have presented a second appeal to this Court.

It is contended for the respondents that the lower appellate Court has given no finding on the question of the title to the land, but this is not correct. The learned District Judge clearly means to find that the land is Shamilat, and as the land is recorded as "*abadi deh*" there can be no doubt that it belongs to the whole of the proprietary body.

It is next urged for the respondents that they have been in adverse possession for more than 12 years, but this contention also I cannot agree with. The land is waste, and the owners have not been dispossessed merely because the defendants have been burying their dead there. At any rate the possession of the owners is not affected in respect of that portion of the land in which there are no graves.

Another argument advanced is, that the suit should have been brought within six years from the time when the defendants began using the land as a burial ground, and that not having been brought within that period it is time-barred. This argument has no force as the plaintiffs are not pressing their claim for an injunction for the removal of the bodies which have been buried in the disputed land. Their right to sue to restrain the defendants from burying bodies there in future is a continually recurring right, and this claim is not barred.

The reasons given by the learned District Judge for refusing an injunction are that the land is of no use to the owners and that the advantage to them in granting the injunction is out of all proportion to the distress

that it would inflict on the defendants. But there is a regular graveyard elsewhere, and when it has been found that the land in dispute is not a regular grave yard, that it has been used by the defendants for burying their dead for only about 20 years and that it belongs to the proprietary body of Karnal and not to the defendants, the fact that the latter would be distressed or annoyed at being forbidden to bury their dead there in future is immaterial. An injunction prohibiting them from doing what they have no right to do is not to be refused merely because it would distress them. The learned District Judge has remarked at the end of his judgment that if the case were remanded the defendants might be able to prove that they had used the land for burying purposes for more than the statutory period, but his view, that they could acquire by prescription a right to bury the dead in land belonging to other persons is not correct. In 66 I. C. 640, cited by counsel for the appellants, it was held that such an easement is unknown to the law.

The fact that the proprietors have no present use for the land is also not a reason for refusing an injunction. The land is just outside the town of Karnal, and it is impossible to say that the proprietors might not require it at some time for building or other purposes. At any rate, they are entitled to protect their rights, and to prevent persons to whom the land does not belong from using it as a grave yard, and they are not precluded from doing so, by the fact that they did not object to bodies being buried there, on previous occasions. To refuse an injunction in this case would be tantamount to extinguishing the owners' rights in the land, altogether.

I accordingly accept the appeal, reverse the decree of the lower appellate Court, and restore that of the first Court. Defendants 1 to 3 will pay the plaintiffs' costs in this Court and the lower appellate Court. Costs in the first Court will be paid as directed by that Court.

Appeal allowed.

1924 LAHORE 493

SCOTT-SMITH AND FFORDE, JJ.

Murli Das—Defendant—Appellant.

v.

Achut Das—Plaintiff—Respondent.

F. A. No. 702 of 1918, Decided on 22nd October 1923, from the decree of Senior Sub. J. Delhi, D/- 8th May 1918.

(1) *Evidence Act, S. 86 — Forwarding by Resident does not amount to certifying by him.*

Where copies of the statements of certain witnesses who were examined in a succession certificate case in a Court of a Native State were sought to be put in evidence in a Br. India Court under S. 33 of the Evidence Act.

Held: that (1) the mere fact that the Resident of the State forwarded the copies in due course is not equivalent to the certificate referred to in section 86. (2) When a certificate is required by law it cannot be dispensed with merely because it can be obtained at any time [P. 494, C. 1]

(2) *Succession Certificate Act, S. 25 Decisions under the Act are not* res judicata — *C. P. Code, S. 11*

No decision under the Act upon any question of right between any parties is a bar to the trial of the same question in any suit between the same parties. [P. 494, C. 2]

Sardha Ram—for Appellant.

Dev Raj Sawhney—for Respondent.

Scott Smith, J.—The dispute in the present appeal relates to succession to the incumbency of a temple in Delhi known as Baghichi Madho Das. The previous incumbent Man Das died on the 17th October 1912. The plaintiff-respondent claimed to succeed as the *chela* of Man Das, whereas the appellant, Murli Das, who took possession of the temple after the death of Man Das, denied that the plaintiff was the latter's *chela*, and said that he himself was entitled to succeed as the *gurbhai* of Man Das. It was not denied that Murli Das was the *gurbhai* of Man Das, but the Court below held that Achut Das, the plaintiff, was appointed by Man Das to be his *chela* and was, therefore, entitled to succeed. It accordingly decreed his claim, and Murli Das appeals. The Court below, in addition to deciding the point of fact, in favour of the plaintiff, held that the question whether he was a *chela* of Man Das was

res judicata on account of the decision of the Jaipur Court in his favour in a succession certificate case.

Upon the question of fact the lower Court has based its decision upon (1) the oral evidence of three Bindraban witnesses, Swami Gowardhan Das Rangacharia, Mahant Murli Das and Chhote Lal, printed at pages 28 to 30 of paper book (A); (2) copies of the statements of certain witnesses who were examined in the succession certificate case (some of these witnesses have died, and as regards the others the Court was of opinion that there was reasonable ground for holding that they could not be found within the meaning of S. 33 of the Evidence Act); and (3) a document (Exhibit P. 1) which was prepared and attested for the purpose of meeting the claim of Murli Das to a succession certificate in the Jaipur State. As regards the copies of the depositions of witnesses who were examined in the succession certificate case it was objected in the lower Court, and the objection has been strongly pressed before us, that they are not admissible in evidence as the certificate of the Resident as required by S. 86 of the Indian Evidence Act has not been given. In regard to this the Court says (page 52 of the judgment.) "As these copies have all been forwarded to this Court by and through him (Resident), I, therefore take it, that he has certified by his action in the matter that the manner in which the documents are certified is the manner commonly in use in the Jaipur State for the certification of copies of judicial records. In any case the point is a trifling one as the necessary certificate under S. 86 can always be obtained." We are unable to admit the correctness of this view. It appears that the copies were obtained by the plaintiff himself in the Jaipur State, and that he got them forwarded by the State officials along with the evidence taken on commission. The mere fact that the Resident forwarded the papers in due course, is not equivalent to the certificate referred to in S. 86. Further, we are unable to agree that, when a certificate is required by law it can be dispensed with merely because it can be obtained at any time. We, therefore, propose to exclude this evidence from our consideration.

[The judgment then dealt with evidence and holding that Man Das appointed plaintiff as *chela* continued as follows;—]

Having regard to our decision on the question of fact, it is unnecessary for us to decide whether the finding of the Jaipur Court in the succession certificate case operates as *res judicata*. The lower Court said it did so operate under S. 13 of the Civil Procedure Code, but it appears to us to have lost sight of S. 25 of the Succession Certificate Act of 1389 which lays down that no decision under this Act upon any question of right between any parties shall be held to bar the trial of the same question in any suit between the same parties.

The appeal fails and is dismissed with costs.

Appeal dismissed.

1924 LAHORE 494

ABDUL RAOOF AND CAMPBELL, JJ.

Tek Chand — Defendant — Appellant.

v.

Tara Chand and others — Plaintiff & Defendants—Rnspondents.

F. A. No. 1346 of 1919, Decided on 12th November 1923, from the decree of Sub. J., Lahore, D/- 22nd March 1919.

Court Fees Act, S. 17—Appeal by vendee from a decree in favour of pre-emptor on payment of Rs. 6800—Appellant asking for reversal of decree or for more money—Court fee to be paid on Rs. 6800.

Plaintiff sued for pre-emption in respect of the sale of house property sold for Rs. 10000. He alleged that the actual consideration was only Rs. 5100. The lower Court found that the market value of the house was Rs. 6800, and granted plaintiff a decree on payment thereof; the vendee appealed to the High Court and valued his appeal at Rs. 6800. He asked for restoration of the property or for an additional sum of Rs. 3200.

Held: that there being no "distinct subjects" within the meaning of S. 17 the appeal was correctly valued at the higher of the two alternative reliefs. [P, 495, C. 2]

Gullu Ram—for Appellant.

Tek Chand, Tirath Ram and *Kahan Chand*—for Respondents.

Campbell, J.—This judgment will dispose of two appeals Nos. 1283 and 1346 of 1919 against the decree of the Subordinate Judge, Lahore, in a suit for pre-emption.

A certain house in Said Mitha Bazar, Lahore City, belonged to a family of Sardars of Killa Jiwan Singh. It was partitioned about the year 1894 and the northern half fell to the house share of Rajindar Singh, who in 1914 sold it to Tara Chand. The southern half went in equal shares to Kehr Singh and Dhian Singh and is the subject of the present suit.

Tara Chand is the plaintiff. He asserted that the whole of the southern half has been sold by Kher Singh and Dhian Singh to Tek Chand ostensibly for Rs. 10,000 but really for Rs. 5,100 and that in the sale deed registered on 18th June 1918 it was falsely stated in order to defeat his right of pre-emption that a strip including every portion of the southern half which touches the northern half has been reserved by the vendors.

It is convenient to describe this strip as part B, the portion ostensibly sold according to the sale deed part A, and Tara Chand the pre-emptor's house as C.

Tara Chand claimed a right of pre-emption on the grounds both of dominance and contiguity. The vendors and vendee denied that B had been sold and pleaded that Tara Chand had no right of pre-emption in respect of A, because A neither touched his property nor was a servient tenement thereto.

The trial Court has held that part B was sold along with part A, that the plaintiff therefore was an owner of immoveable-property contiguous with the property sold and had a right to pre-empt, that Rs. 10,000 the ostensible price, was neither paid nor fixed in good faith, and that the market value was the price actually paid, *viz.*, Rs. 6,800. The plaintiff was granted a decree for possession on payment of this amount, there being eventually no contest about the existence in the locality of a custom of pre-emption.

Appeal No. 1283 is by the vendors contesting the decision that B was sold, and appeal No. 1346 is by the vendee contesting this point and also the findings as to non-payment of the ostensible price and market value.

We overruled a preliminary objection by Mr. Tek Chand, Advocate for the respondent, that the vendee's appeal is insufficiently stamped. The vendee has valued his appeal at Rs. 6,800, the figure at which the Court below has valued the property in suit and the suit itself which was originally valued by the plaintiff at Rs. 5,100. The vendee asks for a decree restoring that property to him or else requiring the successful pre-emptor to pay him an additional sum of Rs. 3,200. These are two alternative reliefs based on exactly the same cause of action and only one of them can be granted. They are not two distinct subjects within the meaning of S. 17 of the Court Fees Act and the correct fee is one calculated not on the aggregate of the two values but on the higher of the two. The fact that the appellant himself asserts the value of the property to be Rs. 10,000 does not affect the question.

[The judgment then dealt with the merits of the case and ultimately dismissed the appeal.]

Appeal dismissed.

1924 LAHORE 495

ABDUL RAOOF AND CAMPBELL, JJ.

Gokal Chand — Defendant—Appellant.

v.

Sanwal Das and others — Plaintiff and Defendants—Respondents.

F. A. No. 1893 of 1919 Decided on 12th November 1923, from the decree of Senior Sub. J., Delhi, D/- 25th August 1919.

(a) Pre-emption—Custom of, prevails in Delhi City.

It is settled beyond all doubts that in the Delhi City the custom of pre-emption prevails very generally in respect of sales of residential houses. [P. 496 C. 2]

(b) *Punjab Pre-emption Act, S. 5 (b)—For a house to be* Dharmasala, *there must be dedication.*

Where Sadhus were allowed to live in a house with owner's special permission and no dedication of the house was ever made though once contemplated and the house had been the subject of sales on several occasions.

Held: it was not a *Dharmasala* within S. 5 (b). [P. 497 C. 2]

Shamair Chand—for Appellant.

B. P. Khosla and *Mool Chand*—for Respondents.

Abdul Raoof, J.—This appeal has arisen out of a pre-emption suit brought by the plaintiff-respondent in respect of a house described as *diwankhana* situated in Mohalla Bhojpura, of Delhi City. The house was sold on 22nd September 1916 for Rs. 21,000. The plaintiff based his claim on the ground of contiguity and also on the ground of common stair-case and common entrance and alleged that the custom of pre-emption prevailed in the locality. The sale was made in favour of Gokal Chand as the manager of an institution known by the name of Sadh Margi Baradari. The said institution is admittedly unregistered and there are a number of persons who are its members. Under the direction of the Court the plaint was amended and in the place of Sadh Margi Baradari Institution the names of its members were placed upon the record. The suit was resisted on the following grounds:—

(1) that the plaintiff had no right of pre-emption in respect of the house in suit on any of the grounds mentioned in the plaint ;

(2) that the right of pre-emption did not exist in the *mohalla* or subdivision in which the property was situated ;

(3) that the house at the time of the sale being a *dharamsala* no right of pre-emption existed in respect thereof ; and

(4) that the suit was barred by time as the necessary defendants were added on the 20th December 1917, long after the period of limitation had expired.

Four issues were framed by the trial Court. The first related to the plaintiff's right of pre-emption, the second related to the question of custom, the third related to the nature of the property in dispute and the fourth raised the question of limitation. All these issues were found in favour of the plaintiff and the suit was decreed. Hence this appeal by the vendees.

No argument has been addressed to us by the learned counsel, Mr. Shamair Chand, on the first issue, namely, "whether the plaintiff has a right of pre-emption in respect of the property in suit." He has admitted the correctness of the finding of the learned Senior Subordinate Judge that the plaintiff has a right of pre-emption on the ground of contiguity. On the remaining issues a feeble argument has been addressed to us. It has been first contended that the right of pre-emption does not exist in the *mohalla* as it forms a defined subdivision of the city of Delhi and no evidence of special custom existing in that sub-division has been adduced on behalf of the plaintiff. It is admitted, however, that no evidence has been given on behalf of the defendants-appellants that the *mohalla* in which the house in dispute is situated is in fact a defined sub-division of the city. As found by the learned Senior Subordinate Judge there is ample documentary evidence to show that the custom of pre-emption prevails genarally in the city of Delhi. Over and above this there is a volume of decisions to be found reported in the Punjab Records in which it was held that the custom of pre-emption did prevail in the city of Delhi generally. Some of those decisions are mentioned in Appendix V at Page 459 of Ellis' Law of Pre-emption in the Punjab. In case of *Abdulla Beg* v. *Walaiti Begum* (1), the learned judges who decided the case made the following observations:—

(1) [1906] 120 P.R. 1906—55 P.L.R. 1907

"And we have in Mr. Clifford's judgment of 1886 no less than 60 instances in other parts of Delhi, and we have several rulings of this Court in which the existence of the right in various parts of Delhi was affirmed, and no instances have been produced by the defendant in which a claim to pre-emption has been successfully resisted. Under these circumstances, we think, without holding that *Kucha* Aqal Khan is a sub-division within the meaning of S. 6 of the Pre-emption Act, that the right of pre-emption does obtain in that locality and the plaintiff is entitled to possession, by pre-emption, of the house claimed."

This remark fully applies to the facts of the present case. In this case also not a single instance has been cited on behalf of the defendants in which a claim to pre-emption has been successfully resisted. In the case of *Nawal Kishore* v. *Amir Khan* (2) it was held that the custom of pre-emption prevailed generally in the Delhi City. Likewise in the case of *Bhagwanti* v. *Sohan Lal* (3) the learned judges held that it had been settled beyond all doubts that in the Delhi City the custom of pre-emption prevailed very generally in respect of sales of residential houses. It is not necessary to refer to all the cases bearing on the question. We are unhesitatingly of opinion that the custom of pre-emption relied upon by the plaintiff does exist.

The next contention put forward was that the house, the subject matter of the suit, being a *dharamsala* under S. 5 (*b*), Chapter II, of the Punjab Pre-emption Law, could not be the subject of the claim to pre-emption. The defendants produced a large number of witnesses to prove that the house had been used for a long time as a *dharamsala*, as *Sadhus* had been residing in it off and on, on various occasions. The evidence given by these witnesses has been read to us and we have observed that almost all the witnesses have stated that *Sadhus* were allowed to live in the house invariably after special permission granted for the purpose by the owners. As held by the learned Judge of the Court below, the house has been the subject of sales and mortgages on various occasions. This circumstance militates against the theory of dedication. Kishan Chand, who is said to have dedicated the house to religious and charitable purposes, has stated that his father had left Rs. 20,000 for the purchase of certain houses with a view to dedication for religious and charitable purposes and that this was purchased for these purposes but was never dedicated. He has further stated that the house had been utilised off and on by the *Sadhus* who came to Delhi. Beyond this there is no evidence on the record showing that there was ever any intention to create a *wakf*. We fully agree in the view of the evidence taken by the learned Senior Subordinate Judge on this question.

The only other point urged by the learned counsel was that of limitation; but he had to admit that the point raised by him was fully covered by the decision of a Division Bench in the case of *Moti* v. *Sayad Ahmad Shafi* (4). We accordingly overrule this contention also. The result is that the appeal fails and is dismissed with costs.

It has been brought to our notice that the pre-emption money deposited by the plaintiff in obedience to the decree of the lower Court had been allowed to be withdrawn by the plaintiff-respondent during the pendency of the appeal with liberty to re-deposit it after the decision thereof. We accordingly extend the period and allow the plaintiff-respondent to re-deposit the pre-emption money within three months from the date of our decree. On such payment being made, the defendants shall deliver possession of the property to the plaintiff and that if the purchase money is not so paid the suit shall stand dismissed with costs in favour of the defendants-vendees.

Appeal dismissed.

(2) [1906] 122 P.R. 1906—80 P.L.R 1907.

(3) [1908] 116 P.R. 1908.

(4) [1896] 29 P.R. 1896.

1924 LAHORE 498

SHADI LAL, C. J. AND FFORDE, J.

Nur Ali—Convict—Appellant.

v.

The Crown—Opposite party.

Criminal App. 911 of 1923, Decided on 7th February 1924, from the order of Ss. J. Multan, D/-2nd August 1923.

Evidence Act, S. 24—Extrajudicial confession may not contain exact words of accused, it is enough if it gives the substance and is also corroborated.

The duty of the Court before which an extra-judicial confession, not incorporated in a document, is relied upon is to scrutinise the whole of the material before it, and then to decide whether there is sufficient evidence to prove the confession. A mere general statement to the effect that the prisoner had confessed, is too uncertain a foundation to sustain a finding against him and the trial Court ought to ascertain as far as possible the very words spoken by an accused who is said to have confessed. There may however be cases in which the evidence gives the substance, though not the actual words of the statement made by the accused and if that evidence is reliable there is no rule of law which precludes the Court from holding, that the confession has been proved. 10 B. L. R. 322 Ref. [P. 499, C. 2]

Chaudhri Shahab-ud-din—for Appellant.

D. R. Sawhney—for the Crown.

Shadi Lal, C. J.—The appellant, Nur Ali, a boy aged about 14 years, had been convicted of the murder of *Mt.* Fatima, a girl of about 4 years age; and has been sentenced under S. 302, Indian Penal Code, to transportation for life. The prisoner is a resident of Pind Dadan Khan in the Jhelum District, and in the month of June 1923 he left his home in order to pay a visit to his mother's sister who resides in Bahawalpur State. On the way he stayed at Multan with his relative Niaz Ali and while there he paid visits to the house of the girl's father Karam Hussain, who is related to him by marriage.

Now, it is beyond dispute that on the afternoon of the 24th June *Mt.* Fatima disappeared from her father's house, and that in the evening when her father returned home from his shop he was informed by his wife that the girl had gone out to play at about 3-30 p. m. and had not come back. The father thereupon commenced a search for the girl, and at 10 p. m. he was informed by his apprentice Jamal that the latter had seen her at about 4 p. m. going outside the Park gate with the prisoner. The appellant was accordingly sent for and when questioned by his relative Niaz Ali he made a clean breast of the whole affair in the presence of Nur Muhammad, the father in-law of Karam Hussain, and stated that he and another person had thrown the girl into a canal known as the Wali Muhammad *Nala.* He also promised to point out the place where he had pushed the girl into the canal.

Upon receiving this information Karam Hussain sent his neighbour Karam Ali to the Police Station where he recorded a detailed report of the affair at 1-45 a. m. on that very night. It will be observed that this report mentions not only the fact that Jamal had seen the appellant taking the girl away, but also that he (the accused) had confessed the commission of the crime.

Before examining the arguments advanced on behalf of the appellant I must mention two other circumstances which have been relied upon by the learned Sessions Judge. On the afternoon of the 25th June the corpse of the girl was found in the canal but without the gold eardrops which she had been wearing on the preceding day, and this recovery is said to have been made in persuance of the information supplied by the accused. There is also evidence to the effect that on the 26th June he guided the investigating party to a uninhabited house belonging to one Bhawani Das which had a lay aperture in the door. The owner did not happen to possess the key of the lock of the door, and Sub-Inspector consequently broke the lock and opened the house. The prisoner then stepped inside and picked up a couple of eardrops lying on the floor at a distance of about a foot the from door. These ornaments have been identified to be the eardrops which the child was wearing on the after-noon on which she disappeared from her father's house.

There can be no doubt that *Mt.* Fatima was last seen alive in the company of the appellant, and that

the latter when examined by the Court, was unable to count for her disappearance. As stated above, Jamal informed her father at the earliest opportunity that he had seen her going with the accused, and this fact was prominently mentioned in the first Information Report. It is not suggested that Jamal was in any way hostile to the prisoner, and it cannot be seriously contended that he has invented a false story in order to implicate an innocent boy.

But the most important evidence against the appellant is the confession which he is alleged to have made on the night of the 24th June. The witness, Nur Muhammad, who testifies to this confession, is his relative by marriage, and there is no valid ground for holding that he is not telling the truth. It is true that Niaz Ali has not appeared as a witness for the prosecution, but his near relationship with the appellant made it difficult for him to depose against him. It is, however, significant that he was summoned for the defence but was not examined as a witness.

The confession was not reduced to writing, and it is urged that, as the witness Nur Muhammad has not reproduced the actual words uttered by the prisoner, his evidence can be treated as a mere statement of the conclusion at which he himself arrived from the answers which the accused gave to the questions put to him. Now, there can be little doubt that if the statement made by the witness presented merely the impression conveyed to his mind by what was said by the prisoner, it would be insufficient to prove the alleged confession. But I am not prepared to accede to the contention that in no case can an extra-judicial confession, not reduced to writing, be held to be proved unless the Court has before it the exact words used by the prisoner. In support of this contention our attention has been invited to the observations of Phear, J, in *Queen* v. *Soobjan* (1) which undoubtedly emphasised the necessity of proving the precise words alleged to have been spoken by an accused, but I do not think that the learned Judge intended to lay down any hard and fast rule. A perusal of the judgment shows that the learned Judge did not reject the evidence relating to confession on the ground that it did not reproduce the actual words used by the prisoner, but examined it and found it to be unreliable and inconclusive. The duty of the Court, before which an extra-judicial confession, not incorporated in a document, is relied upon, is to scrutinise the whole of the material before it, and then to decide whether there is sufficient evidence to prove the confession. As I have aleady said, a mere general statement to the effect that the prisoner had confessed is too uncertain a foundation to sustain a finding against him, and I consider that the trial Court ought to ascertain, as far as possible, the very words spoken by an accused who is said to have confessed. There may, however, be cases in which the evidence gives the substance, though not the actual words of the statement made by the accused, and if that evidence is reliable, there is no rule of law which precludes the Court from holding that the confession has been proved.

Now, what is the evidence in the present case? Nur Muhammed does not say merely that the appellant admitted his guilt, but he gives the substance of the latter's statement. He is positive that the accused, when questioned, stated that he, together with another person, had thrown the victim into the canal. The matter was simple enough, and there was no scope for any mistake or misapprehension. The testimony of the witness appears to me correctly to represent what the appellant said on the night in question, and I must, therefore, hold that it has been proved that he, either alone or with some other person whose identity has not been disclosed, pushed the child into the canal.

The medical evidence makes it clear that *Mt.* Fatima's death was due to drowning, and there is ample evidence that the corpse was recovered from the canal. It may be con

(1) 10 B.L.R. 322.

ceded that the appellant did not point out the exact spot where the body was found, but he was undoubtedly the person who first gave the information which led the relatives of the victim to search for the corpse in the canal. Further, there is ample evidence to show that on the afternoon of the 26th June he led the investigating party to the house from which the eardrops were recovered, and there is no valid reason to impeach the veracity of the witnesses or the genuineness of the discovery. It is contended that the eardrops are too large for a girl of four years of age, but the goldsmith Nazar Ali, who made the ornaments is positive that he made them for the girl and saw her wearing them.

The confession of the appellant corroborated as it is by the two discoveries mentioned above, and also by the fact that the victim was last seen alive in his company, leaves no doubt that he participated in the murder. The conviction is therefore, justified, and though the life sentence is unsuitable in the case of a young lad, the Court has no discretion in the matter. It is for the Local Government to take such action as they think fit.

The appeal is accordingly dismissed.

Fforde, J.— I agree. The statement of the accused taken in conjunction with the rest of the evidence establishes the guilt of the appellant beyond any doubt.

The evidence of Nur Muhammad to the effect that the appellant "had stated that he had thrown the girl into the canal," has been objected to by counsel for the defence on the ground that the witness has not given the exact words alleged to have been uttered. I cannot accept the proposition that a statement amounting to a confession of a crime can only be received in evidence if the actual words of the confession are proved. It is true that a general statement by a witness that an accused person admitted that he committed the offence for which he is being tried, should not be accepted. And I think, as a rule of caution, the Court should always require the witness to give the actual words uttered by the accused as nearly as the witness can recollect them. But the fact that a witness gives the statement in the third person instead of in the first person does not make the evidence inadmissible. As to the value which the Court will attach to the evidence of a statement given in this manner, that is another matter. The admissibility of the evidence in that particular form is one thing, its weight is another. When a witness cannot give a clear account of what the accused is alleged to have said, his testimony will have to be received with great caution and should receive little weight unless supported by other circumstances. In the present case the evidence as to the confession is precise, if not very detailed, and it is entitled to considerable weight when taken with the other incriminating circumstances, though taken by itself, it would not be sufficient to sustain the conviction.

Appeal dismissed.

1924 LAHORE 500

MOTI SAGAR, J.

Munshi—Defendant—Appellant.

v.

Ghanaya and others—Plaintiffs and efendants—Respondents.

F. A. No. 1122 of 1923, Decided on 31st January 1924, from the decree of S. J. Hoshiarpar, D/- 25th August 1922.

Custom (Punjab)—Alienation by widow—Daughter's marriage.

What is reasonable expenditure justifying an alienation by widow on the marriage of her daughter is to be determined by what would be reasonable if her husband were living if the circumstances of the estate remain the same. [P. 502 C. 1]

Fakir Chand—for Appellant.

Nand Lal—for Respondents.

Moti Sagar, J.—On the 25th of November 1921 Mt. Partapi, widow of one Bhola, mortgaged 30 *kanals* 5 *marlas* of land in village Sus in the Tahsil and District Hoshiarpur to one Munshi for a sum of Rs. 1,700. The

plaintiffs, who are the collaterals of *Mt.* Partapi's husband, thereupon brought this suit for a declaration that the alienation was without consideration and legal necessity and that it would not affect their reversionary interest. The consideration for the mortgage as recited in the deed was made up of the following items :—

	Rs.	a.	p.
(1) Due to prior mortgagees ...	510	0	0
(2) Expenses for registration ...	30	0	0
(3) Left in deposit with the mortgagee for defraying the marriage expenses of *Mt.* Kisri, the daughter of the mortgagor ...	1,160	0	0

The trial Court dismissed the suit holding that consideration and necessity had been fully establised. An appeal was preferred against the decision to the District Judge who was of opinion that a sum of Rs. 1,160 was not a reasonable amount of expenditure to incur on the marriage of a daughter and that half of that sum would have been quite sufficient for that purpose. No objection was raised by the plaintiffs with regard to the other items mentioned in the mortgage-deed, and it was consequently held that they had been raised for a necessary purpose. The appeal was accordingly accepted and a decree awarded to the plaintiffs for the declaration prayed for subject to their paying a sum of Rs. 1,120 to the defendant-mortgagee when succession opened out. The defendant-mortgagee has now come up in second appeal to this Court through Mr. Fakir Chand, and I have heard Dr. Nand Lal on behalf of the plaintiffs-respondents.

After hearing the learned Counsel on both sides I am of opinion that the learned District Judge was not justified in reducing the marriage expenses to one-half, and that the plaintiffs' suit ought to have been dismissed in its entirety. That the marriage of *Mt.* Partapi's daughter did in fact take place shortly after the mortgage-deed in question was executed cannot for a moment be doubted. It is also clear from the evidence that the whole of the sum of Rs. 1,160 was actually expended over the marriage of the girl and that the expenditure was personally supervised by the mortgagee with whom the money had been left in deposit. There is also evidence on the record to show that the prices of foodstuffs were very high at the time when the marriage was celebrated, and that an expenditure of Rs. 1,500 to Rs. 2,000 over the marriage of a daughter was not regarded as unreasonable for a person of *Mt.* Partapi's position and status in life. It had been argued that the fact that the money was applied to a necessary purpose was not sufficient to justify the loan, and that it ought to have been proved that there was not sufficient income available to meet legitimate expenses without charging the estate. In my opinion, there is more than ample evidence on the record to show that the income of the land was wholly insufficient to meet even the ordinary expenses of *Mt.* Partapi's husband when he was alive. The husband owned 123 *kanals* of land altogether in this village, out of which he mortgaged 14 *kanals* during his lifetime and which the widow subsequently redeemed by paying off a sum of Rs. 530 to the mortgagees. It is hardly likely that Bhola would have mortgaged this land if the income was sufficient to meet his legitimate expenses. The *patwari* was produced in evidence, and he has stated that the major portion of the land is *barani* and that, though it could be let at the rate of Rs. 4 or Rs. 5 per *kanal*, yet the income actually realized by the widow was not more than Rs. 100 or Rs. 120 a year. It is in evidence that the widow served a notice upon the plaintiffs that they should make arrangements for the marriage of her girl, and that she would be compelled to alienate the property if they declined to come to her aid. The plaintiffs admittedly did not pay any attention to this notice, and the widow was consequently obliged to raise money and to make such arrangements as she thought best under the circumstances. The learned District Judge is of opinion that it was absolutely unnecessary for the

widow to give any jewellery to her daughter or to expend any money in entertaining the guests who must have come to her house on the occasion of the marriage, and that the expenditure incurred was wholly unreasonable. This view is obviously incorrect. It is a well recognized custom that a daughter should be given some jewellery on the occasion of her marriage, and it is also necessary that the guests who come to the bride's house on that occasion should be properly feasted and entertained. As to what would be a reasonable expenditure by a widow the general rule laid down in *Gurdit Singh* v. *Mehr Sing* (1), is that what would be reasonable for a marriage if the husband were living would be reasonable on the part of the widow after death if the circumstances of the estate remained the same. Having regard to the amount of land possessed by the husband and to his social position in life, I do not think that an expenditure of Rs. 1,160 over the marriage of his only daughter was unreasonable.

The result is, that I accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

(1) [1884] 67 P. R. 1884.

✱ 1924 LAHORE 502

ZAFAR ALI, J.

Deshbandhu Gupta—Convict—Petitioner.

v

The Crown—Opposite Party.

Cr. Rev. No. 1984 of 1923, Decided on 14th January 1924, from the order of S. J. Delhi, D/- the 6th November 1923.

✱ *Penal Code, S. 153-A—Reminding Hindus of similar occurences in other places is no offence under the section.*

The fact that the article in a newspaper was not conductive to an improvement in the feelings of the two communities towards one another is no ground for conviction under S. 153-A because even if it was not, the prosecutin has to establish that it was published with intent to incite Hindus against Muhommadans or to stir up feelinge of hatred and enmity between the two communities. The act of recalling to the mind of the Hindus of a place, the painful experiences of people of their community in other places would naturally have the effect of enbittering their feelings against the alleged oppressors, but those who suffer have the right to complain, and if the complaint is made in a sober language and is free from exaggerations and incisive comments, it can lawfully be published, for the consideration of public officers and others concerned with a view to their taking necessary action to prevent a repetition of what had previously taken place. [P 503 C 2]

Badri Das—for Petitioner.

C. H, Carden Noad—for Opposite Party.

Judgment.—Having published in the Vernacular Daily newspaper the "Taj" of Delhi, dated the 4th of August 1923, an article on the subject of the Hindu-Muhammadan disturbances, which took place in those days at Panipat, the Petitioner who is the editor of that paper was prosecuted by order of the Local Government on acharge under S. 153-A and S. 505 (c) Indian Penal Code, on the grounds (1) that he attempted by means of that article to promote feelings of enmity and hatred between Hindus and Muhammadens, and (2) that he published it with intent to incite or that it was likely to incite the Hindus of Delhi to commit offences against the Muhammadens of that place. The case was tried by the learned District Magistrate of Delhi who found the petitioner guilty and sentenced him to simple imprisonment for one year. The learned Sessions Judge maintained the conviction and sentence and dismissed the appeal.

It was conceded by the learned District Magistrate that the statement of facts in the article in question was correct but he considered its tone and certain expressions and comments therein to be inflammatory and objectionable. The learned counsel for the petitioner contends, and that is his main contention, that the European Officers, who presided over the Courts below, could not appreciate the real report and the real motive and the meaning of the article as it was in vernacular and that it does not, if pro-

perly interpreted, suggest any such inferences as have been drawn therefrom by those officers. This contention would have necessitated a detailed examination of the article as there was no evidence on the record on this point with the exception of that afforded by the article itself, but it is not necessary to do so, as the learned Assistant Legal Remembrancer, who appears on behalf of the Crown contends that there is nothing in the article which might fall within the purview of the clause (c) of S. 505, Indian Penal Code. But in this connection it may be stated here that the learned Sessions Judge, who gave a synopsis of the article in his judgment, evidently misunderstood certain portions of it, and thus drew thereform an important but erroneous inference, and that it was on the basis of that inference alone, that it could be said that the writer of the article intended to work up the feelings of Hindus against Muhammadens. I refer to his summary of paragraphs 5 and 6 of the article which runs thus. "The mentality of the Hindus is then criticised, and they are upbraided for allowing the Muhammadans to interfere with their religion, to slaughter cows and to carry meat through their quarter."

Evidently it was by reference to the above that the learned Session Judge arrived at the conclusion that the Hindus were blamed for their pusillanimity. But neither the mentality of the Hindus was criticised anywhere, nor were they blamed for their pusillanimity. On the other hand the fact that they were peace loving and suffered tamely was mentioned approvingly.

It may further he noted in respect of the charge under S. 505, Indian Penal Code, that the learned District Magistrate found that the article did not incite the Hindus of Panipat against the Muhammadens of that place. Another point that may be noted here is, that the learned Sessions Judge took into consideration against the accused, which he ought not to have done, the fact that the article was not conductive to an improvement in the feelings of the two communities towards one another because even if it was not, the prosecution had to establish that it was published with intent to incite Hindus against Muhammadens or to stir up feelings of hatred and enmity between the two communities.

There can be no doubt that the act of recalling to the mind of Hindus of Delhi the painful experience of people of their community in other places would naturally have the effect of embittering their feelings against the alleged oppressors, but those who suffer have the right to complain, and if the complaint is made in a sober language and is free from exaggerations and incisive comment, it can lawfully be published, for the consideration of public officers and others concerned, with a view to their taking necessary action to prevent a repetition of what has previously taken place. The learned counsel for the crown could not point out anything in the article which could reasonably be condemned as objectionable. He took exception to a statement in the paragraph of the article "that the *Mullahs* were stirring up their co-religionists" on the ground that this amounted to declaring the leaders of Muhammadens as responsible for their wrongful acts. But *Mullahs* are not known to be the leaders in the Punjab. Moreover this allegation would not exite in any way the Hindus of Delhi against the Muhammadens. Next, he referred to the last sentence of the article which was rendered by the learned Sessions Judge into English as follows :—

"In the light of these events it is not correct to say that a rowdy element of our fellow countrymen is ready to make every place into a Multan or a Malabar."

This expression of apprehension from the rowdy element was quite natural. As the article complained of contains no such statement, expression, or comment, as may fall within the purview of S. 505 or S. 153-A, Indian Penal Code, the conviction and sentence cannot be up-

held, I therefore accept the petition, set aside the conviction, and sentence, and acquit the petitioner. As he is already on bail, he is discharged from his bail bond.

Petition allowed.

✱ 1924 LAHORE 504

MOTI SAGAR, J.

Paras Das and another—Plaintiffs—Petitioners.

v.

The East Indian Railway Company—Defendants—Respondents.

Civ. Rev. No. 838 of 1922, Decided on 25th May 1923, from the decree of the Judge, Small Cause Court, Delhi, D/-21st August 1922.

✱ *Railways Act, Ss. 77 and 140—Notice upon Traffic Managers not sufficient.*

Service of notice upon a subordinate of the Agent may be sufficient if it could be shown by evidence that the Agent had invested the subordinate with authority to receive service on his account.

Where there was no evidence that the Divisional Traffic Manager had been invested with any such authority by the Agent, but on the contrary he had the power to settle claims below Rs. 250 only when a valid notice under S. 77 had been served upon the Agent.

Held : that there was no ground for holding that the subordinate official was authorised by the Agent to receive notices on his behalf, and therefore notice upon the Divisional Traffic Manager was no notice to the Agent within the meaning of Ss. 77 and 140. 5 Lah. L. J. 3 Ref.

[P. 504 C. 2 P. 565 C. 1.]

Sardha Ram—for Petitioners.

Jagan Nath—for Respondents.

Judgment.—This is an application for revision of an order passed by the Judge of the Court of Small Causes at Delhi in a suit brought by the plaintiffs against the E. I. R. Coy: for compensation for loss of goods, and the sole question for determination before me is whether a valid notice under S. 77 of the Indian Railways Act had been given to the railway administration. It appears that on the 8th of March 1921 the plaintiff delivered two consignments of caps to the defendant company at Delhi for carriage to Jubbulpur. The consignments were lost in transit. The plaintiffs gave information to this effect to the Divisional Traffic Manager at Cawnpore and claimed damages. Correspondence went on between them for some time but with no appreciable result. After the expiry of six months the plaintiffs served a notice upon the Agent, and then brought a suit to recover damages which has given rise to this application for revision.

It is argued on behalf of the petitioners on the authority of *Mahadeva Aiyar* v. *South Indian Railway Co. Ltd.* (1) that the notice to the Divisional Traffic Manager, which was admittedly given within the prescribed period, was equivalent to notice to the Agent and that the learned Judge of the Court below has erred in holding otherwise. I am unable to agree with this contention and am of opinion that the judgment of the Lower Court is correct, S. 77 of the Indian Railways Act requires that a claim for compensation must be preferred in writing to the railway administration within six months from the date of the delivery of the goods to the railway, and S. 140 provides that in the case of a railway administered by a Company notice shall be served upon its Agent in India either by delivering of notice to the Agent or by leaving it at his office or by forwarding it by post in a pre-paid letter addressed to the Agent at his office and registered under part III of the Indian Post Office Act, 1866. It is nowhere provided that service upon a subordinate official is service upon the Agent. In the case of the *B. B. and C. I. Railway* v. *The Firm Manhohar Lal-Parwin Chand* (2) it was decided by a Bench of this Court that service upon a subordinate of the Agent may be sufficient if it could be shown by evidence that the Agent had invested the subordinate with authority to receive service on his account. In that present case there is no evidence the the Divisional Traffic Manager had been invested with any such authority

(1) 1922 Mad. 362—45 Mad. 135—14 M. L. W. 684—30 M. L. T. 112—42 M. L. J. 202— (1921) M. W. N. 878.

(2) 1923 Lah. 84—4 Lah. 46—5 L. L. J. 3—9 P. W. R. 1923.

by the Agent. On the contrary, it appears from the statement of the Divisional Traffic Manager that he had the power to settle claims below Rs. 250 only when a valid notice under S. 77 had been served upon the Agent. There is, therefore, no ground for holding that the subordinate official was authorised by the Agent to receive notices on his behalf. The case of *A. Mahadeva Ayyar* v. *The South Indian Railway Company* (1) on which reliance is placed by Mr. Sardha Ram is not in point and is no authority for holding that notice upon the Divisional Traffic Manager is notice to the Agent within the meaning of Ss. 77 and 140 of the Indian Railways Act. It was held in that case that the notice of claim under S. 7 must be served upon the Agent of the Railway, or upon any officer deputed by the Company or its Agent to receive such notice, and that it would be sufficient if the Agent had somehow knowledge of the claim within the specified time. As already pointed out, there is no evidence in this case that the Divisional Traffic Manager was deputed by the Agent to receive notices, or that the Agent otherwise had notice within the prescribed period.

The petition fails and is dismissed with costs.

Application dismissed.

1924 LAHORE 505

ABDUL RAOOF AND CAMPBELL, JJ.

Sher Khan and others—Defendants—Appellants.

v.

Muhammad Khan—Plaintiff — Respondent.

F. A. No. 1267 of 1919, Decided on 19th November 1923, from the decree of Senior Sub. J. Mianwali, D/- 26th July 1918.

(a) *Custom (Punjab)—Chandwand and Pagwand—Where common ancestor's property was divided as per Pagwand* (Per Capita) *same rule is presumed to continue—No rule of exclusion of half blood by whole blood is found to exist among* Awans *of Nammal.*

In the case of collateral succession, in a contest between the whole blood and the half blood, the Court may presume until the contrary is proved, that, when the property of the common ancestor was distributed *per capita* (*pagwand*), the whole blood and half blood succeed together. A person alleging a custom of exclusion of half blood by whole blood, must prove the same. In this case no such custom was held as proved among *Awans* of Nemmal of Mianwali district; it was also held in this case that the *Awans* of Nammal do not constitute a distinct sub-section of the *Awans* tribe following a custom of succession different from that obtaining among other *Awans*.

[P. 507 C. 1 & P. 509 C. 1, 3]

(b) *Mohamaden Law—Succession—Murderer cannot succeed to victim's property.*

It is contrary to public policy to allow a murderer to derive from his crime the benefit of succeeding to the property of his victim, even in respect of property which would have come to the hands of the victim but for his murder 74 P. R. 1900; 41 P. R. 1906; 1923 L. 293, 3 Lah. 103; 1932 L. 243, 3 Lah. 248 Ref.

[P. 510, C. 2]

Nand Lal, Lal Chand Mehra, Khazan Singh and *M. S. Bhagat*—for Appellants.

Mukand Lal Puri—for Respondent.

Campbell, J.—The following pedigree table (*vide* p. 506) is necessary for the proper understanding of the dispute which has resulted in this first appeal:—

On the death of Yaran, son of Fateh Khan, his estate passed to his mother Mt. Mehran. In her hands it was augmented by a portion of the estate of Ali Khan, and then she died. The Revenue Officer at mutation entered the defendants 1 to 3 as heirs of one-half of his estate, the plaintiff as heir of one-fourth, and his niece, Mt. Sis Bano, defendant 4, as heir of one-fourth.

The plaintiff has sued for possession of the whole (*a*) against defendants 1 to 3 on the ground that by custom of the family the whole blood excludes the half blood, and (*b*) against Sis Bono on the ground that she being a female, has no right by custom to succeed in his presence to a male collateral.

Defendants 1 to 3 based their defence on a denial of the custom set up by the plaintiff. Mt. Sis Bano based her's on the fact that the plaintiff by the verdict of a *jirga* in the year 1901 was found guilty of the murder of her brother. Attar Khan, and on certain judicial decisions which have refused to recognise the claim of a murderer

Mst. Fateh=
ATTAR
=*Mst.* Azim Bi
Burkhurda
Jahan
Sher Khan (Defdt. No. 1).
Nur Khan (Defdt. No. 2).
Dost Mohd. (Defdt. No. 3).
Suleman
Muhammad Yar
Muhnmmad Khan D. S. P.
Jahan Khan
Fateh Khan, D. S. P.
Mehr Khan
Sher Khan, plaintift.
Muhammad Khan.
Muhammad Khan
Attar Khan (murdered by plaintiff. 19th January 1901).
Mst. Sis Bano (defendant No. 4).
Khuda Yar, D. S. P.
Zaman
Nur Khan
Fateh Sher
Sultan Ahmad
Mst. Mulkani.
Mst. Satbharai=Ali Khan,
Mst. Mehrai.
Shah Nawaz=*Mst.* Bakht Bhari.
Allah Yar Khan
Mst. Mulkani
Fateh Khan=*Mst.* Mehram
Yaran (D. S. P. in 1896 or 1897).

to inherit the property of his victim and in particular on one reported as *Muhammad Khan* v. *Sis Bano* (1), where the Chief Court upheld the dismissal of a suit by Muhammad Khan, the plaintiff's son for possession of Attar Khan's estate.

The trial Court decided that the plaintiff had established the custom propounded by him, that Mt. Sis Bano, although she had been placed by executive authority in possession of Attar Khan's estate, was not his legal heir and was still less an heir of Yaran, and that the executive orders made in regard to Attar Khan's own estate after his death could not be applied to the situation subsequently created by the dying out of Fateh Khan's line. The plaintiff was given a decree and all the defendants have appealed.

The main question, and the only one of any difficulty, is whether by custom the estate of one of the defendants of Mt. Azim Bi is inherited exclusively by the remaining descendants. Admittedly when Attar died he was succeeded by his four sons in equal shares and the plaintiff does not deny that inheritance of sons to fathers is by *pagwand* and not by *chundavand*.

The general rule of custom is stated as follows in paragraph 26 of Rattigan's Digest of Customary Law and is amply supported by authority. "In the case of collateral succession, in a contest between the whole blood and the half blood, the Court may presume, until the contrary is proved, that, when the property of the common ancestor was distributed *per capita* (*pagvand*), the whole blood and half blood succeed together ; but where brothers of the whole blood subsequently form separate groups and so regulate succession among themselves as to alter the original rule of distribution the presumption will cease to operate."

The burden then of proving the rule of succession alleged by him lay on the plaintiff and this he does not contest. It may be said at once that there is no evidence of the respective descendants of Mt. Fateh and Mt. Azim Bi having formed themselves into separate distinct groups.

The oral evidence was conflicting and was, in our opinion, rightly regarded by the trial Court as valueless. It consists of two flatly contradictory accounts of the prevailing custom by two sets of witnesses each of which appears to be frankly partisan.

The lower Court held that the plaintiff had established his case by instances partly extracted from the revenue records by a local commissioner (the Naib Sadr Kanungo) and partly proved by documentary evidence.

The record contains an extract from the *riwaj-i-am* of 1908 but nothing from any previous *riwaj-i-am*. According to this extract *Sayads* and most *Pathan* tribes observe the rule that the full brother succeeds in preference to a half brother. Among Hindus and Bhangi Khel, Khatak and Isa Khel *Pathans* full brothers and half brothers succeed equally. *Jats* state that this is their rule, but instances of the full blood excluding the half blood have been quoted. Half the *Biloches* have alleged the one custom and half the other, and instances of both have been given. The *Awans* are also divided on the question, succession having taken place in both ways. Nine *Awan* instances were cited, four of them (all from Nammal, the village of the parties) being of succession by the whole blood only and five from other villages of succession by whole and half brothers equally.

Fourteen instances are dealt with by the lower Court in its judgment. Several of these admittedly show neither one thing nor the other. The rest we have examined in detail and they are as follows :—

(*a*) *The lower Court's No.* 3—This is the only instance occurring in the family of the parties. Ali Khan's estate (see pedigree-table) after the marriages or deaths of his widow and daughter went to his brother's widow. When she died there was a dispute regarding their rights of inheritance between Attar Khan on the one side and Mt. Mulkani, daughter of Alla

(1) [1906] 41 P.R. 1906—95 P.L.R. 1906.

Yar Khan, and Mt. Mehran, widow of Fateh Khan, on the other. The present plaintiff and defendants 1 to 3 joined and a compromise was eventually made by which the defendants 1 to 3 were given a share. The appellants rely strongly upon this instance and it cannot be ignored, as the learned Counsel for the plaintiff-respondent would have it, because it is the outcome of the adjustment of a suit. Had there been a definite and well-established family custom in favour of the whole blood, it is most unlikely that the descendants of Jahan would have had the effrontery to make any claim at all and still more unlikely that a claim, if made, would have been treated seriously.

(*b*) *No.* 6 *of the lower Court*—This is an instance against the plaintiff. The mutation proceeding is on the record and shows that on the death of Ali Khan, *Awan* of Nammal, his half brother, Mehr Khan, inherited equally with the two full brothers, Jahan Khan and Sardar Ali, the last named consenting to such an order being passed. The mutation order is dated 9th December 1915 and the instance is attacked by the plaintiff-respondent on the ground that it is recent and may be the subject of a suit hereafter by Jahan Khan, the other full brother. There is not much force in this objection.

(*c*) *No.* 7 *of the lower Court*—This instance, in our opinion, is inconclusive and should be disregarded.

(*d*) *No.* 8 *of the lower Court*—One of the four Nammal instances cited in the *riwaj-i-am*. It is deposed to by the local commissioner as having been found in the records. One Mehr Khan of Nammal had sons, Jahan Khan and Ahmad Khan by one wife and Muhammad Khan by another. Jahan Khan was succeeded by Ahmad Khan to the exclusion of Muhammad Khan. The mutation order has not been placed on the record and thus we have not got full information about the case, but so far as it goes it is a good instance in favour of the plaintiff's custom.

(*e*) *No.* 9 *of the lower Court.*—The local commissioner reported that a note on the *Shajra Nasb* of 1878 stated that one Daim was then in possession of the estate of his two whole brothers to the exclusion of his half brother. The local commissioner filed a copy of the pedigree-table, and this does not contain the alleged note. The instance, however, is mentioned in the judgment of the Divisional Judge in *Tura* v. *Muhammad* to which reference will be made presently.

(*f*) *No.* 10 *of the lower Court*—An instance of similar character to (*d*), reported by local commissioner but unsupported by a copy of mutation order which would explain exactly how and why the whole brothers obtained possession against the half brothers. It is thus another instance in favour of the plaintiff but not a complete one.

(*g*) *No.* 11 *of the lower Court, and the converse of* (*d*) *and* (*f*)—It is against the plaintiff, being a case where full and half brothers inherited equally, extracted by the local commissioner and reported without a copy of the mutation order.

(*h*) *No.* 12 *of the lower Court*–This instance is to some extent in the plaintiff's favour. It was a disputed inheritance between full and half brothers. The attesting officer ordered mutation in favour of all alike. The Collector in appeal directed the entry of the full brother as sole heir. There is no copy of the Collector's order on the record and thus we do not know the grounds on which it was passed. If the full brother was in possession it was the duty of the revenue authorities to enter him as his brother's successor without going into questions of title between him and his half brothers. On the other hand it does not appear that the half brothers took the matter any further and the mutation is of the year 1898. On the whole this is a doubtful instance although it is one of the four Nammal instances quoted in the *riwaj-i-am* and referred to above.

(*i*) *No.* 13 *of the lower Court*—This is a judicial instance in favour of the plaintiff. In the suit *Tura* v. *Muhammad* the issue was framed. "Do the *Awans* of Mianwali *Tahsil* follow *pagvand* or *Chundavand* rule?" On appeal it was held by the Divisional

Judge in a judgment dated 9th December 1897 that *pagvand* is the rule of the descent from father to sons but that half brothers do not inherit in the presence of real brothers. The decision was based upon paragraph 27 of the *riwaj-i-am* (of what year it is not stated) where the statement was made, according to the Divisional Judge that when there are full and half brothers and one dies he is succeeded by his full brother or brothers alone. This *dictum*, the Divisional Judge said, was supported in the *riwaj-i-am* by one instance and another instance was held by him to be proved in the suit, namely that of Daim mentioned above. It is extremely curious that no attempt has been made in the present case to prove the *riwaj-i-am* entry to whioh this judgment alludes. The learned trial Judge has remarked that the *riwaj-i-am* of 1878 "contains no clear provision on the point," but the record contains no copy of paragraph 27 of that *riwaj-i-am*. However, as a judicial instance, this a good one in favour of the plaintiff.

(*j*) *No.* 14 *of the lower Court*—Here one *Mussammat* Bhag Bhari was succeeded by her father's two full brothers to the exclusion of his half brothers. The mutation order is on record and the instance is in favour of the plaintiff's custom.

(*k*) The plaintiff relies upon yet another instance deposed to verbally by his witness Fateh Khan. It is not referred to by the trial Court. Fateh Shah and Fakir Shah were two full brothers and Rang Shah was their half brother. Fateh Shah alone inherited the property of Fakir Shah. This is the fourth Nammal instance mentioned in the *riwaj-i-am*, and we are not prepared to hold that the witness has invented it. But without corroboration, of whioh there is none, we are not disposed to believe his statement that Fateh Shah, etc., belonged to the same family as the parties to the suit,

All these instances are of *Awans* of Nammal. Nammal, it appears, is a large village with at least three outlying hamlets, Rikhi, Kalri and Dhibba. Put in a nutshell the situation is this. The *riwaj-i-am* proves that there is no universal tribal custom. The plaintiff asserted in his pleadings a special family custom. The one instance of inheritance proved in the family is against him. He subsequently proceeded on the assumption that the *Awans* of Nammal were a definite sub-division of the Mianwali *Awans* and proved among those *Awans* six instances, *viz.* (*d*), (*e*), (*f*), (*i*), (*j*) and (*k*) above (we are not prepared to admit any more) in support of the custom asserted by him. The defendants proved three to the contrary (*a*), (*b*) and (*g*).

No evidence, however, has been given on which it can be held that the *Awans* of Nammal constitute a distinct sub-section of the *Awans* tribe following a custom of succession different from that obtaining among other *Awans*. The learned counsel for the plaintiff-respondent has argued, that because the four instances of *yak madri* succession, that is to say exclusive succession by the whole blood, mentioned in the *riwaj-i-am* of 1908 are all from Nammal and the five instances of the contrary custom are from other villages, therefore the *riwaj-i-am* must be held to lay it down that *yak madri* is the rule prevailing among Nammal *Awans*. We cannot presume anything of the kind. There is nothing on the record to show the numerical strength of the *Awan* tribe in the Mianwali District and the *riwaj-i-am* does not purport to record all the instances of a particular custom which may be discoverable. It may well be that the fact of all the *yak madri* instances belonging to Nammal is a mere coincidence. In any case the instances which we have examined prove that the custom alleged by the plaintiff is neither certain nor invariable in the village of Nammal and more important still, the plaintiff himself has set up not a tribal custom nor a village custom but a family custom.

We have already said that we do not believe the witness who stated that the *dramatic personae* of instance (*k*) belong to the family of the parties. There is no evidence of the existence of any brothers or uncles or great-uncles of Attar, the head of the pedigree-table and plaintiff's family,

so far as the contents of the record show, consists of the descendants of Attar. A glance at the pedigree table makes it clear, that proof of how the property of Muhammad Khan, son of Attar and *Mt.* Azim Bibi, was inherited would be most important evidence on the point at issue. Unfortunately there is no such proof. The witnesses for the defendants have asserted that Barkhurdar shared in the inheritance, but cross-examination revealed that they had no personal knowledge of what they were talking about. The statements to the contrary by the plaintiff's witnesses are open to the same objection.

It comes then to this that the only family instance, instance (*a*), goes against the plaintiff so far as it does go. The persons concerned in the other instances are not proved to have any connection with the parties' family other than as residents in the same large village. It cannot be presumed that because in the rest of the village there are six instances of *yak madri* succession against two of a contrary custom, the family custom of the parties must be *yak madri*.

In *Ghulam Muhammad Khan* v. *Nur Khan* (2) a case of *Awans* of Thamewali in Mianwali District proof of a single instance in the family itself failed to satisfy the Chief Court that *yak madri* was the family custom.

We hold that the finding of the lower Court that this custom obtains in the family of the parties, because there are certain instances of its observance in the village of Nammal, was not justified by the evidence and that on this point the appeal must succeed.

The other point for decision is whether the lower Court was right in decreeing to the plaintiff the share in the disputed property which Attar Khan, whom he murdered, would have inherited if he had been alive. Here again we are unable to uphold the learned Subordinate Judge. Certain principles have been laid down in four reported cases of this Court and of the Chief Court, Mussammat *Shah Khanam* v. *Kalandhar Khan* (3) *Muhammad Khan* v. *Sis Bano* (1), *Mt. Jind Kaur* v. *Indar Singh* (4), and *Har Bhagwan* v. *Hukam Singh* (5), one of which, common to all, is that it is contrary to public policy to allow a murderer to derive from his crime the benefit of succeeding to the property of his victim. There is no doubt that ordinarily neither law nor custom would give *Mt.* Sis Bano any right to inherit the property of Yaran in the presence of the plaintiff. Here, however, we are not dealing with a claim by *Mt.* Sis Bano to oust the plaintiff. She has been placed by the executive Revenue authorities in possession of the share which would have belonged to her murdered brother, in consequence of the Chief Court's decision in *Muhammad Khan* v. *Sis Bano* (1) that neither the plaintiff nor his son Muhammad Khan was entitled to oust her from the property held by Attar Khan at the time of his death. Is it in accordance with public policy for a Civil Court now to turn her out in favour of Attar Khan's murderer? We think not. The motive for the murder is stated in *Muhammad Khan* v. *Sis Bano* (1) to have been a desire to get hold of Attar Khan's property. The plaintiffs, learned counsel urges that a murderer can only be excluded from an inheritance which could have been in his contemplation at the time of the murder, but, even if this be conceded, the facts are against him. The murder was committed in January 1901. Yaran died in 1896 or 1897 and in January 1901 his estate was in the hands of a female life-tenant. Ali Khan and Shah Nawaz were already dead and it was obvious to the plaintiff at the time of his murder that at least one-half of the property of his great-uncle Muhammad Yar's line must come to his branch of the family and that, with Attar Khan removed, he would secure a double portion.

(2) [1917] 65 P. R. 1917—41 I. C. 897—105 P. W. R. 1917.

(3) [1900] 74 P. R. 1900,

(4) 1922 Lah. 293—3 Lah. 103—23 P. W. R. 1922.

(5) 1922 Lah. 243—3 Lah. 242—4 L. L. J. 245.

We accept the appeal, set aside the decree of the Lower Court and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

1924 LAHORE 511

ABDUL RAOOF AND LUMSDEN, JJ.

Nur Ahmad Khan and another — Plaintiffs—Appellants.

v

The Municipal Committee, Amritsar — Defendant—Respondent.

S. A. No. 1999 of 1920, Decided on 5th June 1923, from the decree of District, Judge, Amritsar, D/-16th June 1920.

(a) *Evidence Act, S. 35—Entry in Register that a well is public is no evidence against owner when owner had no notice of the entry.*

The fact that a certain well was recorded as *wakf* in the Municipal register without any objection on the part of the owner, does not make it a *wakf* when it is not shown that the owner had any notice of the entry in the register. At the most the entry may be treated as an admission of the Municipal Committee that the well was *wakf*. [P 512, C 1]

(b) *Punjab Municipal Act, S. 56 (b)—Public taking out water for nearly thirty years—Well is not necessarily a public one.*

In India ordinarily the owners of wells do not prohibit public from using them. It is considered to be a meritorious act to allow the public to take water even from private wells; therefore, the mere fact that the public was allowed to take water from a well and it continued to take water for nearly 30 years, cannot necessarily lead to the conclusion that the well was dedicated to the public. [P 512, C 2]

Aziz Ahmad, Abdul Rashid and *D. R. Sawhney*—for Appellants.

Lala Hargopal—for Respondent.

Judgment.—This was a suit for a perpetual injunction in respect of a well No. 734, situated within the Municipal limits of Amritsar. The plaintiffs claimed to be its owners and complained that the Municipal Committee had wrongfully filled it up. The relief claimed was for a mandatory injunction directing the defendant to restore the well to its former condition. The defendant denied the plaintiffs' title and asked for the dismissal of the suit on the ground that the plaintiffs were out of possession and were not entitled to maintain the suit. It was further pleaded that as the well was in a very bad and dangerous condition the defendant had filled it up for the benefit of the public and the neighbouring proprietors. Durga Prasad, Munsif, 1st class, dismissed the suit by his judgment, dated the 4th of October 1918 on the preliminary ground that the plaintiffs having failed to prove their present possession were not entitled to maintain it.

On appeal by the plaintiffs the case was remanded by Mr. A. Campbell, Additional Judge, by his order dated the 1st of March 1920 under Order 41, rule 23, Civil Procedure Code, for trial on the merits. The case again came up for decision before Durga Prasad, Munsif, 1st class, who recorded the following finding on the question of title.

"The defendant in written pleas has not stated that the well was sunk by the committee or by the general public but it is given in the pleas that the well is a public one which means that the well once belonged to the plaintiffs and now by some reasons it has become a public well on which the Committee had a full control. The well is situate in front of the plaintiffs' house as I have seen twice on the spot and the whole site near the well belongs to the plaintiffs. From these facts I find that the well belonged to the plaintiffs as it was purchased by their father along with the house, in front of which the well is situate."

The learned Munsif, however, further found that by long user by the public the well had become a public one and that, therefore the Municipal Committee under S. 56 (b) of the Municipal Act, 1911, had the power to fill it up. The suit was accordingly dismissed.

On appeal the decree dismissing the suit has been upheld by the lower appellate Court. Hence the plaintiffs have come up in second appeal to this Court.

It has been contended on their behalf that on the facts found the conclusion that the well is a *wakf* property and thus comes within the

description of a public well is not justified. The lower appellate Court has recorded the following findings of fact ;

1. That the plaintiffs were the original owners of the well ;

2. That admittedly there was no express dedication ;

3. That the well was recorded as a *wakf* in the Municipal register of 1890 without any objection being raised by the owner ;

4. That the well has for a long time been used by the public without any interruption on the part of the owner though no exact period has been given by the witnesses and ;

5. That the plaintiffs had been spending money on its repair.

Upon the findings the lower appellate Court arrived at the following conclusions.

"It seems to be probable that at least since 1890, the public have been using the well without any hindrance and this, I think, is *prima facie* sufficient to show an intention on the part of the owner to dedicate the well to the use of the public. If this dedication can be inferred then the public has a right to use the well and it appears to me that the well is a public one within the meaning of S. 56, clause (a) (b) of the Municipal Act."

The conclusion at which the learned Judge has arrived is mainly based upon two facts, namely, (1) that the well was recorded as *wakf* in the Municipal register in 1890 without any objection on the part of the owner ; and (2) that it has been used by the public since 1890 without any objection on the part of the owner.

It is not shown that the owner had any notice of the entry in the register. The register in which the entry had been made was kept by the defendant. At the most, the entry may be treated as an admission of the defendant that the well was *wakf*. The evidence as to the entry of the well as *wakf* property in the register of the Municipal Committee in our judgment cannot be used as a piece of evidence against the plaintiffs in this case. The learned Munsif found upon evidence that up till 1880 the plaintiffs or their predecessors-in-title were in possession of the well as owners. The user by the public is said to have commenced from 1890. In our opinion this was not sufficient to raise the presumption that the owners had dedicated the well to the public. In this country ordinarily the owners of wells do not prohibit public from using them. It is considered to be a meritorious act to allow the public to take water even from private wells. We are, therefore, clearly of opinion that the mere fact that the public has been allowed to take water from the well since 1890 cannot necessarily lead to the conclusion that the well was dedicated to the public. We have looked at the plan of the well which shows that there are buildings belonging to the plaintiffs on the east and south of the well and that there is an enclosure with walls on three sides within which the well is situated. It is open towards the public road. The learned Munsif has also found that "the well is situate in front of the plaintiffs' house as I have seen twice on the spot and the whole site near the well belongs to the plaintiffs". Under these circumstances we cannot uphold the finding of the lower appellate Court on this point. The Committee had no power to act in the manner it did. In our opinion S. 56 (b) of the Municipal Act has no application to the facts of this case and the well did not vest in the Committee. If the well appeared to the Committee to be injurious to health or offensive to the neighbourhood it had ample power under S. 131 of the Act by notice to require the owner to cleanse, repair, cover, fill up or drain it off. This was not done by the Committee.

We accordingly accept the appeal and setting aside the decrees of the Courts below grant the plaintiffs a mandatory injunction directing the Municipal Committee to restore the well to its original condition with costs in all Courts. If the Municipal Committee fails to do this within a reasonable time the plaintiffs may themselves restore the well and recover the costs from it.

Appeal allowed.

✱✱ 1924 LAHORE 513

Full Bench

SHADI LAL, C. J. SCOTT-SMITH LEROSSIGNOL, HARRISON AND FFORDE, JJ.

Lee—Petitioner.

v.

Lee—Respondent.

Civil. Ref. No. 3 of 1923, Decided on 5th January 1924, from the D. J. Ambala, D/-14th February 1923.

✱✱ (a) *Divorce Act, (IV of 1869) S. 2—Mere residence confers jurisdiction on Court to dissolve marriage.*

Mere residence within the forum confers jurisdiction upon the Indian Courts to grant a decree for the dissolution of a marriage between persons who are not domiciled in India. The residence however as contemplated by the Statute means ordinary residence and not a mere temporary presence in a country such as that of a traveller, and such residence must be *bona fide* residence and not one acquired for a fraudulent or collusive purpose. The word "resides" in S. 2 is used in its ordinary sense and is not intended to mean "is domiciled."

[P. 523, C. 1]

(b) *Interpretation of Statutes—Plain meaning to be followed.*

A Court interpreting a statute has no right to scan the wisdom or policy of the Legislature, nor is it entitled to modify the plain meaning of the language used by the Legislature in order to avoid a conflict between two systems of law or undesirable consequences. The intention of the Legislature must be gathered from the language used in the Statute.

[P. 514, C. 2]

✱ (c) *Divorce Act (IV of 1869) S. 7—'Principles and rules' do not include rule as to jurisdiction.*

It is very doubtful whether the expression "principles and rules" mentioned in S. 7 of the Act is intended to include such an important matter as the rule defining the jurisdiction of the Indian Courts. The section is merely a residuary section and it seems that the Legislature, after making express provisions for various matters relating the matrimonial causes, intended by means of this Section to apply the English Law to such matters of miscellaneous character as were not expressly dealt with by the Act. The opening words of S. 7 "subject to the provisions contained in this Act" expressly save the rule relating to jurisdiction contained in S. 2 of the Act. 1923 B. 321 Ref.

[P. 515, C. 2]

✱✱ (d) *Divorce Act, (IV of 1869) — Not ultra vires of Indian Legislature.*

The Act is not *ultra vires* of the Indian Legislature. *Keyes* v. *Keyes* 1921 P. D. 204 *dissented from*, The fact that the Parliament decided to legislate and got the Indian Divorces (Validity) Act (11 and 12 Geo. V. c. 18) enacted in order to validate the decrees granted in the past cannot be construed as implying an approval of the dictum in the judgment in *Keyes* v. *Keyes* 1921 P. D. 204.

[P. 519, C. 2]

✱ (e) *Interpretation of Statutes — Indian Law is not invalid because it conflicts with English Law.*

A statute passed by the Indian Legislature which is intended to have local operation and binds persons so long as they are within the said territories, cannot be rendered invalid by the circumstances that the law which it has enacted is at variance with the English Law on the subject, or that the result ensuing from it may not be recognised by the English Courts.

[P. 518, C. 1 and 2]

✱ (f) *Interpretation of Statutes—Conflict—Law of the land is to be obeyed.*

The function of the Courts is to administer the law as they find it, and not to modify it in the light of the laws of another country or in accordance with their own notions of expediency, in order to produce a uniform result. In a vital matter like divorce it is desirable that all civilised countries should observe the same rule regarding jurisdiction, but there is nothing to prevent one country from adopting a rule different from that followed by another country; and if a different rule has been laid down by Municipal law of a country, the Courts of that country are bound to give effect to that rule irrespective of the consequence which may flow from it. 1895 A. C. 517. Foll

[P. 522, C. 1; P. 522, C. 2, P. 524 C. 1]

Carden Noad—for Petitioner.

Respondent was not represented.

Shadi Lal, C. J.—The question of law, upon which we are invited to pronounce our opinion, is one of grave importance to the European British subjects residing in India and we have, therefore, bestowed upon it our close and earnest attention and taken time to deliver our judgment. Put briefly, we are asked to determine whether mere residence within the forum confers jurisdiction upon the Indian Courts to grant a decree for the dissolution of a marriage between persons who are not domiciled in India or whether it is necessary that they must be domiciled in India at the time of the presentation of the petition for divorce. In other words, whether residence or domicil is the test of jurisdiction in granting a decree for divorce as distinguished from a decree for judicial separation

There is no dispute as to the facts material for the decision of the issue as to jurisdiction. The suit has been brought by Katherine Edith Melville Lee for the dissolution of her marriage with the respondent Captain Rupert Henry Melville Lee on the ground of adultery and cruelty. The parties are British subjects, and were married in England, and they were also domiciled in that country at the time of the commencement of the proceeding for divorce. It, however, appears that the petitioner resided in India at that time and that the matrimonial offence complained of was committed within the local limits of the jurisdiction of the Court.

Now, it is desirable to point out at the outset that although on a case of this description involving a foreign element (the term "foreign" is used, not in its political sense, but in its legal sense; and unless there is something repugnant in the context, the expression "foreign country" in this judgment means any country except British India, and "foreign" means "not Indian") a conflict sometimes arises between two or more competing systems of law as to which of them is applicable to the case, the rules which determine this question constitute a branch of the municipal law of the country to which the Court dealing with the case belongs. It the is duty of the Court before which an action of this description is brought to decide, in accordance with the rules of its own municipal law, whether it has jurisdiction to entertain the action. If the *lex fori* contains a definite rule governing jurisdiction over the case, that rule must be followed irrespective of the question whether it is in accordance with the corresponding rule of other countries or not, and whether the decree granted by the Court would or would not be recognised by the tribunals of a foreign country. I desire to emphasize this principle because I find that in some of the cases, which have been cited at the Bar; the Judges in arriving at their conclusion appear to have been influenced by the consideration that their decree would not receive extraterritorial recognition.

We must, therefore, turn to the Indian Law and find out whether it furnishes any rule governing jurisdiction in cases of divorce. Now, the second section of the Indian Divorce Act (IV of 1869) provides that "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition." This requirement must be satisfied in every matrimoinal cause, and in the case of a petition for the dissolution of a marriage it is further laid down that one of the three following conditions must be fulfilled:—

(*a*) the marriage has been solemnized in India; or

(*b*) the matrimonial offence complained of has been committed in India; or

(*c*) the husband has, since the solemnization of the marriage, exchanged his profession of Christianity for the profession of some other form of religion.

Now, it is not disputed that the case before us satisfies all the requirements prescribed by the aforesaid section, and there is no cogent reason for holding that the word "resides" was not used in its ordinary sense and was intended to mean "is domiciled." A Court interpreting a statute has no right to scan the wisdom or policy of the Legislature, nor is it entitled to modify the plain meaning of the language used by the Legislature in order to avoid a conflict between two systems of law or undesirable consequences. As observed by Pollock C. B. in *Miller* v. *Salomons* (1), "I think, where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right, or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it; and I think to take a different course is to abandon the office of a judge, and to assume the province of legislation."

(1) 21 L. J. 161.

If there were any doubt as to the meaning of the word, it is set at rest by S. 3 of the Act which defines "District Court" as "the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside, or last resided together.

The contention that the expression "resides" is synonymous with "is domiciled" can be shown to be wholly untenable, if we substitute the lattar phraseology for the former in that section. The definition of the "District Court" will then read as follows:- "District Court" means the Court of the District Judge within the local limits of whose ordinary jurisdiction or * * * * the husband and wife 'are domiciled' or were last 'domiciled together.' It is obvious that there is no such thing as domiciled together,' and there can be little doubt that so far as S. 3 is concerned, residence cannot be construed as meaning domicile, and it cannot be seriously suggested that the same word bears one meaning in one section of the Statute and a different meaning in another section The intention of the Legislature must be gathered from the language used in the Statute and the language in the present case shows that the Indian Legislature adopted "residence" and not "domicil" as the test of jurisdiction in a suit for divorce. If it were permissible to refer to the speech of Sir Henry Maine who was in charge of the Bill which became the Indian Divorce Act, it could be shown conclusively that the Legislative Council intended to base the jurisdiction of the Indian Courts on mere residence.

It is, however, unnecessary to dwell further upon the subject, because it is not seriously disputed that S. 2 of the Act would create jurisdiction on the ground of mere residence, if that section is not controlled by another provision of the Statute. But it is urged that S. 7 of the Act, which requires the Indian Courts to follow the principles and rules observed by the Divorce Court in England, imports indirectly into the Indian Law the rule of the English Law that it is only the Court of domicil which is competent to grant a decree for divorce. This argument has found favour with the majority of the Full Bench of the Bombay High Court (Macleod C. J. and Marten J—Crump J. dissenting from his colleagues) in *Wilkinson* v. *Wilkinson* (2), and it is, therefore, necessary to examine it carefully. The seventh section of the Act is in the following terms:—"Subject to the provisions contained in this Act, the High ourts and District Courts shall in all suits and proceedings here-under, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

Now, it is very doubtful whether the phrase "principles and rules" mentioned in the section was intended to include such an important matter as the rule defining the jurisdiction of the Indian Courts. The section, as its wording indicates, is merely a residuary section, and it seems to me that the Legislature, after making express provisions for various matters relating to matrimonial causes, intended by means of this section to apply the English Law to such matters of miscellaneous character as were not expressly dealt with by the Act. I do not, however, wish to dilate upon the question because I consider that the opening words of S. 7 "subject to the provisions contained in this Act" expressly save the rule relating to jurisdiction contained in S. 2 of the Act. This rule empowering the Indian Courts to grant divorce in cases in which the petitioner resides within their territorial jurisdiction is certainly one of the provisions contained in the Act, and by reason of the words quoted above it remains unaffected by any principle or rule observed by the English Court.

It must be remembered that since the year 1869, when the Indian Divorce Act, was enacted, the Courts in India have consistently acted upon

(2) 1923 Bom. 321.

the doctrine that mere residence conferred upon them jurisdiction to divorce persons who were not domiciled in India—*vide*, *inter alia*, *Jogendra Nath Banerjee* v. *Elizabeth Banerji* (3), *Giordano* v. *Giordano* (4), *Mary Alice Warwick* v. *Charles Spencer Warwick* (5) and *Gale* v. *Gale* (6). Indeed, the validity of a divorce granted by a competent Indian Court to persons merely residing within its jurisdiction was not questioned even in England until the year 1921, and there are some reported cases decided during this period of half a century in which the English Court had either given extra-territorial effect to such divorces or recognised the jurisdiction of the Indian Courts on the ground of residence—*vide Thornton* v. *Thornton* (7); *Warter* v. *Warter* (8); and *In re. Norton's Settlement* (9). It was only two years ago that a dissentient note was struck for the first time in the case of *Keyes* v. *Keyes and Gray* (10), but I am not prepared to accept the dictum contained in that judgment that the Indian Legislature was not competent to found jurisdiction in divorce on residence, and that the Statute laying down the rule is, *pro tanto ultra vires*. In delivering the judgment in that case Sir Henry Duke, the President of the Probate Division, certainly expressed his opinion that the Indian Statute in basing jurisdiction on residence transgressed the limits imposed by the Imperial Parliament upon the powers of the Indian Legislature, but this dictum was hardly necessary for the decision of the case. The facts bearing upon the question were briefly these:—The petitioner Reginald Keyes had obtained a decree for the dissolution of his marriage from the Chief Court of the Punjab in 1918. He was, however, doubtful as to whether the decree would be recognised as valid in England and he consequently brought a suit for divorce in the English Courts. The suit was not defended, but, considering the importance of the question involved, the Secretary of State for India obtained leave to be heard in support of the validity of the Indian decree, and his counsel was allowed to address the Court as *amicus curiae*. The King's Proctor also intervened and the Attorney-General on his behalf contended that the Indian Divorce Act, when construed in the light of the English decisions, based jurisdiction in divorce cases upon domicil and not upon mere residence; and that the Indian Divorce, granted as it was by a Court within whose jurisdiction the parties were not domiciled, was consequently invalid. This contention was controverted by Sir Earle Richards who appeared on behalf of the Secretary of State, and urged that the Indian Law recognised residence as the test of jurisdiction, and that the Indian divorce was valid and should be given extra-territorial effect.

Now, the first issue in logical sequence which required determination was whether the decree was granted by a Court of competent jurisdiction, for it is clear that if the Court had no jurisdiction to grant the divorce its decree could not receive extraterritorial recognition from the English Courts. The determination of that issue depended upon the rule of the English Law governing jurisdiction in divorce cases. That rule has, as will be shown presently, undergone modification from time to time, but since the year 1895, when the case of *Le Mesurier* v. *Le Mesurier* (11) was decided the English Courts have followed the doctrine that only the tribunal, within whose jurisdiction the parties (that is to say, the husband, because the wife follows the domicile of her husband) are domiciled,

(3) [1898] 3 C.W.N. 250.
(4) [1912] 40 Cal. 215—20 I.C. 512—17 C.W.N. 491.
(5) [1900] 64 P.R. 1900.
(6) [1911] 47 P.R. 1911—171 P.L.R. 1911—10 I.C. 487—122 P.W.R. 1911.
(7) [1886] 11 P.D. 176-55 L.J.P. 40—54 L.T. 774—34 W.R. 509.
(8) [1890] 59 L.J.P. 87-15 P.D. 152—63 L.T. 250—54 J.P. 631.
(9) [1908] 1 Ch. 471.
(10) [1921] P.D. 204.

(11) [1895] A.C. 517—64 L.J.P.C. 97—72 L.T. 873—11 R. 527.

can pronounce a divorce dissolving their marriage, and that a decree granted by any other Court is invalid and cannot be recognised in England. Judged by this test the Indian decree was invalid and could not operate as a bar to the suit brought in the English Court. In this view of the matter it was unnecessary for the Court to decide whether the Statute, which conferred jurisdiction upon the Indian Court, went beyond the powers of the Indian legislature. The learned President, however, discussed the question whether the Governor-General in Council was authorised by the Indian Councils Act, 1861, to establish Courts having jurisdiction in India with power to decree the dissolution of the marriage of persons not domiciled in India, and, having decided that the Indian Legislature had no such authority and that the Indian Divorce Act, of 1869 was *pro tanto* invalid, he declared that the decree granted by the Chief Court did not have the effect of dissolving the marriage between the parties and that the husband was consequently, entitled to maintain his suit for divorce in English Court.

It seems to me that the bar alleged to have been created by the Indian decree could have been removed at once by declaring that the decree was passed by a Court which, according to the English Law, was not competent to entertain the suit; and that the pronouncement on the validity or otherwise of the Indian Statute was not necessary to the decision of the case. It is to be regretted that there was no appeal against the judgment of the learned President, and the only course, which the Secretary of State for India, who was not a party to the case, could in the circumstances adopt was to ask the British Parliament to pass an Act to validate the decrees which had been granted by the Indian Courts. Accordingly the Indian Divorces (Validity) Act. 11 and 12 Geo. V. c. 18, was enactad, which provides that decrees granted under the Indian Divorce Act and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom, and any order made by the Courts in relation to any such decree shall, if the proceedings were commenced before the passing of the Act, be valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India. This legislation was necessitated by the doubt cast by the judgment in *Keyes* v. *Keyes* (10), on the validity of the Indian Divorces, but the fact that the Parliament decided to legislate in order to validate the decrees granted in the past cannot be construed as implying an approval of the dictum in that judgment that the Indian Divorce Act, went beyond the limits of the legislative authority of the Governor-General in Council.

The observations of Sir Henry Duke, though they are, in my opinion, no more than *obiter dicta*, are nevertheless entitled to very great weight, and it is, therefore, our duty to examine the question whether in enacting the Indian Divorce Act, the Indian Legislature exceeded the authority conferred upon it by the British Parliament. For an answer to this question we must turn to S. 22 of the Indian Councils Act, 24 and 25 Vict c. 67, which so far as is at present material is in the following terms :—

"The Governor-General in Council shall have power to make laws and regulations for all persons whether British or Native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within the Indian Territories now under the dominion of Her Majesty * * * * Provided always that the said Governor-General in Council shall not have the power of making any laws or regulations * * * which may affect the authority of Parliament, or the constitution and rights of the East India Company or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or

the sovereignty or dominion of the Crown over any part of the said Territories."

Now, Sir Henry Duke observes that without the *proviso* " the enacting words which I have quoted, reading them in their every day meaning, could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India. The laws to be made are to be of local operation. The status of a citizen domiciled elsewhere is not a condition having local effect in India, or local limitations. No one would suppose, I think, that the legislative authority created by S. 22 could extend to the making of a law which should affect the heritable capacity of a man resident in India in respect of land in England, or control his conduct in any matter of purely English concern. The proviso which I have read could perhaps be used to support an argument based upon the maxim *expressio unius exclusio est alterius* ; but if the terms of the proviso do raise a question of construction, the result seems to me to be only to refer back the enquiry to the principles on which the construction of statutes depends. A statute must be construed with due regard to its subjects-matter and object, and the object of this Act is to provide for the Government of India by laws binding upon persons and things in India. As between two possible constructions, that which is conformable to international law as declared in our own tribunals is to be preferred to that which would involve infringement of the rights of other communities."

It may be conceded at once that the Indian Statute has operation only within the Indian territories, and that the Governor-General in Council has no authority to legislate for persons and things outside the limits of those territories ; but a statute passed by the Indian Legislature, which is intended to have local operation and binds persons so long as they are within the said territories, cannot be rendered invalid by the circumstances that the law which it has enacted is at variance with the English Law on the subject, or that the result ensuing from it may not be recognised by the English Courts. The Indian Statute is undoubtedly binding upon the Courts and persons in India ; a decree passed in pursuance of it has operation in India, and it is immaterial for the validity of the Statute whether the decree would or would not be recognised by a foreign Court.

The scope of the legislative powers of the Governor-General in Council was considered by their Lordships of the Privy Council in the case of *The Empress* v. *Burah* (12). In delivering the judgment of the Privy Council Lord Selborne made the following pertinent observations :—

" The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribed these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of parliament itself. The established Courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restriction."

The Indian Divorce Act falls within the ambit of the affirmative words of S. 22 of the Indian Councils Act,

(12) [1878] 4 Cal. 172—5 I. A. 178—3 C. L. R. 197 (P. C)

and it is not even suggested that it violates any express condition or restriction by which the power conferred by those words is circumscribed. The words confer plenary power upon the Governor-General in Council to make laws of every description, and it is immaterial whether the laws so made do or do not affect the status of non-domiciled British subjects. The laws cannot, however, have operation beyond the limits of India, but they must be given full effect within those limits. If the Imperial Parliament had intended to prohibit the Indian Legislature from making laws affecting the status of the British subjects domiciled in the United Kingdom, there would have been no difficulty in making this intention clear by means of express words imposing that prohibition.

It will be observed that the judgment in *Keyes* v. *Keyes* (10) removes from the scope of the legislative authority of the Governor-General in Council only such laws affecting status as are not in conformity with the English Law. To use the language of Sir Henry Duke, "To create a jurisdiction in divorce such as is exercised in the Courts of this country was, I have no doubt, within the powers conferred upon the Governor-General in Council by the East India Councils Act of 1861. That Act, however, does not in my opinion warrant the making of a law to empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction." It appears that the Indian Statute would not have been held to be invalid, if it had laid down a rule on the subject of jurisdiction in conformity with that followed by the English Courts.

Assuming for the moment the correctness of the proposition that the fate of the Indian Statute depended upon its enacting a rule which was in harmony with the English Law, can we say that in the year 1869, when that Statute was promulgated, the English Courts had definitely enunciated the doctrine that domicil and nothing short of domicil was the sole test of their jurisdiction in divorce, and that residence could not be recognised to be the basis of that jurisdiction. In order to solve this problem, I consider it necessary to sketch briefly the history of the English Law on the subject. It is beyond dispute that until the year 1857 when the Matrimonial Causes Act, 20 and 21 Vict. c. 85, was enacted, there was no court in England which could dissolve a marriage. The Ecclesiastical Courts no doubt had jurisdiction in matrimonial matters, but they never professed to dissolve marriage bond. They could grant only a judicial separation which is sometimes called divorce *a mensa e' thoro*, and they based their jurisdiction on the residence of the parties and not on their domicil. The only way to obtain a divorce *a vinculo matrimonii*, which alone could sever the matrimonial tie, was to move the British Parliament and to induce it to pass a private Act to dissolve a particular marriage.

In 1857 the Matrimonial causes act was passed by which jurisdiction in all matrimonial matters was transferred from the Church to the Crown, and a special Court called the Court for Divorce and Matrimonial Causes was established. This Court was not only empowered to exercise the old jurisdiction of the Ecclesistical Courts to grant judicial separation, which jurisdiction rested upon the residence of the parties, but was also authorised to dissolve a marriage or, in other words, to grant a divorce *a vinculo*. This was a new function, but the Statute did not prescribe any rule governing jurisdiction in the matter of divorce *a vinculo*, and left it entirely to the Court to decide whether its jurisdiction should depend upon residence or domicil or any other ground such as the place of the solemnization of the marriage of the allegiance of the parties.

Coming to the Case Law on the subject, we find that it has by no means been consistent and that the rule relating to jurisdiction has varied from time to time. The earliest case which requires consideration is that of *Shaw* v. *Gould* (13). The question arose whether a foreign Court was competent to

(13) [1868] L.R. 3 H. L. 55—37 L.J. Ch. 433—18 L.T. 833.

dissolve an English marriage (namely, a marriage which, whether celebrated in England or elsewhere, is entered into by parties, of whom the husband is at the time thereof domiciled in England). The House of Lords decided that a foreign tribunal has authority to pronounce a decree of divorce in the case of an English marriage provided that the parties thereto are *bona fide* domiciled within the jurisdiction of such tribunal at the time of the suit. The judgment expressly overruled the opinion expressed in *Lolley's Case* that an English marriage could not be dissolved by a foreign Court. It must be remembered that *Shaw* v. *Gould* (13) dealt only with the jurisdiction of foreign Courts, and did not profess to circumscribe the jurisdiction of the English Courts by the same rigid rule. Indeed, even as regards foreign Courts Lord Colonsay was inclined to go so far as to say that residence for a considerable time, though not amounting to domicil, would give those Courts jurisdiction to pronounce a decree of divorce which would not be ignored in England.

The next case in the chronological order, which has a bearing upon the question, is *Wilson* v. *Wilson* (14), which was decided in 1872. The parties to the case were married in Scotland, and were also domiciled in that country both on the date of the marriage and also at the time of the commission of the matrimonial offence. The husband afterwards acquired an English domicil and then applied to English Court for a divorce. The wife, however, resided in Scotland, and the question for determination was whether an English Court had jurisdiction to entertain a suit for the dissolution of the marriage. Lord Penzance decided that the husband had acquired a domicil in England and that the English Court had consequently jurisdiction to pronounce a decree of divorce between the parties. It is noteworthy that the judgment while containing dicta to the effect that jurisdiction in matrimonial causes should be exercised by the Courts of the country in which the parties are domiciled did not enunciate the proposition that residence short of domicil was not sufficient to give the English Courts jurisdiction to dissolve a marriage. The learned Judge no doubt stated that the inclination of his own opinion was in favour of the rule of domicil, but he was careful to point out that "whether any residence in this country short of domicil, using that word in its ordinary sense will give the Court jurisdiction over parties whose domicil is elsewhere is a question upon which the authorities are not consistent." Indeed, he made it absolutely clear that he was not expressing any opinion on that question because it did not arise in the case. "It is not, however, necessary for me," says the learned Judge, "to decide on this occasion whether mere residence short of domicil in this country is sufficient to found the jurisdiction of this Court, because I have arrived at the conclusion that the petitioner was at the commencement of this suit domiciled in this country." I have considered it necessary to quote these passages *in extenso* from the judgment in *Wilson* v. *Wilson* (14) in order to show that there is no warrant for the view that it was settled in 1872 that the jurisdiction of the English Courts rested only on domicil and not on residence.

This was the state of the authorities when the case of *Niboyet* v. *Niboyet* (15) came up for decision before the Court of Appeal in 1878. In this case the parties were French subjects and were domiciled in France. They resided for some years in England but did not acquire an English domicil. On these facts two of the Judges of the Court of Appeal decided tnat the English Court had jurisdictisn to dissolve the marriage, as the partios were resident within its jurisdiction. The third Judge, however, dissented from this view, and held that the only Court which was competent to dissolve the marriage, was the Court of the country in which the parties had their domicil

(14) [1872] L. R. 2 P. & D. 435—41 L. J. Ch. 74.

(15) [1878] 48 L. J. P. 1—4 P. D. 1—39 L. T. 486—27 W. R. 203.

at the commencement of the proceedings; and that the English Court had consequently no jurisdiction to entertain the suit for divorce.

The doctrine, upon which the majority of the Judges in *Niboyet* v. *Niboyet* (15) founded their jurisdiction, was apparently followed by the English Courts during the following 17 years, for there is no reported decision during that period in which any dissent was expressed; and it was not until 1895 that its soundness was impeached before a Court of law. The matter came up before the Privy Council in the well-known case of *Le Mesurier* v. *Le Mesurier* (11). The parties to the marriage in this case had their residence in Ceylon, but they were domiciled in England There was no statute dealing with the question whether mere residence not amounting to domicil gave the Ceylon Court jurisdiction to dissolve their marriage, and their Lordships of the Privy Council, relying upon the general principles of private international law, ruled that the domicil for the time being of the spouses affords the only true test of jurisdiction to dissolve their marriage.

It is true that the Courts in England not being subordinate to the Privy Council were not bound to follow this exposition of the law, but we find that the English Courts have since adopted this rule and have expressly overruled *Niboyet* v. *Niboyet* (15), vide *Bater* v. *Bater* (16).

The result of the above discussion is that though the view of the English Courts on the subject of jurisdiction in divorce has not been uniform, the rule is now firmly established that only the Court within whose jurisdiction the married pair are domiciled has jurisdiction to dissolve their marriage. This rule now furnishes the test by which the English Courts determine not only the jurisdiction of the foreign Courts but also their own jurisdiction.

Assuming for the sake of argument that the validity of the Indian Divorce Act depended upon the question as to whether the rule contained in it conformed to the English Law on the subject, can we, in view of the history of the English Law as sketched above, say that the English Courts had, prior to the enforcement of the Statute, laid down in definite terms the proposition that only domicil and nothing short of domicil determined their jurisdiction in divorce cases? The only relevant case decided before 1869 was that of *Shaw* v. *Gould* (13), and while it recognised the jurisdiction of a foreign Court to dissolve an English marriage between parties domiciled in the foreign country to which the Court belonged, it did not repudiate the proposition that jurisdiction could also be founded upon residence falling short of domicil. Much less did it profess to limit the jurisdiction of the English Courts by the rule of domicil. That the law on the subject was uncertain was admitted in express terms three years later by Lord Penzance whose own inclination, however, was strongly in favour of the rule of domicil. Indeed, six years after the judgment of Lord Penzance the Court of Appeal went even further and expressly gave judicial recognition to the theory that residence was the test of jurisdiction, and this doctrine evidently remained in full force until 1895 when it was dissented from by the Privy Council in *Le Mesurier* v. *Le Mesurier* (11). I am, therefore unable to hold that there was in 1869 any clear rule of the English Law, the non-observance of which rendered the Indian Statute invalid. And if the Indian Statute did not transgress the English Law as it stood at the time of its enactment and was consequently not invalid at that time, can it be urged with any show of reason that it became invalid because the English Courts have since adopted the rule by which jurisdiction is founded on domicil?

There is, I think, no valid reason for supposing that the doctrine embodied in the Indian Divorce Act ran counter to any law which had been affirmatively laid down by the English Courts, and that the Act

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(16) [1906] P. 209—75 L. J., P. 60—94 L.T. 835—22 T.L.R. 408.

should be treated to be an invalid statute.

I have so far assumed that the Indian Legislature had no authority to enact a rule governing jurisdiction in the matter of divorce which did not conform to the English law on the subject, and that a statute embodying such rule would be invalid. But I do not think that there is any justification for such an assumption. While it may be conceded that, in order to produce a uniform result in a vital matter of this character, it is desirable that all civilised countries should observe the same rule regarding jurisdiction, there is nothing to prevent one country from adopting a rule different from that followed by another country; and if a different rule has been laid down by the municipal law of a country, the Courts of that country are bound to give effect to that rule irrespective of the consequences which may flow from it. The soundness of this principle cannot be disputed, and indeed it was recognised by the Privy Council in *Le Mesurier* v. *Le Mesurier* (11), the very judgment which is now regarded as the *locus classicus* on the subject. "In order to sustain the competency of the present suit," observed their Lordships, "it is necessary for the appellant to show that the jurisdiction assumed by the District Judge of Matara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch Law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by tribunals of every civilised country." It may be mentioned in this connection that all European countries are not agreed even now that jurisdiction in divorce should rest on domicil. For instance, the Italian Code, while refusing to recognise divorce in the case of Italian subjects, makes, so far as foreigners are concerned, personal capacity and jurisdiction in divorce depend, not upon domicil, but upon allegiance or nationality. The following example will make my meaning clear. The husband and wife are Swedish subjects but they have their domicil in France. While domiciled in that country, they obtain a divorce from a Court in Paris. The divorce would be recognised as valid by the English Courts but not by the Italian Courts.

This divergence merely illustrates the point to which I have already alluded that there is really no such thing as the common law of nations or of Europe on the subject of extra-territorial operation of rights, and that each country has its own rules on that subject. These rules form part of the municipal law of the country and must be gathered from the statutory enactments and judicial decisions which embody its municipal law. A reference to the so-called common law of nations or to the law of another country is permissible only when the *lex fori* does not furnish any rule governing a particular case, and the Court then adopts the rule borrowed from another system of law, not because it is bound to follow it, but because it considers it to be reasonable and in consonance with the general principles applicable to the facts of the case. The rule derives its authority, not from the circumstance that it originally formed part of the comity of nations or of *jus gentium*, a phrase wrongly used by text-writers and even judges when dealing with this branch of the municipal law, but from the fact that it has been adopted by the Court and has consequently been incorporated into the laws of the country.

Upon these considerations I feel no hesitation in holding that if an Indian statute provides a rule for determining jurisdiction in divorce cases, the Courts in India are bound to give effect to that rule and cannot discard or modify it, because it does not conform to the principles of the so-called *jus gentium* or to the English Law on the subject. The function of the Court is to administer the

law as they find it, and not to modify it in the light of the laws of another country or in accordance with their own notions of expediency. If the law is found to be out of date or to lead to inconvenient results, then it is the duty of the Legislature to step in and to introduce such changes as may be deemed to be desirable or expedient.

As I have already said, the Indian Divorce Act, which does not in any way transgress the limits imposed upon the legislative authority of the Governor-General in Council, contains a definite rule founding jurisdiction on residence and that rule must be obeyed. The Indian Courts have no other alternative, and they cannot allow themselves to be swayed by any consideration derived from a comparative study of the laws of other countries or by any argument based upon inconvenience. It must, however, be understood that residence as contemplated by the Statute means ordinary residence, and not a mere temporary presence in a county such as that of a traveller, and that such residence must be *bona fide* residence and not one acquired for a fraudulent or collusive purpose.

There can, at the same time, be no reasonable doubt that the principle now adopted by the English Courts is that jurisdiction in the matter of divorce depends upon the domicil of the spouses at the time of the commencement of the proceedings, and that this test is applied by them in determining not only the jurisdiction of foreign Courts but also their own jurisdiction. It follows that a decree of divorce granted by a foreign Court is invalid in England if the parties to the marriage are at the time of divorce not domiciled in the country where the Court pronouncing the decree exercises jurisdiction. We may, therefore, take it that the Courts in England will not give recognition to the decrees granted by the Indian Courts to parties not domiciled in India. The decisions of the English Courts no doubt furnish some instances in which such decrees have been assumed to be valid, but the considered opinion is to the effect that these decrees having been pronounced by Courts incompetent to grant them cannot have operation in England. This conflict of laws is bound to lead to the scandal, which was strongly deprecated by Lord Penzance in *Wilson* v. *Wilson* (14) that a man and woman are held to be man and wife in one country and strangers in another. The scandal is not confined to their own personal relations, but affects also the validity of a subsequent marriage entered into by either of the parties, the legitimacy of the issue of that marriage, and succession to the property owned by the parties to the second marriage. Indeed the second marriage could be treated by the English Courts as a bigamous marriage and the parties can be arraigned before a criminal Court. These and other consequences which must result from a conflict between the two systems of law are very serious matters, and while they cannot influence the decision of the Courts, they must receive due consideration from the authorities who are responsible for amending the law. Indeed, there is now a divergence of judicial opinion even among the High Courts in India on the question whether the Indian Statute recognises residence or domicil as the basis of jurisdiction, and it is obviously desirable to put an end to this controversy. If jurisdiction is to rest upon residence, steps should be taken to ensure that the Indian decrees will be recognised by the English Courts.

These matters do not, as I have stated, concern the Courts whose duty is to enforce the law as it stands. To the question submitted to us my reply is that the Court of the District Judge at Ambala has jurisdiction to dissolve the marriage between the parties.

Scott-Smith, J.—I agree with the learned Chief Justice that the Court of the District Judge at Ambala has jurisdiction to dissolve the marriage between the parties. In view of his exhaustive judgment I do not find it necessary to do more than state my own reasons very briefly.

Two questions arise which have been argued before the Full Bench:—

(1) Did the Indian Legislature when enacting the Indian Divorce Act of 1869 confer jurisdiction on the Courts in India to dissolve marriages between persons not domiciled in India?

(2) Had the Legislature power to do so?

The effect of such a decree outside British India does not arise. In the case of *Le Mesurier* v. *Le Mesurier* (11) it was held by the Privy Council that the permanent domicil of the parties within the territory is necessary to give to its Courts jurisdiction so to divorce *a vinculo* as that its decree to that effect shall, by the general law of nations, possess extra-territorial authority. At that time the Indian Statute was not considered by their Lordships and they did not lay down that the Indian Courts would not have jurisdiction to dissolve marriages, but the result of their decision would certainly appear to be that such a dissolution would have no extra-territorial authority if the parties' domicil was elsewhere than in India. If the above two questions are answered in the affirmative the Indian Courts would, I conceive, be bound to adjudicate upon petitions for divorce even if their decisions had no force outside British India.

I proceed to consider the relevant sections of the Indian Divorce Act. S. 10 provides that "any husband" or "any wife" may present a petition upon certain grounds. The conditions and restrictions which bind a Court in the exercise of its jurisdiction are laid down in S 2 which provides *inter alia* that "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition." The only restriction which it is necessary to consider for the present purpose is the one as to residence. The petitioner must at the time of presenting the petition be resident in India. The word 'resides' which is quite a simple one has no technical meaning and should, in my opinion, be understood in its ordinary meaning. I do not see how it can be understood to be equivalent to 'is domiciled.' It was laid down in *The vestry of the Parish of St. John, Hampstead* v. *Henry Horace Powell Cotton* (17) that the Courts are bound to construe a section of an Act according to the plain meaning of the language unless either in the section itself, or in any part of the Act anything is found to modify, qualify or alter the statutory language, even if absurdity or anomaly be the result of such interpretation. I can find nothing in any other part of the Indian Divorce Act to modify, qualify or alter the plain meaning of the word 'resides.' It has been suggested that S. 7 of the Act governs S. 2 and that S. 2 should be read subject to it. I fail, however, to see how S. 7 can be invoked for this purpose for it is clearly stated therein to be subject to the provisions contained in the Act. I think that S. 7 merely means that in the exercise of their jurisdiction and in the trial of petitions before them the Courts should act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. I would therefore hold that the Act confers jurisdiction to hear the petition of a person who resides in India whether he be domiciled there or not.

The second question has been answered in the negative by the learned President of the Probate Division of the High Court of Justice in England in *Keyes* v. *Keyes* (10). His decision is, however, not binding upon the Courts in India. Powers of legislation were conferred upon the Government of India by the Indian Councils Act of 1861 to make laws and regulations for all persons whether British or native, foreigners or others, and for all Courts of Justice whatever and for all places and things whatever within the Indian territories. These powers were con-

(17) [1886] L. R. 12 A. C. 1

sidered by the Privy Council in the case of *Queen-Empress* v. *Burah* (12) where Lord Selborne said " The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers * * * * * * *. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively they are restricted." Now, we find that full powers of legislation were affirmatively conferred upon the Indian Legislature by the Indian councils Act, 1861, and the express conditions and restrictions are set out in the proviso to S. 22 of Act and in Ss. 19 and 24. There are no express restrictions in the Act or elsewhere against the making of laws to interfere with the status of subjects of the Crown not domiciled in India. This was the *ratio decidendi* in *Keyes* v. *Keyes* (10), but with all due respect I find myself unable to agree with the decision of the question in that case. It does not appear that at the time when the Indian Councils Act was passed in 1861 there was anything in the law as then administered in England which would lead us to suppose that there was any intention to fetter the Indian Legislature in the way suggested by the learned President of the Divorce Court. On the contrary, we find that in 1878, *i.e.*, 17 years later, in the case of *Niboyet* v. *Niboyet* (15), it was held that residence within the jurisdiction was sufficient to empower the Courts to give decrees for divorce. This decision must no doubt be considered unsound in view of the case of *Le Mesurier* v. *Le Mesurier* (11), but there was no amendment of the Indian Divorce Act thereafter in order to give effect to the Privy Council decision. I would therefore hold that the powers conferred on the Indian Legislature by the Act of 1861 were not at all exceeded in the passing of the Indian Divorce Act.

Le Rossignol, J.—I have had the advantage of reading the lucid and learned judgment of the Chief Justice and find myself in complete agreement with it. Two points of law are involved in this reference:—

(1) Does the Indian Divorce Act, IV of 1869, confer jurisdiction on the Indian Courts to entertain petitions for the dissolution of their marriage from persons who satisfy the conditions laid down in that Act but have no Indian domicil ?

(2) If such a jurisdiction is conferred by the Act had the Legislature power under the Indian Councils Act of 1861 to confer such jurisdiction ?

My answer to both these questions is in the affirmative.

With the further question what effect the Indian decree shall have in countries outside India we have no direct concern. *Prima facie* the decree of a competent Court should be accepted at its face value in a foreign country and should be defeasible only on grounds which would defeat any foreign judgment, *e.g.*, fraud; and this view has peculiar force when the Courts of the countries concerned derive their authority from the same fount.

What shall constitute an adequate foundation for the jurisdiction of its Courts is, I conceive, a branch of the municipal law of each country and not a matter to be regulated by International Law sometimes miscalled the *jus gentium*. Accordingly if the Indian Legislature acting within its powers has conferred jurisdiction in respect of any matter on the Indian Courts, those Courts would be guilty of a dereliction of duty if they failed to exercise that jurisdiction, regardless of the fact that their decrees may possess no extra territorial value.

I have nothing to add to the demonstration of the learned Chief Justice that the Indian Legislature was acting entirely within its powers in enacting the Indian Divorce Act and from that Act it is clear that residence and not domicil was deliberately adopted by it as the basis of jurisdiction for its Courts in matters

of divorce. To argue that the word "residence" as used in the Act must be interpreted to mean domicil whenever the English Courts recognise nothing short of domicil as the test of jurisdiction, and to mean mere residence when, if ever, the English Courts again revert to mere residence as the test of jurisdiction, is to go counter to all recognised rules for the interpretation of Statutes and to rob language of all exactitude.

In the case of *Keyes* v. *Keyes and Gray* (10) we find a dictum that the Indian Legislature was not competent to base jurisdiction in divorce on mere residence and that the Statute laying down that rule is *pro tanto, ultra vires.* But inasmuch as it is the rule of the English Courts to recognise no divorce decree pronounced by a Court of which the jurisdiction is not based on domicil I entirely fail to understand by what jurisdiction the learned Judge was competent to make a pronouncement upon the validity of the Act of the Indian Legislature. That judgment, though entitled to very great respect, is not a judgment of the Privy Council and consequently has no binding force upon the Indian Courts.

Finally, I concur in regretting the scandalous results of this conflict of laws and the incongruity arising from the refusal of one set of Courts to recognise the decrees of another set of Courts although both derive their authority from the same source. That Courts which are admittedly competent to deprive a subject of the Crown of his life should be held incompetent to alter his mere status appears to me to constitute a state of things verging on the ridiculous. This, however, is a matter which can be remedied only by the Legislature.

My answer to the reference is that the referring Court has jurisdiction to entertain a petition for the dissolution of the marriage of the parties.

Harrison, J.—I agree throughout with learned Chief Justice.

Fforde, J.—Having had the privilege and pleasure of reading the judgment of the Chief Justice, I find myself in such complete agreement with most of the conclusions at which he has arrived that it seems unnecessary for me to record at length the judgment which I had myself prepared.

The only question which we have to decide is whether or not a decree pronounced by an Indian Court for the dissolution of marriage of spouses resident but not domiciled in India is valid within the limits of that Court's jurisdiction.

We are not judicially concerned with the extra-territorial validity of that decree. The reception which it may receive in a foreign country depends upon the principles adopted by such country in the administration of its matrimonial laws. So far as England is concerned it is now quite clear that the Courts will only regard a marriage as being validly dissolved when the decree for dissolution is pronounced by the Court of the domicil; and acting on this principle the English Courts refuse to entertain a suit for divorce unless it appears that the domicil of the husband is English at the date of the suit. If in the case of *Keyes* v. *Keyes* (10) the decree in question had been pronounced by the Court of a foreign country, using the term foreign in its political sense, all that the Court need have enquired into was the matter of domicil. As soon as it appeared that the decree in question had been pronounced by a Court which was not of the country of the domicil, the English Court was bound by its rule of private international law to refuse to recognize that the status of the spouses had been altered outside of the territories of the country where the decree was granted.

The Courts in India, however, though they are the Courts of a foreign country for all purposes concerning the rules of private international law, have had their jurisdiction in matrimonial matters conferred upon them by an Act which was itself promulgated by an Act of the Imperial Parliament. It, therefore, became necessary in the case of *Keyes* v. *Keyes* (10) to consider whether the terms of Imperial Statute overrode the rule of law adopted by the English Courts. In other words, whether the Act of 1861 enabled the Governor-General of India in Council to pro-

mulgate an Act giving jurisdiction to Courts in India to grant a decree of dissolution of marriage which the English Courts would be bound to recognize.

The promulgating Statute only gives power to make laws for India; and the Indian Divorce Act of 1869, passed under and by virtue of that Statute, made residence and not domicil the test of jurisdiction in matters of divorce. But at the time of the passing of the Indian Divorce Act there is no doubt that in England residence and not domicil was the test of jurisdiction, and consequently, in 1869, had this question arisen, the Courts in England could have had no ground for refusing to recognise the validity of a decree of these Courts based on residence, as there was then no conflict between the law of India and the law of England on the question of jurisdiction in suits for dissolution of marriage.

But since the decision in *Le Mesurier* v. *Le Mesurier* (11) the situtation has changed. The English Courts from then onwards have by judicial authority adopted domicil as the test of jurisdiction while the Indian Courts remain governed by the Act of 1869 which has based jurisdiction on residence; and a conflict in this matter has thus arisen between the laws of the two countries.

The learned President in the course of his judgment in *Keyes* v. *Keyes* (10) said "To create a jurisdiction in divorce suits as *is* exercised in the Courts of this country (that is, based on domicil) was, I have no doubt, within the powers conferred upon the Governor-General in Council by the East India Councils Act of 1861." It may with equal force be said that to create a jurisdiction in divorce suits as *was* exercised in the English Court (that is, based on residence), was likewise within the powers conferred by that Act; and it may be added that such a jurisdiction was in fact created by the Act of 1869 promulgated by the Governor-General in Council by virtue of the powers so conferred upon him. How then is this jurisdiction taken away? It cannot disappear simply because the jurisdiction *now* exercised by the Courts of England is not such as was *then* exercised by these Courts.

The view of the learned President that the Act of 1861 "does not warrant the making of a law to empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction" may be a correct statement of the law if we add the words "so as to affect their status as to marriage in the country of their domicil." The added words are in fact taken from an earlier part of the same judgment and led me to believe that the learned President intended to confine his judgment merely to determining whether or not a decree of the Indian Court based on residence is to be regarded as valid in England. The full passage runs as follows:—"The principles enunciated in *Shaw* v. *Gould* (13) and in *Le Mesurier* v. *Le Mesurier* (11) seem to me to be material in the inquiry whether, upon the true construction of the Imperial Statute of 1861, power is by that Statute conferred upon the Governor-General of India in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicil."

The judgment in *Keyes* v. *Keyes* (10) has been assumed to have decided not only that a decree of an Indian Court based on residence only is invalid in England, but further that such a decree is void even in India. But the fact that an English Court refuses to regard as valid the decree of a foreign Court which is not based on domicil, does not necessarily imply that the English Court is thereby pronouncing the decree to be invalid within the limits of the foreign Court's jurisdiction. The English Court is not judicially concerned with the effect of the decree within the local forum, any more than this Court is concerned with its effect outside of that forum.

In *Green* v. *Green* (18), Gorell Barnes J. said, "In my opinion the American decree was unjustly obtained against the petitioner, who never submitted himself to the jurisdiction

(18) [1893] P. 89.

of the American Court, and it was obtained on grounds which would not have entitled the parties to a decree in this Court. There is no case precisely in point; but on the principle laid down in *Shaw* v. *Attorney General* (19), it is clear that though the decree of divorce may be treated as valid in America this Court cannot recognise it as putting an end to a marriage which is binding in this country—the petitioner being domiciled in England."

In *Gillig* v. *Gillig* (20) the husband was domiciled in the State of New York, but obtained a decree of dissolution of his marriage in the Court of South Dakota, where he obtained a domicil in a sense which is recognized in America but is foreign to English notions. In other words, he obtained a divorce based on what English law would regard as mere residence and not domicil. In the State of New York (the place of the actual domicil) the decree of the Court of Dakota was recognized as valid. The plaintiff in that case having subsequently married an Englishman domiciled in England, brought a petition in England for a declaration that her subsequent marriage was valid. The President of the Probate and Divorce Court found that the marriage was dissolved in the State of Dakota, and that it was recognized as dissolved in the State of New York, and upon those findings held that the marriage must be regarded as dissolved all over the world.

In *Bater* v. *Bater* (16) the Court of Appeal considered the jurisdiction of the Court of the State of New York to dissolve a marriage contracted in England between persons domiciled in England at the time of the marriage, the husband having subsequently abandoned his domicil of origin and acquired a domicil in the State of New York. Among other matters which the Court inquired into was the proper construction of the New York Code which governed proceedings of that kind. But the matter of domicil was regarded as being the determining factor in the case, going as it did to the root of the whole question of jurisdiction. On proof of the change of domicil, and of the jurisdiction of the American Court, it was held that the decision of that Court governed the rights of the parties everywhere.

It appears from these cases that the English Courts will inquire into the jurisdiction of a foreign Court to grant a decree of divorce, and if it appears that the decree is that of the Court of the domicil, or is recognized by such Court, will regard the decree as binding in England. But in any event it will deem the decision of the foreign Court to be effective within the limits of that Court's jurisdiction even in cases where it holds it to be invalid according to the principles of English Law [*Green* v. *Green* (18)], I apprehend that to hold otherwise would be tantamount to dictating to a foreign country the mode in which it should administer its municipal laws.

The English Courts apparently do not go as far as the Courts of Scotland in scrutinizing the jurisdiction of foreign decrees of divorce. for while the Scotch Courts will not admit a decree to be valid which is pronounced upon grounds not recognized as adequate by Scotch Law [*Sterling* v. *Sterling* (21)], the English Courts will recognize such decrees [*Bater* v. *Bater* (16)]. To this extent the rule of private international law adopted in Scotland differs from the rule in England.

The attitude of the English Courts towards foreign decrees of divorce is summarized in the judgment of Lord Westbury in *Shaw* v. *Gould* (13), where a Scotch decree was in question, in the following terms:—" The first essential for the validity of a foreign decree is that it should be pronounced by a Court of competent jurisdiction between parties *bona fide* subject to that jurisdiction. It is perfectly competent to the Courts in Scotland to fix a certain amount of residence as a condition for the exercise of its jurisdiction, and if that condition be fulfilled it may proceed to pronounce a judgment that will be

(19) [1870] L. R. 2 P. 156—39 L. J. P. 81—23 L. T. 322—18 W. R. 1145.

(20) [1906] P. 135—75 L. J., P. 42—94 L. T. 614—22 T. L. R. 306.

(21) [1908] 2 Ch. 344

binding within its own borders; but that judgment cannot claim extra-territorial authority unless it be pronounced in accordance with the rules of international public law." And again, in another part of the same judgment; "No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicil are entitled or even bound to reject such judgment as having no extra-territorial force or validity. They are entitled to reject it if pronounced by a tribunal not having competent jurisdiction and they are bound to reject it if it be an invasion of their own laws and polity."

As I read the judgment in *Keyes* v. *Keyes* (10) I do not regard it as deciding that a decree of this Court is invalid within the limits of our jurisdiction in the eyes of English law, but merely that it is invalid ontside those limits.

For the reasons given by the learned Chief Justice which I need not repeat, I am of opinion, that the District Court has jurisdiction to hear and determine the suit between the parties and cannot refuse to exercise such jurisdiction, even though the deplorable result of a decree will be, that the parties will be regarded as free to marry again in this Province but may be prosecuted for bigamy in England should they contract a fresh marriage and take up a residence in that country.

Per Curiam.—Our answer to the question referred to us is that the District Judge of Ambala has jurisdiction to entertain the suit for the dissolution of the marriage between the parties. The record must now go back to the District Judge.

Referenee answered in the affirmative.

1924 LAHORE 529

HARRISON, J.

Jiwna Ram—Petitioner.

v.

The Crown—Opposite Party

Cr. Rev. No 2150 of 1923, decided on 7th March 1924, from the order of Ss. J. Karnal, D/-29th August 1923.

Opium Act, I of 1878 S. 9(c)—Preparation of sugar-mixed opium pills is no offence.

Mere preparation of sugar-mixed opium pills is no offence though prepared with intent to sell. [P. 529, C. 2]

Shamair Chand—for Petitioner.

Nemo—for the Crown.

Harrison, J.—Jiwna Ram has been convicted under S. 9 (*c*) of the Excise Act and sentenced to pay a fine of Rs. 25, the finding being that when his shop was searched opium pills weighing one *tola* one *masha* were found and these contained an admixture of sugar whereby the opium was adulterated. The Sessions Judge has held that he doubtless prepared these pills with a view to selling them and that inasmuch as the rule lays down that it is an offence to sell any thing but pure opium, he is guilty under this section.

On revision it is contended that even if he did intend to sell the pills no offence was committed. The word used in the rule being "sell" counsel points out that at the utmost all that his client did was to prepare adulterated pills for sale and therefore no offence was committed, for it is common ground that the amount of opium found, made up into pills and unmanufactured, was not more than what is allowed. The same rule 49 (2) (*a*) which says that the license-holder may sell pure opium and poppy heads only goes on to say that he may not keep in stock or sell any chloral hydrate. The same embargo has not been placed on the keeping in stock of adulterated opium. This may be an oversight, but the rule may be strictly enforced and the wording cannot be stretched against the subject. I find therefore that the preparation of adulterated opium pills is no offence.

I accept the application for revision and acquit Jiwna Ram. The fine will be refunded.

Revision accepted.

1924 LAHORE 530

ABDUL RAOOF AND MOTI SAGAR, JJ.

Harbhagwan and others—Plaintiffs—Appellants.

v.

Amar Singh and others—Defendants—Respondents.

S. A. No. 1183 of 1920, Decided on 20th December 1923, from the decree of D. J. Rawalpindi, D/-28th February 1920.

Court Fees Act, Sch 11 Art 17 (iii)—Suit contesting alienation by plff's father partly decreed—Appeal from decree—Court fee of Rs. 10 is proper.

A suit for a declaration that a certain alienation made by the plaintiffs' father should not be binding upon the plff's reversionary interests was decreed on payment of a certain sum to the defendant-mortgagee. On an appeal by the plaintiff.

Held, that a Court fee of Rs. 10 was proper. Court-fee payable on part of a whole claim in appeal cannot, in the absence of express direction to the contrary, exceed the Court-fee payable on the whole claim. 92 P. R. 1900 foll. [P. 530, C. 2.]

B. R. Puri—for Appellants.

Sheo Narain—for Respondents.

Moti Sagar, J.—The facts of the case, which have given rise to this second appeal, are few and simple and are briefly these:—On the 28th July 1912, one Jita Mal executed a deed of mortgage in respect of a house at Rawalpindi in favour of one Amar Singh for a consideration of Rs. 2,500. On the 5th / 6th December 1912, he executed two more deeds for Rs. 99 each by which he mortgaged the equity of redemption of this very house to the same mortgagee, Amar Singh. On the 23rd January 1919, the plaintiffs, who are the minor sons of Jita Mal, brought this suit for a declaration that the house mortgaged was ancestral, that the mortgages were without consideration and legal necessity, that the debts were contracted for immoral purposes, and that the alienation would not be binding on the reversionary interests of the plaintiffs after the death of the alienor. The suit was dismissed by the Senior Subordinate Judge who held that it had not been established that the sums borrowed had been expended on immoral purposes. On appeal the learned District Judge found that it had been proved that Jita Mal, the mortgagor, was leading an immoral and an extravagant life but that he was also carrying on the business of a goldsmith upon which the loans might have been expended with propriety. He further found that out of Rs. 2 700 advanced to the mortgagor necessity to the extent of Rs. 2,365 had been fully established, and that this sum constituted a valid charge on the property mortgaged. He accordingly decreed the plaintiff's suit subject to their paying this sum with interest to the defendant-mortgagee when succession opened out.

Against this decision the plaintiffs have preferred a second appeal to this Court, while the defendant-mortgagee has filed a cross-objection in respect of the sum of Rs. 335 which has been disallowed by the learned Judge of the Court below.

A preliminary objection has been taken by the respondent to the hearing of this appeal that it is not sufficiently stamped and that the appellants should pay full Court-fee on the sum of Rs. 2,365 which, it is alleged, is the subject matter of dispute in this appel. In our opinion, this preliminary objection has no force and must be overruled. The suit was one for a declaration that a certain alienation made by the plaintiffs' father should not be binding upon their reversionary interests. The plaint was rightly stamped with a Court-fee of Rs. 10. In appeal the same prayer is repeated, and we do not think that, by the mere fact that the suit has been decreed on payment of a certain sum to the defendant-mortgagee its nature has in any way been altered. It has been laid down in *Hazari Singh* v. *Piran* (1), that it was not contemplated by the Legislature that the Court fee payable on part of a whole claim in appeal is in the absence of express direction to the contrary to exceed the Court-fee payable on the whole claim. It is not denied that if the suit had been wholly dismissed a stamp of Rs. 10 would have been quite sufficient on

(1) [1900] 92 P. R. 1900.

the appeal. It would be most unreasonable to hold that when the claim has been dismissed in part, the appellants should be required to pay Court-fee which is greater than the Court-fee which they would be required to pay if the suit had been wholly dismissed We are of the opinion that the present case is governed by the principle laid down in *Hazari Singh* v. *Piran* (1), and for this reason we disallow the objection.

Appeal dismissed.

1924 LAHORE 531

HARRISON AND ZAFAR ALI, JJ.

Bharat National Bank, Ltd., Delhi and others—Defendants—Appellants,

v.

Banarsi Das — Plaintiff — Respondent.

F. A. No. 399 of 1923, Decided on 27th November 1923, from the decree of Senior Sub. J. Ambala, D/- 16th January 1923.

Evidence Act, S. 115—Estoppel by conduct—Promissory note by Bank not specially providing for compound interest—Bank keeping current accounts at compound interest—Compound interest should be paid by Bank and also by Directors when they guaranteed payment.

Two promissory notes were executed by the deft. Bank with interest at 11 per cent. per annum in favour of plff. Certain Directors of the Bank gave a personal guarantee rendering themselves liable for payment of the entire sum due on these promissory notes The promissory notes merely stated that interest at 11 per cent, will be charged. The Bank however throughout credited interest with half-yearly rests in its own accounts as well as in the pass book of the plaintiff.

Held: that plff. was entitled to compound interest at half yearly rests. [P. 532, C. 1]

Held: further that though the concluding portion of the guarantee provided as follows:- "Failing this payment we agree to pay you personally whatever balance may be found due to you on the said date together with the interest as given in the promissory notes", the guarantors were Directors of the Bank and as such presumably cognizant of all that the Bank did and the method, in which it conducted its business and therefore were liable to pay compound interest. [P. 532, C. 1]

Gokal Chand Narang—for Appellants.

Devraj Sawhney and *D. C. Ralli*—for Respondent.

Harrison, J.—The facts of this case are that two promissory notes were executed by the Bharat National Bank in January 1914 for Rs. 15,000 and Rs. 85, 000, respectively, with interest at 11 *per cent. per annum* in favour of *Rai Bahadur Lala* Banarsi Das. On the 31st October 1918 certain Directors of the Bank gave a personal guarantee rendering themselves liable for payment of the entire sum due on these promissory notes. *Rai Bahadur Lala* Banarsi Das has brought this suit against the Bank and the guarantors claiming Rs. 81,427-11-1. The execution of the promissory notes is admitted and the only points disputed are whether the Bank is bound to pay compound interest as claimed with half-yearly rests; and whether, if it be held that the Bank is liable to pay such interest, the guarantors are also liable and whether costs should be allowed on the entire sum.

After the institution of the suit a sum of Rs. 13, 142-3-6 was paid by the Bank and this has been deducted from the total amount of the decree, though costs have been allowed on the amount stated in the plaint. The plaintiff has put in cross-objections claiming the interest which has been disallowed from the date of institution to the date of realisation.

The all important question is that of the compound interest. The promissory notes merely state that interest at 11 *per cent.* will be charged. The Bank however, has throughout credited interest in its accounts with half-yearly rests, and, not only has it done so in its own accounts, but it has made the same entries in the pass book of the plaintiff. It is urged by the appellants that this was merely a clerical mistake, which was discovered by one of the Directors of the Bank after the suit had been instituted, and that they were fully entitled to make the adjustment they have made, and thereby reduce the amount outstanding by over Rs. 29,000. The defendants-appellants rest their whole case on the wording of the promissory notes. They allege that it is quite usual for Banks in this country to insist on the insertion of a clause providing for the half-yearly

rests and that the omission of such a clause points to a definite agreement made by the parties that there should be no such rests, and that simple interest would be charged throughout. On the other hand as laid down in Shastri's Book on the Law of Interest, pages 115 and 119, and also in Halsbury's Laws of England, Volume 21, page 43 and Hart's Law of Banking, page 192, it is the usual practice of Banks to make out their accounts at regular intervals of six months or a year, to add the amount of unpaid interest to the principal, and to bring forward the balance so calculated as the first item in the new account. Not only is this the common practice but it is admittedly the practice of the defendant Bank. What is infinitely more important however is that the Bank has by its own action led the plaintiff to believe that they were crediting him with compound interest and there can be no doubt in our opinion that their action in doing so has led him to allow the account to run on. The wording of the promissory notes does not exclude the charging of compound interest. It merely says that interest will be charged at 11 *per cent.* The defendant Bank has itself read this as meaning that compound interest would be charged on any amount not paid by due date and in our opinion the fact that they periodically wrote up the pass book of the plaintiff, as they did, debars them from now urging that this was merely a clerical mistake and that both parties understood that simple interest only would be charged.

We find, therefore, that the defendant Bank is liable to pay compound interest as claimed.

In the year 1918 the guarantors signed the following document:—"We do hereby guarantee the payment by the Bank, to your goodself, of the entire sum remaining due to you under the Bank's promissory notes." This certainly renders them liable to pay any sum due on the 31st October 1918. The concluding portion of the guarantee runs as follows:—"Failing this payment we agree to pay you personally whatever balance may be found due to you on the said date together with the interest as given in the promissory notes." It is contended that these words excluded the charging of compound interest from the 31st October 1918.

Had the guarantors been strangers it might be argued that the amount for which they are liable is the amount found to be due on the 31st October 1918 on the promissory notes and simple interest on the same from that date forward. As, however, it is admitted that these guarantors were Directors of the Bank and as such presumably cognizant of all that the Bank did and the method in which it conducted its business we are of opinion that even from the 31st October onwards they are liable to pay whatever is due on the promissory notes.

On the question of costs it is admitted that no notice of suit was given and that Rs 13,000 odd were paid at once. Under these circumstances we think that no costs should have been allowed on Rs. 13, 142-3-6 and to this extent we reduce the amount of the decree.

On the cross-objections we consider that interest should have been allowed after institution until the date of realization and this we allow and we accept the cross-objections in so far as to allow this interest at 6 *per cent. per annum.* The costs of the plaintiff will be paid throughout by the defendant-respondents.

Appeal allowed in part.
Cross-objections accepted.

1924 LAHORE 532

SHADI LAL, C. J. AND LUMSDEN, J.

Bur Singh and another—Defendants-Appellants.

v.

Dalip Singh and others—Plaintiffs—Respondents.

S. A. No. 1470 of 1920, Decided on 21st April 1923, from the decree of District Judge, Hoshiarpur, D/- 13th March 1920.

Custom (Punjab)—Adoption—Son's daughter's son cannot be adopted.

A Son's daughter's son does not stand on the same footing as a daughter's son, so far as eligibility for adoption is concerned. 50 P. R. 1893 F. B. Ref. [P 533 C 1]

Faqir Chand—for Appellants.

Nanak Chand—for Respondents.

Shadi Lal, C. J.—On the 14th of September 1918, one Bur Singh, a Jat of the village Lehli Khurd in the district of Hoshiarpur, adopted the son of his deceased son's daughter. Bur Singh has died and the present suit has been brought by his reversioners who contest both the *factum* and the validity of the adoption.

The *factum* of the adoption has been established, and the question for determination is whether the adoption of a grand-daughter's son is valid under the customary law applying to the parties. Now the Full Bench Judgment in *Ralla* v. *Budha* (1) enunciates the rule that the burden of proving the validity of the adoption of a non-agnate in the presence of near agnates lies upon the person setting up the adoption, and it is admitted that there is not a single instance of the adoption of a grand-daughter's son. The *riwaj-i-am* does not recognise the adoption of any cognate except a daughter's son or a sister's son; and we are unable to hold that a son's daughter's son stands on the same footing as a daughter's son.

Mr Faqir Chand for the appellant invites our attention to the judgment in *Atar Singh* v. *Lakhmir Singh* (2) which lays down that among Parwal Jats of the Amritsar District the adoption of a sister's grandson is valid by custom. The judgment does not profess to discuss the question but only points out that if a sister's son can be adopted, there is no reason why a sister's grandson (apparently sister's son's son) is not eligible. Now, there are two observations which we wish to make in connection with this authority. In the first place, the learned Judges, who decided the case, were of the opinion that a sister's grandson was practically on the same footing as a sister's son; but we are clear that a daughter's son and a son's daughter's son are not persons in the same position. It is well known that a daughter's son is an heir under the Hindu Law and also under the customary law in the case of some tribes, but the same thing cannot be said with respect to the son's daughter's son. In the second place, the judgment in *Atar Singh's* case (2) has been practically superseded by the rule laid down by the Full Bench in 50 P. R. 1893.

The defendant, on whom the onus rested, has not adduced any evidence in support of the validity of the adoption. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) [1893] 50 P.R. 1893.
(2) [1885] 120 P. R. 1885.

1924 LAHORE 533

LE ROSSIGNOL, J.

Hardwari—Defendant—Appellant

v.

Chuni Lal and others—Plaintiff & Defendants—Respondents.

S. A. No. 2473 of 1923, Decided on 27th February 1924, from the decree of the D. J. Karnal, D/- 9th August 1923.

Hindu Law—Alienation by paternal uncle in presence of minor's mother does not bind minor's estate.

Paternal uncles are not natural guardians in the presence of the minor's mother and therefore have no power to mortgage minor's share in joint property and therefore a mortgage by paternal uncle is not binding on minor, though he may have derived benefit under the mortgage. [P 534 C 1]

Shamair Chand—for Appellant.

Manohar Lal—for Respondents.

Le Rossignol, J.—Piare Lal and Chhotu on their own behalf and acting as guardians of their nephew Hardwari executed in 1916 two mortgage deeds; one of agricultural land for Rs. 500, the other of a house for Rs. 400 and this appeal and the connected appeal arise out of two suits brought by the mortgagees for recovery of the mortgage-debt. The first Court decreed the plaintiffs' suit and the decrees were affirmed on ap-

peal by the learned District Judge. These appeals are pressed on behalf of Hardwari only and the contention on his behalf is that on the finding of the learned District Judge that Piare Lal and Chhotu and Hardwari did not constitute a joint family, Hardwari's share in the properties should be relieved of all liability to satisfy the decrees.

For the respondents it is contended that even if Chhotu and Piare Lal are not the natural guardians of Hardwari during the lifetime of Hardwari's mother still it is clear from the record that they had many common interests and in view of the finding of the learned District Judge that the mortgages were effected for the benefit of the minor there should be no interference by this Court.

Paternal uncles, no doubt may be natural guardians under Hindu Law, but they are not natural guardians in the presence of the minor's mother. For this reason I must hold that although Hardwari participated in the benefits derived from these mortgages, his uncles were not his natural guardians and consequently had no power to bind his share in the joint property. I accordingly accept the appeals and modify the decrees given by the Courts below by directing that they shall be executed only against Chhotu and Piare Lal and their shares in the mortgaged property. Cost in the Courts below shall be borne by Piare Lal and Chhotu and in this Court by the parties incurring them.

Appeals allowed.

1924 LAHORE 534

CAMPBELL AND ZAFAR ALI, JJ.

Nihal Chand—Plaintiff—Appellant.

v.

Khuda Bakhsh and another—Defendants—Respondents.

S. A. No. 2137 of 1920, Decided on 18th May 1923, from the decree of Additional District Judge, Sheikhupura, at Lahore, D/- 17th June 1920.

Limitation Act, Art. 66—Bond executed by two promissors—Article applies—Punjab Loans Limitation Act.

A suit was instituted on 26th May 1919 for money due on a bond dated the 10th May 1913. The plaint alleged that the bond had been executed by K as principal and by G as surety and the prayer was for a decree against K and the property of G in the hands of S son of G. The trial Court decreed the suit but in appeal the point of limitation was decided against plaintiff and the suit dismissed as against S. Second appeal was preferred from the decision. The terms of the bond were rather obscure and the lower Appellate Court having given no finding on the interpretation of the instrument, the High Court in Second Appeal assumed that the bond was signed by both K and G as principal debtor and surety.

Held that the Article applicable was Article 66, the suit being certainly one on a single bond executed by 2 persons with a day specified for payment and that the suit was in time as the period of 3 years under Art. 66 is extended to 6 years by the Punjab Loans Limitation Act 105 P. R. 1919 Dist. [P 536 C 1]

Gullu Ram and *Tirath Ram*—for Appellant.

Respondents were not represented.

Campbell, J.—The suit with which this second appeal is concerned was instituted on 26th May 1919 for money due on a bond dated the 10th May 1913. The defendants being Khuda Baksh and Sultan, son of Ghulam Mahammad. The plaint alleged that the bond had been executed by Khuda Bakhsh as principal and by Ghulam Muhammad as surety and the prayer was for a decree against, Khuda Baksh and the property, of Ghulam Muhammad in the hands of Sultan, with a direction that if the decretal amount should not be realised from Khuda Bakhsh it should be realised from the property of Ghulam Muhammad.

Sultan pleaded that he knew nothing about the bond or whether any consideration was paid for it.

The trial Court framed the following issues :—

(1) Did defendant No. 1 with father of defendant No. 2 as a surety write the bond with consideration ?

(2) Is plaintiff entitled to interest, if so at what rate ?

(3) Is the suit within time ?

We are concerned with issues Nos. 1 and 3 only.

On issue No. 1 the finding was that the scribe of the bond apparently knew very little of Urdu and for that reason the wording of it was defec-

tive, that Ghulam Muhammad was shown as a principal debtor in the bond, that the names of both Khuda Bakhsh and Ghulam Muhammad appeared in the bond, that in the body of the bond there is mention of a surety, that in the margin Ghulam Muhammad is shown as a witness and his thumb impression was taken under the word 'witness,' and that a perusal of the bond gives the impression that Khuda Bakhsh as a principal and Ghulam Muhammad as a surety wrote the bond.

Under the third issue the question was discussed whether as against Ghulam Muhammad's representative the period of limitation would be 3 years under Article 65 or Article 115 of the Limitation Act or whether it would be governed by one of the other articles the period of which has been extended to 6 years by the Punjab Loans Limitation Act. The learned Munsif referred to a ruling of the Punjab Chief Court reported as *Harbans Lal* v. *Nathu* (1) which he considered laid down the rule that the liability of principal and surety must be considered co-extensive, and he thought that there was no reason for the claims against Khuda Bakhsh and Sultan being governed by 2 different periods of limitation. He concluded that the period should be 6 years against both the defendants under one of the three Articles 66, 67 or 120.

The plaintiff was given a decree for Rs. 700 to be realised first from Khuda Bakhsh and failing him against the property of Ghulam Muhammad.

Sultan appealed to the District Judge on the question of limitation among other grounds. This question was the only one discussed and decided. The plea that on the face of the bond Ghulam Muhammad was merely a witness was not taken up and the learned District Judge did not say definitely whether he considered the trial Court's interpretation of the document to be correct. Regarding the point of limitation, he distinguished *Harbans Lal* v. *Nathu* (1) which, as he rightly observed, was not directly in point since it was a decision regarding the effect of S. 20 of the Limitation Act and ruled merely that under that section payment of interest by the principal debtor, within the period of limitation, would give a fresh starting point of limitation, against the surety. He proceeded to hold on the authority of *Dwarkadoss Govardhana Doss* v. *Chivakala Krishnayya* (2) and *Brojendro Kissore Roy* v. *Hindusthan Co-operative Insurance Society* (3) that for purposes of limitation a debtor and his surety do not stand on the same footing and that the present suit as against Sultan was governed by Article 65 or Article 115. The appeal was accepted and the plaintiff's suit as against Sultan was dismissed.

The plaintiff has come to this Court on Second Appeal urging that the decision of the learned District Judge, that the suit was time barred against Sultan is wrong in law. The case has been referred to a Division Bench in view of the importance of the point of limitation involved. Unfortunately the respondent has not appeared and we have only heard arguments for the plaintiff-appellant.

This is one of those questions which only arise in this Province where a Special Act has extended to 6 years the period of 3 years prescribed in certain Articles of the Limitation Act and has left the 3 years' period of others untouched. It is also unfortunate that we have no finding by the lower Appellate Court on the interpretation of the instrument, the terms of which are decidedly obscure.

We must assume for purposes of the decision of the point before us that Ghulam Muhammad, as held by the trial Court, signed the bond as a promissor and not as a witness, that the word '*Zamin*' used in the body of the bond refers to him, and also that at the commencement of the bond Ghulam Muhammad was shown as a principal debtor.

(1) [1919] 105 P. R. 1919—53 I. C. 586.

(2) [1911] 21 M.L.J. 457—9 M.L.T. 215—9 I.C. 204—(1911) M.W.N. 41.

(3) [1917] 44 Cal. 978—21 C.W.N. 482—39 I.C. 705—25 C.L.J. 238.

In the 2 cases cited by the lower Appellate Court the question of the period within which a suit must be brought against a surety to enforce his liability was discussed from an entirely different point of view to that from which the present suit must be regarded, because there was no contest in those cases between articles altered by a special Act and those which remained unaltered. In neither case was the surety a party to the instrument on which the suit was brought. In the Madras case he had entered into an entirely separate contract of guarantee. In the Calcutta case, *Brojendro Kissore Roy* v. *Hindusthan Co-operative Insurance Society* (3), the suit was on a promissory note executed by the first defendant on the back of which the second defendant had made an endorsement guaranteeing payment. This endorsement, the learned Judges held, had to be treated as a contract of guarantee and the decision proceeded on the view that there were two separate debts due to the plaintiff *viz.*, that of the principal debtor and that of the surety. The main question was the applicability of S. 20 of the Limitation Act. After a careful consideration of both the rulings we do not think that they afford any practical guide in this case.

The contention of the learned counsel for the appellant is that this is a suit on a bond and nothing else and that the Article of the Limitation Act applicable to both executants is Article 66 or Article 88 for each of which the period is 6 years under the Punjab Loan Limitation Act. We think that the Article applicable is Article 66. The suit is certainly one on a single bond executed by 2 persons with a day specified for payment. The liability of Ghulam Muhammad, if any, is immediately on the bond and not upon any separate contract of guarantee.

We hold accordingly that the suit is within limitation against both the defendants. We accept the appeal, set aside the order of the lower Appellate Court and remand the case to it under Order 41, rule 23 for decision on the other issues which arise. The question whether Ghulam Muhammad was liable at all on this bond is one which is entirely open and nothing in our judgment should be allowed to prejudice its decision. Our finding is merely this, that the suit as framed is not time barred against the second defendant Sultan.

Costs in this Court will follow the event. The stamp on appeal will be refunded.

Case remanded.

1924 LAHORE 536

ZAFAR ALI, J.

Vidya Wanti, minor wife of *Bakshi Ram*—Petitioner.

v.

Jai Dayal Kapur and another—Respondents.

Civil Mis. No. 72 of 1924, Decided on 4th April 1924.

Civil P. C., O. 44, R. 1—Proviso does not apply unless applicant is found to be pauper.

The proviso to Order 44 rule 1 is not applicable unless it should be found that the applicant is a pauper. [P 536 C 2]

Nand Lal—for Petitioner.

Lala Fakir Chand — for Respondents.

Zafar Ali, J.—The learned Counsel for the respondents has filed objections to this application for leave to appeal as a pauper. Under Order 44, rule 2. Civil Procedure Code, I direct the Court from whose decision the appeal is preferred to make an enquiry into the alleged pauperism of the applicant in accordance with the provisions of Order 33, Civil Procedure Code, relating to pauper suits, and to submit a report to this Court within 3 months.

Counsel, for the respondents urges at this stage that the application is liable to dismissal under the proviso to Order 44 Rule 1, but obviously the proviso is not applicable unless it should be found that the applicant is a pauper.

As regards certain other objections in writing raised by the Counsel, he states that he reserves his arguments thereon till the receipt of the report of the Court below.

Petition accepted.

1924 LAHORE 537

MOTI SAGAR, J.

Mt. Jivan—Plaintiff—Appellant.

v.

Wadhawa — Defendant — Respondent.

S. A. No. 1569 of 1922, Decided on 9th May 1923, from the decree of District Judge, Sialkot, D/- 13th February 1922.

Custom (Punjab)—Succession— Daughter is not excluded by collateral of the 6th degree—Kalwan Jats of Wazirpur.

Among *Kalwan Jats* of *Mauza* Wazirpur, in the Raya Tahsil of the Sialkot District there is no custom by which a daughter is excluded from succession by a collateral of the 6th degree. The burden of proving such custom of exclusion is on the collateral. [P. 537, C. 2]

Gobind Ram Khanna — for Appellant.

Respondent was not represented.

Judgment.—The parties to this case are *Kalwan Jats* of *Mauza* Wazirpur, in the Raya Tahsil of the Sialkot District. The land in suit consists of ½ share of 50 *kanals* 17 *marlas* originally owned by one Surjan, who died some years ago, leaving him surviving a widow Mt. Gulab Devi. Mt. Gulab Devi died some 4 years ago before the institution of the suit and after her death the land was forcibly taken possession of by some persons who set up a mortgage in their favour by the original proprietor. On the 10th of July 1917 one Wadhawa brought a suit for possession of this land alleging that he was a collateral of Surjan related to him in the 6th degree, and that he was entitled to succeed in preference to the defendants whose possession, it was alleged, was unlawful. Subsequently the plaintiff Mt. Jiwan applied to be made a party alleging herself to be the daughter of Surjan and entitled to succeed to his property on the death of his widow Mt. Gulab Devi in preference to the defendant Wadhava. On the 5th of October 1920 she instituted a separate suit on her own account for possession of this land, alleging that in the presence of a daughter a collateral of the 6th degree had no right to succeed. The trial Court found in favour of the plaintiff Mt. Jiwan and decreed the suit. On appeal the learned District Judge came to a contrary finding and held that according to the custom obtaining among the parties a daughter was not an heir and that she was excluded by collaterals however remote they may be. He further held that the *onus* of proving that the daughter was entitled to succeed in preference to collaterals was upon the plaintiff and that she had not discharged this *onus*. In this view of the case the plaintiff's suit was entirely dismissed. The plaintiff has now come up in second appeal to this Court after obtaining a certificate from the District Judge under S. 41 (3), Punjab Courts Act.

The sole question for determination is whether according to the custom obtaining among the parties daughters are excluded by collaterals of the 6th degree. On this question I have no hesitation in holding that the defendant, on whom the *onus* was, entirely failed to discharge it. A large number of witnesses were produced by him in support of his contention but their evidence is worthless and does not in any way improve his case. Some of the witnesses have of course stated that daughters are excluded by collaterals and have also cited some instances but no mutation entries have been produced in support of their statements, and in the absence of any documentary evidence I am unable to hold that the instances have been proved. A large number of witnesses have given evidence to the effect that daughters are excluded by collaterals of the 3rd or 4th degree. This evidence can obviously be of no assistance to the defendant, inasmuch as the dispute in the present case is not between a daughter and a collateral of the 3rd or 4th degree but between a daughter and a remote collateral of the 6th degree.

In my opinion the evidence produced is wholly insufficient to discharge the burden which lay upon the defendant, and I accordingly hold that the defendant has no right to succeed in preference to the plaintiff the daughter of the deceased.

The result is that the appeal is accepted and the plaintiff's suit decreed with costs throughout

Appeal allowed.

1924 LAHORE 538

Full Bench

SHADI LAL, C. J. AND SCOTT-SMITH, LE ROSSIGNOL, BROADWAY AND ABDUL RAOOF, JJ.

Mst. Attar Kaur and others—Plaintiffs—Appellants.

v.

Nikkoo alias Harwant Singh and others—Defendants—Respondents.

S. A. No. 2361 of 1920, Decided on 7th April 1924, from the decree of the District Judge Amritsar, D/- 30th July 1920.

Custom (Punjab) — Inheritance — Ancestral Property—Property inherited from maternal grandfather through mother is ancestral — Daughter's son's son can control disposition of it.

The rule laid down in *Lachna v. Mt. Thakri* (32 P. R. 1895) that where a daughter succeeds in preference to or in default of male heirs to property which, had it descended through males, would have been ancestral still remains ancestral in the hands of her sons is sound and correctly interprets the term "ancestral" as understood in the customary law of the Punjab. Consequently land inherited through a daughter is ancestral in the hands of the daughter's son and his sons may control his disposition of it. [P. 539 C, 1]

Tek Chand & Mehr Chand Mahajan—for Appellants.

G. C. Narang—for Respondents.

Shadi Lal, C. J.—This reference to the Full Bench raises the question whether land inherited by a person from his maternal grandfather is, by custom of the Punjab regarded as ancestral property *qua* the former's son. The question was answered in the affirmative by two of three Judges in *Lehna* v. *Mst. Thakri* (1), and the present order of reference seeks to impeach the correctness of the rule laid down by the majority of the Full Bench, and to support the view taken by Chatterji, J., who dissented from his colleagues.

Now, I do not propose to examine the arguments which may be urged of the respective contentions, and I concede that there is a good deal to be said in favour of the proposition that unless the land came to a person by descent from a lineal male ancestor in the male line it should not be treated as ancestral. The decision of the question does not depend upon any evidence relating to custom on the subject, nor did the learned Judges who dealt with the case of *Lehna* v. *Mst. Thakri* (1), base their conclusions on any evidence. There can be no doubt that the majority as well as as the minority invoked, what they considered to be, the general principles of the customary law in support of their respective views, and that the majority also relied upon the argument *ab inconvenienti*.

It does not appear that there was any definite pronouncement on the subject prior to 1895, but the rule laid down by the majority of the Judges has since been accepted as the correct exposition of law and has been followed in a long course of decisions. I do not think that it is desirable to upset the law which has been followed for nearly 30 years, especially when I find that, even under the Hindu Law, which was relied upon by Chatterji, J., there is a conflict of opinion as to whether the property inherited by a daughter's son from his maternal grand-father is to be deemed ancestral property; Allahabad and Patna High Courts holding it to be non-ancestral, *Jamna Prasad* v. *Ram Pratab* (2) and *Bishwanath Prasad Sahu* v. *Gajadhar Prasad* (3), while the Madras High Court takes the contrary view in *Karri Ramayya* v. *Villori Jagannadhan* (4).

The doctrine of *stare decisis* is a statutory principle to be applied to the law relating to property and I would be reluctant to overrule a decision, upon which many persons may have acted, unless I am convinced that it is clearly wrong. I am not prepared to say that the rule laid down in *Lehna* v. *Mst. Thakri* (1), has

(1) [1895] 32 P.R. 189: (F. B.)

(2) [1907] 29 All. 667-4 A.L.J. 582—(1907) A.W.N. 211.

(3) [1917] 3 Pat.L.J. 168—3 P.L.W. 286—43 I.C. 370—1917 P.H.C.C. 356.

(4) [1916] 39 Mad. 930—18 M.L.T. 360—30 I.C. 889—2 L.W. 874—(1915) M.W.N. 938.

been shown to be manifestly erroneous, and I would accordingly decline to disturb the law which has been followed by the Courts during the last thirty years.

Scott-Smith, J.—I concur. I am further of opinion that the decision of the majority of the Full Bench contained in the judgment of Roe, J., in *Lehna* v. *Mst. Thakri* (1) is sound and correctly interprets the term 'ancestral' as understood in the customary law of the Punjab.

Rossignol, J.—The question referred to this Bench is whether land inherited through a daughter is regarded by custom as ancestral property in the hands of the daughter's son so that his sons may control his disposition of that property, and the reference has been made because the correctness of the decision in *Lehna* v. *Mst. Thakri* (1), has been doubted.

The principle underlying the Punjab custom of agnatic succession is the retention of the land first in the family and then in the tribe. In the case of endogamous tribes, the postulates are satisfied whether the succession is through a male or a female, for in either case the land remains if not in the family at any rate, within the tribe, and it is especially among such tribes that a daughter is allowed to succeed as an heir even in the presence of agnates. In such cases a daughter and her heirs cannot be conceded wider powers of disposal than lineal heirs in the male line.

When, however, we are dealing with exogamous tribes succession of a daughter and her heirs introduces strangers into the village proprietary body and this circumstance throws doubt upon the correctness of the decision above noted. Presumably such a succession takes place only in the absence of near collaterals.

That decision, it may be noted, was arrived at not after an enquiry whether in such a case the land was, in fact, customarily regarded as ancestral, but on pure ratiocination.

With all respect I regard that method as unsound; the matter was one for enquiry not for argument, but it must be remembered that even if that decision does not truly represent the custom prevailing at the date of its issue it has created custom since that date, and for that reason I think we should not disturb it, but follow the rule of *stare decisis*.

Broadway, J.—I concur.

A. Raoof, J.—I agree

1924 LAHORE 539

ABDUL RAOOF AND CAMPBELL, JJ.

Mahindar Singh and another—Defendants—Appellants.

v.

Allah Ditta—Plaintiff—Respondent.

Mis. S. A. No. 2021 of 1921, Decided on 19th November 1923, from the order of the District Judge Hoshiarpur, D/- 4th July 1921.

Punjab Tenancy Act, Ss, 60 and 77 (3) (g) —Occupancy tenant wrongfully dispossessed by landlord—Suit by tenant lies in Rev. Court, though filed after one year of dispossession.

Where Plaintiff claimed possession over certain land on the allegation that he was its occupancy tenant and had wrongfully been dispossessed by the defendants-landlords about 6 years ago.

Held: that a suit of this nature is cognizable only by a Revenue Court and not by a Civil Court even though not brought within one year from the date of plaintiff's dispossession 90 P. R. 1918 F. B. foll. [P.540 C. 1]

Shamair Chand and Fakir Chand — for Appellants.

B. D. Kureshi—for Respondent.

A. Raoof, J.—The plaintiff claimed possession over certain land on the allegation that he was its occupancy tenant and had wrongfully been dispossessed by the defendants-landlords about 6 years ago. The trial Court applying the provisions of section 50 of the Punjab Tenancy Act, held the claim to be barred by time and dismissed the suit. The lower appellate Court has set aside the decree and has made an order of remand under Order 41 rule 23 of C. P. Code. Against this order the present appeal has been preferred.

The lower appellate Court has relied upon the decision reported as

Parman v. *Lhassu* (1) and also upon the ruling in *Imam Din* v. *Feroz Khan* (2) and has held that, as the suit was brought after the period of one year provided by section 50 (b) of the Punjab Tenancy Act, it was cognizable by a Civil Court and the limitation of 12 years was applicable to it. This view is clearly opposed to the Full Bench decision reported as *Akbar Hussain* v. *Karam Dad* (3). It was held in that case that a suit of this nature was cognizable only by a Revenue Court and not by a Civil Court even though not brought within one year from the date of plaintiff's dispossession, vide, Sections 50 and 77 (3) (g) of the Punjab Tenancy Act. The case reported as *Imam Din* v. *Feroz Khan (2)* was expressly overruled in this case. The case dealt with in *Parman* v. *Lhassu* (1) was distinguished from the case decided in the Full Bench ruling on the ground that the plaintiff in that case had been dispossessed in due course of law and that the plaintiff in the Full Bench case had been wrongfully dispossessed. Obviously there is this distinction to be found between the two cases. The learned Judge of the Court below therefore, was wrong in relying upon *Parman* v. *Lhassn* (1) for the decision of the present case. We are clearly of opinion that the present case is fully governed by the decision in the Full Bench case *Akbar Hussain* v. *Karam Dad* (3).

We accordingly accept the appeal and, setting aside the order of remand, dismiss the suit of the plaintiff on the ground that the Civil Court has no jurisdiction to try it. The rusult is that the decree of the trial Court is restored with costs in all Courts.

Appeal allowed.

(1) [1919] 49 P. R. 1919—59 I. C. 443.
(2) [1898] 64 P. R. 1898
(3) [1918] 90 P. R. 1918—48 I. C. 8 (F. B.)

1924 LAHORE 540

CAMPBELL, J.

Ganeshi Lal—Defendant—Petitioner.

v.

Firm Mangat Ram Atma Ram and another — Plaintiffs & Defendant—Respondents.

Civil Rev. Petition No. 575 of 1922, Decided on 20th April 1923, from the decree of the 1st Class Munsif, Ambala, D/- 11th April 1922.

Evidence Act, S. 34—Account books alone are not sufficient evidence.

Where the plaintiff's account books are the only evidence of the defendant's liability to pay any of the particular sums entered against them the evidence is not conclusive unter S. 34, and plff's suit must fail. [P. 541, C. 1]

Sundar Das—for Petitioner.

Madan Gopal for Fakir Chand—for Respondents.

Judgment. — The contentions put forward in revision are:—(1) that important documentary evidence has been overlooked by the Court below in connection with the question whether Ganeshi Lal and Banarsi Das are joint or separate and, (2) that there is no evidence to support the claim except the plaintiffs' books which under S. 34 of the Indian Evidence Act cannot in themselves charge any person with liability.

There is no force in the first point. No material documentary evidence has been overlooked. As regards the second point, this is a case where the claim was denied *in toto*. The principal defendant, the father, stated that he had had no dealings at all with the plaintiffs and the other defendant, the son, pleaded that he had no knowledge of the plaintiffs' claim and that whatever transactions he had carried out with anyone (he did not specifically admit any transactions with the plaintiffs) he had carried out under the instructions of his father.

In such circumstances it has been ruled that a plaintiff to suceeed must prove the various items of his account by independent evidence (13 I. C. 678, 22 I. C. 403

and 71 I. C. 259(*). The items are numerous and there is no evidence apart from the books that any single article charged against the defendants was supplied to them. Two witnesses were produced Ram Richupal, the plaintiffs' present *munim*, and Dwarka Das, a former *munim*. The former said merely that "*lev dev*" between the defendants and the plaintiffs took place in his presence, that he wrote the accounts, and (speaking with the accounts before him) that a payment of Rs. 625-3-0 was once made by the defendants. Dwarka Das said that the defendants, both father and son, had taken away goods in his presence, that once they took goods from him personally, that altogether they took goods to the value of more than Rs. 500, that he, the witness, did not write the books, that the books were regular, and that he did not remember when the defendants took goods or what goods.

Thus the decision of the learned Judge of the Small Cause Court was not according to law, for the plaintiffs' account books are the only evidence of the defendants' liability to pay any of the particular sums entered against them, and under S. 34, of the Evidence Act cannot be conclusive against them.

I accept the revision, set aside the decree of the lower Court and dismiss the plaintiffs' suit with costs throughout.

Revision accepted.

(1) 1922 Lah. 338.

(*) 1924 LAHORE 541

BROADWAY AND CAMPBELL. JJ.

Rajindar Singh—Plaintiff — Appellant.

v.

Mt. Ramjowai — Defendant — Respondent.

F. A. No. 548 of 1920, Decided on 27th February 1924, from the decree of S.J., Jhelum, D/- 27th January 1920.

(*) *Evidence Act, S. 101—Will—Propounder must prove majority of testator.*

The onus of proving not only the soundness of the testator's mind but also the fact that the testator was not a minor at the time of the execution of the will rests upon the person who propounds the will. [P. 542, C. 2]

Tek Chand & Bhagat-for Appellant.

Balri Das and *Anant Ram Khosla*—for Respondent.

Broadway, J.—The following pedigree table will show the nature of the dispute which has resulted in this appeal to this Court :—

KARAM SINGH (died 1912)

Sant Singh (died May 1915) — *Mst.* Ramjowai (defendant)

Rajindar Singh (Plaintiff). | Daya Singh (died, 27-3-1919).

Karam Singh died in 1912 having executed a will in favour of his grandson Rajindar Singh. This will was contested by Sant Singh and the dispute was settled by arbitration in the following manner :—The property was divided into 16 shares. Sant Singh was to get 6/16, Rajindar Singh 5/16 and Daya Singh who was then admittedly a minor 5/16. Before this award could be made a rule of Court, however, Sant Singh's death occurred in May or June 1915. Ramjowai, his widow, then appeared on the scene and the dispute was settled by the allotment of 18/64 to Mt. Ramjowai for her life, on her death her two sons taking equal moieties. 23/64 were allotted to Rajindar Singh and 23/64 to Daya Singh. On the 9th January 1918 Mt. Ramjowai executed a will in favour of her son Daya Singh which will was registered on the 20th January 1919. On the 27th March 1919 Daya Singh died of plague. He left neither widow nor children. On the 17th April 1919 Mt. Ramjowai presented a will dated 15th December 1918 purporting to have been executed in her favour by Daya Singh for registration. The will was duly registered and, on the 28th April 1919 Rajindar Singh instituted the present suit asking for a declaration to the effect that the will said to have been executed by Daya Singh "was ineffectual and null and void as against his reversionary rights." By an order of the Court dated the 12th June 1919 the plaintiff amended his plaint by adding a prayer for the cancellation of the will. Mt. Ramjowai contested the

will and the following issues were settled—

(1) Did Daya Singh execute the will while in full senses? *Onus* on defendant.

(2) Was Daya Singh a minor at the time of its execution? *Onus* on plaintiff.

(3) Is the plaintiff estopped from raising the plea of minority? *Onus* on defendant.

(4) Is there any special custom among *Ahluwalia* community of Jhelum to which the parties belong by which Daya Singh's mother could not succeed to his share even after he had partitioned his property with plaintiff? *Onus* on plaintiff.

(5) If issues Nos. 1 and 3 are found in defendant's favour could she have no more interest in the property devised than a life interest? *Onus* on plaintiff.

(5) Has the plaintiff in that case (issues 1 and 3 being found in her favour) a *locus standi* to contest the will? *Onus* on plaintiff.

(7) To what relief is plaintiff entitled?

The plaintiff's suit was finally dismissed on the 27th January 1920, the execution of the will having been held proved He has come up to this Court in appeal through Mr. Tek Chand who has so far addressed us on two points, firstly, as to the execution of the will, and, secondly, as to whether the *onus* of the second issue had been rightly placed on his client. With regard to the first point, namely whether the will was actually executed by the deceased Daya Singh, we have had our attention drawn to the evidence on the record. This consists of the depositions of Muhammad Akbar, the scribe (page 102 of the printed paper-book) and Mr. Fazl Ilahi (page 96). The trial Court had these two witnesses before it and in regard to Mr. Fazl Ilahi the learned Subordinate Judge has remarked that "he (the witness) occupied a special position of respect as a respectable member of the Local Mission and for his integrity of character there can be no difference of opinion in Jhelum." This witness is the Head Master of the Mission High School in Jhelum, and his evidence clearly shows that the testator Daya Singh, who was one of his pupils, brought the will (Ex. D. 1) to him and asked him to attest it, informing him that it was his will. The document was attested by the witness under date, the 15th December 1918. Mr. Tek Chand has commented on the fact that two other attesting witnesses have not been produced. The explanation for the non-production of these two persons is to be seen at page 96, where the defendant's counsel has stated that they had been given up as their whereabouts were not known. The fact that the 15th December 1918 was a Sunday has also been commented on by Mr. Tek Chand. But as no questions were put to Mr. Fazl Ilahi with regard to this circumstance, we do not think his evidence is in any way weakened by the fact. If the evidence of this witness is accepted, and we think that we are bound to accept, it, the actual execution of the will by Daya Singh must be regarded as proved, and it is, therefore, unnecessary, to discuss the evidence of the scribe, Muhammad Akbar, although we would remark that there is no real reason why this witness should have deliberately told lies on behalf of the defendant.

The contention of Mr. Tek Chand as to the *onus* having been wrongly placed on him of proving issue 2 has force. It is supported by *Bhagirthibai* v. *Viswanath* (1), in which it was held that it is incumbent on the person propounding a will to prove not only the soundness of the testator's mind but the fact that he was not a minor at the time it was executed. Again in *Sukh Dei* v. *Madho Prasad* (2) their Lordships of the Judicial Committee have remarked in a case somewhat similar to this that the *onus* of proving a will rests on the person propounding it. A similar expression of opinion is to be found in *Krishnamachariar* v. *Krishnamachariar* (3). We

(1) [1904] 7 Bom. L.R. 92.
(2) [1901] 23 All. 405—28 I.A. 186—5 C.W.N. 895—3 Bom. L.R. 704—8 Sar. 109 (P.C.)
(3) [1913] 38 Mad. 166—13 M.L.T. 385—19 I.C. 452—(1913) M.W.N. 355—24 M.L.J. 517.

would refer particularly to the following passage in the judgment of their Lordships of the Privy Council in *Sukh Dei* v. *Madho Prasad* (2). "The burden of proof, of course, lies upon the person who sets up a will, not upon the person who is prepared to impeach it."

In this view of the question the *onus* has clearly been wrongly placed. Mr. Anant Ram Khosla states that his client is desirous of producing further evidence on this issue. It has been admitted that the respondent would be entitled to an opportunity for doing so. We therefore, remand this case under Order 41, rule 25 Civil Procedure Code, and direct the Court below to give the respondent an opportunity of producing such fresh evidence on the second issue as she may desire to lead having regard to the fact that the *onus* of that issue rests on her. Should the appellant consider it necessary or desirable to produce any evidence in rebuttal he will be entitled to do so. Return to be made within three months.

Case remanded.

✱ 1924 LAHORE 543

SCOTT-SMITH AND FFORDE, JJ.

Kesar Singh and others—Defendants—Appellants.

v

Indar Singh and another—Plaintiffs—Respondents.

S A. No. 955 of 1920, Decided on 18th March 1923, from a decree of the District Judge, Amritsar, D/-20th February 1920.

✱ (a) *Executor—Can't renounce after acceptance—Even executor de son tort is necessary party—Estate is not bound if he is not made a party*

An executor who has once acted cannot subsequently evade his liabilities by afterwards renouncing his duties and any such renouncement is void. An executor by implication having taken upon himself the duties of an executor in connection with the estate of the deceased continues liable to be sued in the character of executor, and is a proper and necessary party to any proceedings in which the estate of the deceased is sought to be affected. If he is not made a party, the estate is not bound by any decree passed in that suit. [P 543, C 2 & P 544, C 1]

✱ (b) *Practice—Plea of law on proved facts can be newly raised.*

Provided the determination of a question of law which is raised for the first time does not depend upon a decision as to facts which are in dispute, the Court is not only competent but should in the interest of justice entertain the plea. [P. 544, C. 1]

Nand Lal—for Appellants.

Hargopal—for Respondents.

Judgment.—The facts have been fully stated in the judgments of the Courts below, and it is not necessary to repeat them. The short point for our decision is whether or not the plaintiffs-respondents are bound by the decree obtained by Mt. Har Kuar in a suit to which Santa their present suit does not lie. If they are not bound, they are entitled to sue.

It is contended by the plaintiffs-respondents that Santa Singh was the executor appointed under the will of Nahar Singh, deceased; that as such he should have been made a party to the suit; that as he was not made a party the decree in that suit cannot bind the estate of the testator, and that, accordingly, the plaintiffs whose interests in that estate are represented by the executor are not bound by those proceedings.

The defendants-appellants, on the other hand, maintain (1) that Santa Singh was not an executor within the meaning of that term; (2) that if he was an executor, he was removed by order of the Court and Sant Singh appointed in his place, and (3) that he renounced the executorship prior to the suit and that, for these reasons, he was not a necessary party and the suit, therefore, was properly instituted and the appellants are bound by the proceedings.

We cannot accept any of these contentions. It is quite clear that Santa Singh comes within the definition of an executor. On referring to the order of the Court by which it is alleged that he was removed from his office we find that that order merely appointed Sant Singh guardian of the person and property of the minors. No reference is made in that order to Santa Singh and his legal position as executor was in no way effected by that order.

As to the last contention, namely, that he renounced the executorship prior to suit, it is a well-established principle that an executor who has once acted cannot subsequently evade his liabilities by afterwards renouncing his duties and that any such

renouncement is void. In the present case even if it could be held that Santa Singh had not been properly appointed executor under the will of the deceased testator it is quite clear that he intermeddled with the assets and clothed himself with the rights derived from the testamentary disposition of the deceased. At the least, he must be deemed to be an executor by implication and having taken upon himself the duties of an executor in connection with the estate of the deceased he continues liable to be sued in the character of executor. That being so, he was the proper and necessary party to any proceedings in which the estate of the deceased was sought to be effected. As he was not made a party, the estate was not bound by any decree passed in that suit. The plaintiffs-respondents are, therefore, not bound by the decree and are entitled to bring the present proceedings.

The appellants have raised a further point that this question having been raised for the first time in the lower Appellate Court should not be entertained. It is, however laid down in *Nuri Miah* v. *Ambica Singh* (1), that, provided the determination of a question of law which is raised for the first time does not depend upon a decision as to facts which are in dispute, the Court in not only competent but should in the interest of justice entertain the plea.

The point in dispute in the present case is a pure question of law and is not dependent upon disputed facts. This objection of the appellants, therefore, fails. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

(1) [1916] 44 Cal. 47—34 I. C. 869—20 C.W.N. 1099—24 C.L.J. 140.

✱ 1924 LAHORE 544

HARRISON, J.

Pokhar Das — Judgment-Debtor — Appellant.

v.

Radha Kishen — Decree-Holder — Respondent.

Mis S. A. No. 3008 of 1922, Decided on 7th June 1923, from the order of D. J. Amritsar, D/- 15th May 1922.

Arbitration Act (IX of 1899) S. 15 (1)—"Enforceable as if it were a decree" do not mean that an award filed in Court is still not equal to decree.

The words "enforceable as if it were a decree" in S. 15 (1) do not exclude the right of decree-holder to make an application in execution periodically until 12 years have elapsed. The fact that the award is enforceable as a decree of Court makes all the actions of the successful party in enforcing his rights under the award amenable to the provisions of the C. P. Code, and the Limitation Act which governs the execution of decrees. [P. 544, C. 2]

Abdul Rashid for *Jai Gopal Sethi*—for Appellant.

Dev Raj Sawhney—for Respondent.

Judgment. — In this appeal two points were raised but only one has been argued and this is whether the application for execution is within time or not. An award under Act IX of 1889 was duly filed in the Court of the Judicial Commissioner of sind in the year 1911, and under S. 15 became enforceable as if it were a decree of this Court.

The present application is dated the 16th November 1921, and it is not denied that it is within time if Article 182 applies, that is to say if there have been steps in execution in the interval and three years had not elapsed from the date of the last step in aid of execution. Counsel contends that the limitation is governed by Article 181 as although the award is enforceable as if it were a decree it is not a decree. He quotes the Bombay ruling 35 Bom. 196 to the effect that no appeal can be lodged from such an award and contends that the words "enforceable as if it were a decree" do not, cover and include the right to make an application in execution periodically until 12 years have elapsed. There is, in my opinion, no force in this contention. The fact that the award is enforceable as a decree of Court makes all the actions of the successful party in enforcing his rights under the award amenable to the provisions of the Civil Procedure Code, and the Limitation Act which govern the execution of decrees.

The application is clearly within time, and I dismiss the appeal with costs.

Appeal dismissed.

✱ 1924 LAHORE 545

BROADWAY AND ABDUL RAOOF, JJ.

Jhanda Singh and others—Plaintiffs—Appellants.

v

Sadiq Mohammed and others—Defendants—Respondents.

F. A. No. 125 of 1920, Decided on 29th November 1923, from the decree of the Senior Sub-Judge Montgomery D/-26th May 1919.

✱ *Civil P. C., O. 17 Rr. 2 & 3—Where time is granted to party at his request, Rule 3 can be applied though default occurs.*

Per Broadway, J.—An order under Order 17 rule 3, can be made in the absence of the party to whom time has been given.

Where the entire evidence in the case had been recorded and parties had closed their respective cases, a date for arguments had been fixed; and the time had been extended at the instance of one of the parties.

Held: on the failure of that party to put in an appearance the Court was perfectly justified in proceeding to dispose of the case on the merits. [P 546, C 2]

Per A. Raoof, J.—The Court was not bound to act under rule 2; the evidence on behalf of both parties being given and the case being complete the Court was not bound to hear a separate argument for the purpose of deciding the suit. [P 547, C 2]

Lala Kanshi Ram for *Nand Lal*—for Appellants.

Diwan Mehar Chand and *Lala Harcharan Das Kumar* — for Respondents.

Broadway, J. — The plaintiffs in this suit sought to obtain a decree for possession of certain properties which, belonged to one Ganda Singh. It was alleged that Ganda Singh had died forty years previously and had been succeeded by his widows Mst. Sukhan and Mst. Budhan who had been alienating portions of the property. Mst. Sukhan had died 11 years before suit and had been succeeded by Mst. Budhan who had died some six months prior to the institution of these proceedings. The alienees of the two widows or their legal representatives were also impleaded. The defence set up was that the plaintiffs were not related to Ganda Singh and that even if they were related the property in question was not ancestral *qua* them. The necessary issues were struck and the parties proceeded to lead their evidence. The plaintiffs closed their case after which the defendants closed theirs and a date was fixed for arguments, the date being the 20th May 1919. On that date Mr. Mohan Lal one of the Vakils, who had been conducting the case for the plaintiffs appeared in Court with an application in which it was alleged that it was the intention of the plaintiffs to apply for a transfer of the case and asked for an adjournment. The Senior Subordinate Judge postponed the case for the 21st May 1919 directing the payment of certain costs to the counsel for the other side. Mr. Mohan Lal then stated clearly that the senior counsel was engaged in a case in Sessions Court on that date and therefore, the case could not be argued but they could argue the next day. Request also was made that the costs should not be awarded. The case was thereupon adjourned to 21st of May 1919 for arguments, the question of costs being left open for reconsideration. On the 21st of May 1919 an application for adjournment was filed in Court by one of the plaintiffs who, however, failed to appear when the case itself was called on. Mr. Mohan Lal when asked to argue the case declined to do so, saying that he had not been engaged to argue the case. When the Senior counsel was specially sent for and asked to proceed with the arguments he said that he had withdrawn from the case a long time ago and did not wish to appear. The Court, thereupon after recording these facts decided to act under Order 17 rule 3 of the Civil Procedure Code and proceeded to judgment which was pronounced on the 26th of May 1919. The case was disposed of after an elaborate discussion of the merits and the plaintiffs suit was dismissed.

The plaintiffs have now come up to this Court in appeal and on their behalf we have heard Mr. Kanshi Ram. It has been urged before us that the Court's order under Order 17, rule 3, of the Civil Procedure Code was illegal and that, therefore, that suit should be remanded in order that the Court should

proceed in accordance with law. Under Order 17, rule 3, where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith In the present case the adjournment from the 20th May to the 21st was made at the request of the plaintiffs acting through their counsel. It is clear from the record that Lala Mohan Lal Vakil for the plaintiffs, stated that the case could be argued on the next day the senior counsel being engaged on that day, the 20th of May 1919, in the Court of Sessions and the adjournment was specially granted by the Court, the order being that "in any case the argument shall be heard tomorrow". In these circumstances I am of opinion that Order 17, rule 3, of the Civil Procedure Code, was applicable and empowered the Court to dispose of the case on the merits as has been done.

It has however, been contended that, inasmuch as on the 21st of May 1919 there was a default on the part of the plaintiffs and as that default would have brought the case within the purview of rule 2 of Order 17, the suit should have been dismissed in default under that rule and not under rule 3. Mr. Kanshi Ram referred to a case *Murli Dhar* v. *Duni Chand* reported in the All India Reporter 1923 Lah. 281; and 33 Mad. 241 and 41 Mad. 286. In reply to Mr. Mehar Chand's arguments he also referred to 37 All 462. The position in Madras is somewhat peculiar. 33 Mad. 241 does to some extent support Mr. Kanshi Ram's contention. It is, however, opposed to 34 Mad. 97. In 41 Mad. 286 Wallis, C. J. differed from the view taken by his brother Judges and came to the conclusion that 33 Mad. 241 went too far when it laid down that rules 2 and 3 must be read as mutually exclusive. The opinion is of considerable weight inasmuch as Wallis, C. J. was a party to 33 Mda. 241. In the Lahore case Mr. Justice Abdul Raoof has clearly held that an order under, Order 17 rule 3, of the Civil Procedure Code, can be made in the absence of the party to whom time has been given, a view in which I fully concur.

On the other hand 25 All 194, 34 Cal. 235 and 41 Cal. 956 were referred to by Mr. Mehar Chand. In 34 Cal. 235 it was held that the scope of S. 157 (now rule 2 Order 17) was distinct from that of S. 158 (now rule 3, Order 17) but that the Court could act under S. 158 even though the parties were absent if the requirements of that section were otherwise fulfilled and there were materials on the record on which the Court could pronounce Judgment. The decision in 41 Cal. 956 went a little further and it was there held that where an adjournment was granted at the instance of a party for the purposes stated in rule 3 and there were materials enabling the Court to decide the suit it must act under rule 3 and not under rule 2. 25 All. 194 is to the same effect and 37 All. 462 does not in any way weaken the force of the earlier ruling inasmuch as the facts were different. In the latter the adjournment had not been granted at the instance of one of the parties. I therefore think that the Court could act under rule 3 but in any event it seems to me that the Court in disposing of the case acted perfectly rightly. The entire evidence in the case had been recorded and parties had closed their respective cases, a date for arguments had been fixed, the time had been extended at the instance of one of the parties and on the failure of that party to put in an appearance, in my opinion the Court was perfectly justified in proceeding to dispose of the case on the merits.

The only other question referred to at the bar was as to the relationship of the appellants to Ganda Singh. The evidence on this point consists of the testimony of three witnesses (P. W. 7) Kesar Singh (P. W. 10) Labh Singh and (P. W. 11) Ladha Singh. The first two witnesses are related to each other and the statements of all clearly show that they knew nothing personally about the

relationship of the parties. Kesar Singh is unable to remember the names of persons actually living although he professes to be able to know the names of persons who must have died when he was a child. Labh Singh attributes his knowledge to Jhanda Singh plaintiff as also does Ladha Singh. In these circumstances I agree with the view taken by the Court below and hold that the relationship has not been proved. The suit has therefore, been correctly decided and I would dismiss the appeal with costs

A. Raoof, J.—I agree. The facts as disclosed in the case leave no doubt on the point that the Court below was justified in deciding the case on the materials on the record. Look at the case from any point of view you like and you can come to no other conclusion. If the decision be treated as coming under rule 3 of Order 17 of the Civil Procedure Code then there can be no doubt that the Court was justified in proceeding to decide the suit forthwith. As pointed out by my learned brother, evidence on both sides had been completed and all that was necessary was to decide the case. The Court fixed the 20th of May 1919 for arguments. On that day a petition was presented on behalf of the plaintiffs for the adjournment of the hearing of the arguments on the ground that an application for the transfer of the suit from the Court of the learned Senior Subordinate Judge was to be made. In addition to this petition Lala Mohan Lal one of the learned Vakils who appeared for the plaintiffs, made the following statement. "Lala Radha Kishen is engaged in a case in Sessions Court to-day. We cannot argue today. We can argue tomorrow, but I will request that no costs should be awarded, because the counsel who is to argue is busy in the Sessions and cannot find it possible to come today."

I have referred to this statement of the learned Vakil especially for the reasons that Mr. Kanshi Ram, the learned Vakil for the appellants, has contended that rule 3 of Order 17 of the Civil Procedure Code did not strictly apply to the facts of the present case inasmuch as time had not been granted to the plaintiffs at their request for the purpose of performing any act necessary for the further progress of the suit. In support of this contention he relied upon the statement in the petition of the 20th of May 1919 and argued that in that petition it was stated that the adjournment was required for the purpose of making an application for transfer. That was only one ground on which the adjournment was asked. The real object, however, was to get an adjournment for putting forward an argument on behalf of the plaintiffs. However, the statement of Lala Mohan Lal the learned Vakil removes all doubt on this point. He said "we can argue tomorrow". This clearly indicates that he requested the Court to grant time for arguments till tomorrow. It therefore, follows that time was granted to the plaintiffs at the request of their Vakil Lala Mohan Lal for the purpose of advancing arguments in favour of their case. Thus both the requirements of rule 3, were fulfilled, namely, the adjournment was granted at the request of a party and for the purpose of doing an act for the further progress of the suit. Now rule 3 provides " the Court may notwithstanding such default, proceed to decide the suit forthwith." This is what the Court has done in this case. Although the plaintiffs did not appear the Court was not bound to dismiss the suit for default of appearance and could have proceeded to decide the suit forthwith. I entirely agree with my learned brother in holding that even if the plaintiffs did not appear the Court was not bound to act under rule 2, of Order 17 of the Civil Procedure Code. But leaving aside the question of the applicability of rule 3 of Order 17, I am clearly of opinion that the evidence on behalf of both parties had been given and the case being complete the Court was not bound to hear a separate argument for the purpose of deciding the suit Although the Court had fixed a date for arguments the Court was not bound to wait for an argument if the plaintiffs did not choose to appear.

At the most it may amount to a mere irregularity which would be covered by the salutary provision of S. 99 of the Code. The decision in the case of *Sher Khan* v. *Bahadur Shah* (2) was relied upon and it was contended that it was held in the case that the refusal to hear an argument in support of the case was not mere irregularity. The reason given by the learned Judges was that evidence had been taken by one Judge and the decision in the case was given by another Judge. In those circumstances the learned Judges were rightly of opinion that the new Judge should have heard arguments in support of the case. In the present case the evidence was given before the very learned Judge who has decided the case. Therefore that ruling has no manner of application to the facts of the present case.

I need not say anything about the arguments on the merits of the case because, as pointed out by my learned brother, the evidence produced on behalf of the plaintiffs to prove their relationship to Ganda Singh was extremely meagre.

I agree in dismissing the appeal with costs.

Appeal dismissed.

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(2) 91 P. R. 1904.

✱✱ 1924 LAHORE 548

BROADWAY AND FFORDE, JJ.

Secretary of State—Appellant.

v.

(*Shrimati*) *Sarla Devi Chaudhrani*—Respondent.

F. A. No. 1244 of 1920, Decided on 19th December 1923, from the award of the District Judge, Lahore, D/-30th April 1920.

✱ *Civil P. C., O. 13 R. 4—Contravention of provisions renders documents inadmissible.*

Where the provisions of Order 13 rule 4 have been ignored by the Court such documents cannot be regarded as having been legally brought on to the record. A presiding Judge shall endorse with his own hand a statement that (i. e. a document proved or admitted in evidence) was proved against or admitted by the person against whom it was used. 38 All. 627, 663 (P. C.)

[P. 548, C. 2; P. 549, C. 1]

✱✱ (*b*) *Land Acquisition Act, S. 23—Expert's evidence is useless if unsupported by data—Evidence Act, S. 45.*

Where experts give no real data in support of their opinions, the evidence is admissible but may be excluded from consideration as affording no assistance in arriving at the correct value. 11 C. W N. 875,877; 10 Bom. L. R. 907, 913; 33 Bom. 325. Foll. [P. 551, C. 1]

✱ (*c*) *Land Acquisition Act, S. 23—Small plots purchased by neighbours fetching much higher value—Market value is the value of land laid out in the most lucrative and advantageous way—Scheme must be actual.*

It is a well known fact that a purchaser may be willing to pay a sum far in excess of the real value for a small plot of land when that plot of land was needed by him in order to round off his own property or for some other such reason. The fairest and most favourable principle of compensation to the owners is to estimate the market value of the property not according to its present disposition but laid out in the most lucrative and advantageous way in which the owners could dispose of it. Objectors can put forward a scheme showing how the site in question could have been developed by splitting it up in various plots. Scheme for such a development must be put forward and evidence must be led to show that there was any real demand for small houses or shops in the vicinity. The opinion of a Tahsildar based mainly on the objector's opinion as to the value and his claims made before the Tahsildar, has practically no evidential value. [P. 551, C. 2 P. 552, C. 1, 2]

Government Advocate—for Appellant.

Dev Raj Sawhney, Badri Das and S. K. Mukerji—for Respondent.

Broadway, J.—In arguing this appeal the learned Government Advocate objected to any reference being made to certain documentary evidence which is on the record on the ground that that evidence had not been properly proved although appearing admitted on the record. A reference to the entire documentary evidence for both sides in this case discloses the fact that the provisions of Order 13, rule 4, have been completely ignored by the Court below, with the result that the documentary evidence for the Secretary of State, as well as for the objector, cannot be regarded as having been legally brought on to the record, and legally before us. In these circumstances, in order to avoid a failure of justice, it would be necessary for us to direct a retrial. This step has been rendered unnecessary, however, as the learned

Government Advocate and Mr. Dev Raj Sawhney for the objector, on behalf of their respective clients, have agreed to admit the various documents produced by either side so that they may be treated as legal evidence before us. In order to avoid unnecessary expense and delay we allow this to be done and the documents will be duly endorsed with the numbers they already bear. We, however, consider it necessary to condemn a practice which has been referred to by their Lordships of the Judicial Committee, in *Sadik Hussain Khan* v. *Hashim Ali Khan* (1). in the following manner :— "Their Lordships feel bound to criticise adversely a practice followed in these two cases which is as illegal as it is slovenly and embarrassing. By the 141st section of "The Civil Procedure Code 1877" repeated in "The Civil Procedure Code 1882" and practically re-enacted in Order 13, rule 4, of the Rules and Orders passed under the Code of Civil Procedure of 1908, it is provided that a presiding Judge shall endorse with his own hand a statement that it (*i e.*, a document proved or admitted in evidence) was proved against or admitted by the person against whom it was used. * * * * * There is no possible excuse for the neglect, in this manner, of the duty imposed by the Statutes, since, so long ago as the 3rd March 1884, a circular was addressed by the then Registrar of the Privy Council to the Registrar of the High Court of Calcutta calling attention to the requirements of the then existing law and the necessity of observing them. A copy of this circular was sent not only to the High Courts of Madras, Bombay and Allahabad, but, in addition, to the Judicial Commissioner of Oudh and other Judicial Commissioners Their Lordships, with a view of insisting on the observance of the wholesome provisions of these Statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required." We would note that this pronouncement of their Lordships of the Privy Council was published as far back as 1916, and this Court has incorporated the instructions laid down which are mandatory in rule 4 of order 13 in the Rules and Orders, Volume I, S. II, page 38, paragraph 83.

But for the wise action taken by the learned counsel in this case in consenting to the admission of the documents in question and thereby avoiding considerable expense to their respective clients we should have been compelled to remand the case as it would have been impossible for us to slur over or ignore a course of procedure which has been condemned in such strong terms by their Lordships of the Judicial Committee. We, therefore, proceed to hear the appeal.

By a notification No. 343 G. S. published in the Punjab Gazette of the 18th June 1917, the Government acquired a property known as the *Phuswali Kothi*, the total area of the land being 1123 acres or 11 *kanals* 19 *marlas* and 95 square feet. The property consisted of a bungalow and compound together with the usual appurtenances. There were also a certain number of trees standing on the land. This *Phuswali Kothi* belonged to Shrimati Sarla Devi Chaudhrani, and her husband, the late *Chaudhri* Ram Bhuj Datta, acted for her during the acquisition proceedings as well as in the Court of the District Judge. The Land Acquisition Collector after the usual inquiry, made an award allowing a sum of Rs. 34,721-12-5 to which was added the usual 15 per cent., the total coming to Rs. 39,930-0-8. The value of the land alone apart from the building and trees was fixed at Rs. 29,927-12-5, the rate allowed being Rs. 2,500 per *kanal*.

Objection was taken to this award and the matter referred in due course to the District Judge. As noted by the learned District Judge it was

(1) [1916] 38 All. 627—43 I.A. 212—6 L. W. 378—31 M. L. J. 607—14 A. L. J. 1248—19 O. C. 192—18 Bom. L. R. 1037—21 C. W. N. 130—36 I. C. 104—(1916) 2 M. W N. 577—21 M. L. T. 40—1 P. L. W. 157—4 O. L. J. 22—25 C. L. J. 363—10 Bur. L. T. 140 (P. C.)

with considerable difficulty that the objector was prevailed upon to file any written statements of her demands. The record shows, however, that the objector was claiming a rate of Rs. 8,000 per *kanal*. The learned District Judge came to the conclusion that the rate fixed by the Collector was too low and raised it to Rs. 4, 710 per *kanal*, thus increasing the value of the land from Rs. 29,927-12-5 to Rs. 56,520. The value fixed of the trees and the buildings was not interfered with.

The Government has preferred an appeal against the enhancement of the value of the land by the learned District Judge through the Government Advocate. Mr Dev Raj Sawhney for the objector has not attacked the findings of the learned District Judge *qua* the value of the buildings or the trees; and the only point for determination is as to whether the market value of the land has been rightly fixed.

The learned District Judge has held that in this case the only evidence which could be taken into consideration in determining the correct value of the land was that of actual sales. He has eliminated from consideration the testimony of expert witnesses who have given their opinions as to what the land was worth, and also the evidence given by certain brokers and others as to offers made to the objector for the property. It has been contended by Mr. Dev Raj Sawhney that the expert evidence and the evidence as to the offers has been wrongly excluded and was valuable evidence of the value. In my opinion the learned District Judge acted rightly in excluding this evidence. It has been excluded not on the ground of its being inadmissible but on the ground that its value was nil. In *Harish Chunder Neogy* v. *Secretary of State* (2) it was held that although the opinion of experts was evidence their value was not great and that it would not be safe to place much reliance on this kind of evidence unless it was supported by, or coincided with, other evidence. In *Government of Bombay* v. *Merwanji Muncherji Cama* (3) it was remarked that the opinion of an expert witness is admissible in evidence not only when it rests on the personal observation and inquiry of the witness himself or on facts within his own knowledge, but also when it is founded on the case as proved by other witnesses at the trial, but that it was settled law that an expert may not be asked purely speculative, hypothetical questions having no foundation in the evidence. In *In the matter of Government of Bombay* (4) it was held that a "surveyor's opinion by itself is good evidence. What value the Court would put on it depends entirely on the effect of the cross-examination." The expert evidence in this case consists of the opinions of certain brokers and an examination of this evidence shows, in my opinion that it is entirely worthless. None of them have produced any account Books or registers showing that they had been selling similar plots in the vicinity, at or near the time the notification was issued and have given no real data in support of their opinions.

Take, for instance, Das Mal (page 23 of the printed paper-book). He says that *if* the site of the *Phuswali Kothi* is sold in small plots the value is Rs. 7,000 per *kanal*. If it is sold as one block the value would be Rs. 6,000 per *kanal*. In cross-examination he admits that he has brought no land in the vicinity of the *Phuswali Kothi*, and that he keeps no registers. Similarly, Kanhaya Lal gives his opinion that if the site in question was sold in small plots the price would be Rs. 8,000 or Rs. 9,000 per *kanal*. He however, in cross-examination admits that the *Phuswali Kothi* is ¾ of a mile from the Railway Road and that he had had no dealings in land in the vicinity of this *kothi*. Amar Nath, another broker, admits that he had never had any dealings in land any where near the *Phuswali Kothi*. While therefore, Mr. Dev Raj Sawhney is right in contending that the evidence of

(2) [1907] 11 C. W. N. 875.

(3) [1908] 10 Bom L. R. 907.
(4) [1908] 33 Bom. 325.

experts is admissible, in my opinion, the evidence of the experts produced in this case has rightly been excluded from consideration as affording no assistance in arriving at the correct value of the site in question.

Again, it seems to me that even if the evidence of offers be admissible such evidence can rarely be of any real value. In the present case several letters have been put in addressed to *Choudhry* Ram Bhuj Datta making certain offers and advising that the property should be sold in plots. An offer, however, amounts merely to an expression of opinion on the part of the offerer and this can only be proved by the evidence of the offerer himself. In the present case most of the offers have come from or through brokers and with regard to these I would refer to the following remarks to be found in *Government of Bombay v. Merwanji Muncharji Cama* (3)—" The evidence of offers made by irresponsible brokers on behalf of undisclosed principals, or perhaps for their own purposes without any principal behind them, is useless, even supposing it is relevant.' I do not think it necessary to discuss this matter further, and I cannot regard the evidence under this head as of any value whatsoever. It is worthy of note that although *Chaudhry* Ram Bhuj Datta went into the witness box and produced a large number of documents he never made any reference whatever to these offers and the witnesses themselves say that he never replied to them.

I think the learned District Judge has rightly adopted the method of considering the price paid, within a reasonable time, for land adjacent to the land acquired and possessing similar advantages ; but it seems to me that in approaching the question from this point of view he has committed certain errors. He decided to consider only the evidence of sales of lands situated within a distance of ¼ a mile from the site acquired and has then proceeded to consider five sales The record shows that every one of these five sales relates to lands situated at more than ¼ of a mile from the site in question. One of these five was a sale effected on the 27th October 1915 of 4 *marlas* of land for Rs. 1,500 giving the rate of Rs. 7,500 a *kanal*.

Admittedly the value of land has been increasing at an extraordinarily rapid rate from 1914 onwards. There is nothing on the record to show the circumstances under which this transaction in 1915 was entered into, and it is a well known fact that a purchaser may be willing to pay a sum far in excess of the real value for a small plot of land when that plot of land was needed by him in order to round off his own property or for some other such reason.

The learned Government Advocate has taken exception to the omission from consideration by the District Judge of two sales which took place, of lands, within a very short distance of the land acquired, on the 14th May 1917. These two sales have been proved, and the plan on the record shows that they are very close to the site acquired although not adjacent thereto. In my opinion the omission of these two sales was a serious error. The rate per *kanal* according to these two transactions comes to Rs. 1,638.

The learned Government Advocate strongly urged that the five sales relied on by the learned District Judge should not have been considered ; firstly, as to the one referred to above relating to 4 *marlas* of land on the ground that it took place in 1915. I think there is force in this contention. The land is not only situated at a considerable distance, but the sale took place nearly two years before the present site was acquired. Secondly, as to the other four transactions, it was objected that they related to small plots of land and that the sale of small plots of land did not form a correct basis for the valuation of a large site such as was acquired in the present case. On the other hand, it has been repeatedly held that the fairest and most favourable principle of compensation to the owners is to estimate the market value of the property not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it. This principle has been recognised and the object-

ors could have put forward a scheme showing how the site in question could have been developed by splitting it up in various plots. While evidence has been led to show that the value of the land acquired would be greater if split up in small plots, no scheme for such a development has been put forward and no evidence has been led to show that there was any real demand for small houses or shops in this vicinity. At the same time I think that the four sales under reference may well be looked at as they all took place two or three months prior to the notification.

The site in question has two frontages and abuts on two roads. It is situated in the heart of the scholastic world of Lahore, and close to the District Court and the possibility of its being split up for small tenements cannot, I think, be disregarded. It is true that the four sales referred to relate to lands situated at a little distance from the site and nearer to the city but the distance is not so great as to entitle me to ignore them wholly. I think these four sales can reasonably be taken into consideration along with the sales omitted by the learned District Judge and referred to above as having taken place on the 14th May 1917. The average of these six sales comes roughly to Rs. 3,537 per *kanal* and I think that that may be regarded as a fair rate to fix in the present case.

In coming to this conclusion I have not lost sight of the fact that in a reference made by the Acquisition Officer to the Tahsildar the latter fixed the value of this land at Rs. 7,000 a *kanal*. The opinion of a Tahsildar has been held to be relevant by the Madras High Court in a case reported in *Rathanamasari* v. *Secretary of State* (5) while a contrary view appears to have been taken by the Chief Court in *Farman Shah* v. *Secretary of State* (6). Even assuming, however, that the Tahsildar's report is relevant in this connection, a reference to it shows that it is based mainly on the objector's opinion as to the value and his claims made before the Tahsildar. It has therefore practically no evidential value. I have also taken into consideration the fact that the position of this land is decidedly superior to that of the land to which the sales of the 14th May 1917 relate. In my opinion the learned District Judge has fixed too great a value on the land acquired while the Collector's estimate was too small.

I would therefore accept this appeal and fix the rate at Rs. 3,537 per *kanal* and reduce the amount payable for the land from Rs. 56,520 to Rs. 42,444 *plus* the usual 15 per cent. for compulsory acquisition. The appellant will get costs in proportion.

Appeal accepted in part.

(5) 1923 Mad. 332—44 M. L. J. 132—17 M. L. W. 415—32 M. L. T. 279.

(6) [1907] 63 P. R. 1907—83 P. W. R. 1907.

1924 LAHORE 552

MARTINEAU. J.

Ghulam Sabir and others—Plaintiffs—Appellants.

v.

Taba Hussain and others—Defendants—Respondents.

S. A. No. 2911 of 1922, Decided on 13th October 1923, from the decree of the District Judge Ambala, D/- 25th July 1922.

Custom (Punjab)—Alienation—Lohars of Jagadri, Ambala district—Power of alienation of males is not restricted.

The power of a male proprietor, among lohars of Jagadhri, to alienate ancestral property is not a restricted one, although they do not observe the Muhammadan Law in all matters of inheritance, and although among them a widow is not competent to alienate except for necessity. [P 553 C 1]

W. B. O. Connor—for Appellants.
Shamair Chand—for Respondents.

Judgment.—The plaintiffs have sued to contest the sale of a shop effected by their father and uncle, who were lohars of the town of Jagadhri in the Ambala District. The suit has been dismissed, the Court finding that the plaintiffs have failed to prove that the power of a male proprietor among lohars of Jagadhri to alienate

ancestral property is a restricted one. The plaintiffs have filed a second appeal, having obtained a certificate from the District Judge on the question of custom.

There are also cross-objections by the vendee with regard to his costs in the first Court which were not allowed.

I agree with the learned District Judge that although the lohars of Jagadhri do not observe the Muhammadan Law in all matters of inheritance, and although it appears that among them a widow is not competent to alienate except for necessity it does not follow that the custom prevailing among the agriculturists is applicable to alienations by male proprietors, and the onus is on the plaintiffs to prove that male proprietors have not an unlimited power of alienation. That being so the suit must clearly fail. There is only one piece of evidence which lends support to the claim of the plaintiffs- namely a judgment given by Mr. Hurry, Divisional Judge, on the 3rd September 1901, in which he held that the lohars of Jagadhri followed the custom by which a proprietor could not alienate ancestral property except for necessity. That decision, however, is of practically no value as it proceeded solely on the ground that custom was shown to be followed in respect of alienations by widows and in matters of inheritance. A judgment of Major Roe, District Judge, given in 1915 in which he held that an alienation by male proprietors could not be contested, is of greater weight though that decision was an *obiter dictum*. At any rate the plaintiffs have entirely failed to discharge the onus which lay upon them, and the appeal must fail. There does not appear to be any reason for not allowing the defendant Fateh Muhammed the costs incurred by him in the first Court. I accordingly dismiss the appeal and accepting the cross-objections direct that the plaintiffs shall pay Fateh Muhammad's costs in all the Courts.

Appeal dismissed.

✱✱ 1924 LAHORE 553

MOTI SAGAR, J.

Daryai Singh and another—Appellants.

v.

Kunj Lal and others—Respondents.

Mis. F. A. No. 1980 of 1920, Decided on 12th June 1923, from the order of District Judge Hissar, D/- 26th April 1922.

✱ (a) *Provincial Insolvency Act, S. 53—Creditor can apply.*

Obiter: When the Receiver refuses or neglects to apply, a creditor can apply and set the proceedings under this section in motion. 1924 Lah. 331, Rel. on, [P 554, C 1]

✱✱ (b) *Provincial Insolvency Act, S. 53—No time limit for application under S. 53—Limitation Act art 181, does not apply.*

The Court can take action under S 53 at any time during the pendency of the proceedings when a transfer open to objection under the said section is brought to its notice, by an application made to it by a creditor of the Insolvent, Art. 181 has no application to this case. [P 554, C 1]

Shamair Chand—for Appellants.

Lala Jagan Nath—for Respondents.

Judgment.—The facts of the case out of which this appeal has arisen are shortly these.—On the 20th of April 1916 one Shankar applied to the District Judge of Hissar asking that he should be adjudicated an insolvent. On the 19th of August 1916 the Court made the order of adjudication. On the 13th of October 1921 one Kunj Lal, a creditor, applied under S. 53 of the Insolvency Act (V of 1920), that a gift made by the insolvent on the 9th of January 1916 in favour of his sons and wife should be declared invalid and should be cancelled. This application was accepted by the learned District Judge and the gift in question was annulled. Against this decision an appeal has been preferred to this Court by the transferees through Mr. Shamair Chand, and I have heard Mr Jagan Nath on behalf of the creditors.

Two contentions have been raised before me by Mr. Shamair Chand in this appeal. Firstly, it is contended that it was not competent to the creditors to make an application for setting aside the gift and that it was only the Receiver who could make such an application under S. 53 of the Insolvency Act. The second contention is that the application was time-barred under Art. 181 of the Indian

Limitation Act, inasmuch as it was made more than three years after the transfer or even the date on which the order of adjudication was made. In my opinion there is no substance in any of these contentions, and they must be overruled. S. 53 of the Act provides that such transfers as are therein specified shall be voidable as against the Receiver and may be annulled by the Court. There is no doubt that this section contemplates that action will be taken by the Receiver, but I do not think that it means that even when the Receiver refuses or neglects to act, no one else can set the proceedings under this section in motion. The Receiver had taken no action for five years after the order of adjudication was made and, in these circumstances, the creditors were, in my opinion, justified in assuming that he declined to take action. It, however appears to be altogether unnecessary to pursue this matter any further, as I find that there is an application on the record, dated the 9th of February 1922, by the Receiver also asking the Court to annul the transfer and to declare that it would be inoperative as against him. In *Pirthi Nath* v. *Basheshar Nath* (1) it has been held by a Bench of this Court that an Official Receiver can make an application requesting the Court to take action under this section at any time during the pendency of the insolvency proceedings, and that Art. 181 of the Indian Limitation Act is no bar to such an application.

Next, it is argued that the application of the creditor, dated the 13th of October 1921, was barred by limitation under Act. 181 of the Indian Limitation Act. It is contended that this Article is not limited to applications made under the Code of Civil Procedure and that it is a general residuary provision covering all applications which do not fall under any other Article in the Act. On the other hand, it is argued by Mr. Jagan Nath on behalf of the respondents that the Article is limited in its scope and that it is restricted to applications under the Code of Civil Procedure only. A large number of authorities have been cited on both sides and I have been asked to refer this question to a Full Bench if I feel any doubts in the matter. The question whether Art. 181 of the Indian Limitation Act is limited in its scope and is restricted to applications made under the Code of Civil Procedure, or whether it applies to applications made under local or special laws as well is not free from difficulty but I do not think that this question really arises in this case and it therefore, appears to me wholly unnecessary that the matter should be referred to a Full Bench. The case of *Pirthi Nath* v. *Basheshar Nath* which is the latest decision of this Court on this point and to which reference has already been made practically concludes this question. In that case an application was made by the Official Receiver for the annulment of certain payments made more than three years prior to that date, and it was held that such an application was not governed by Art. 181 of the Indian Limitation Act and that the right to move in the matter accrued to the Receiver from day to day as long as the insolvency proceedings continued. The language of S. 53 makes it incumbent on the Court to annul every transfer of property made by an insolvent within two years after the date of the transfer, provided the Court comes to a finding that such transfer was not made in good faith and for valuable consideration As held in *Pirthi Nath* v. *Basheshar Nath* (1) it does not appear from the wording of this section that if the Court chooses to take action itself, it is bound by any period of limitation. Therefore the fact that it was in this case moved to take action by the creditor should not make any difference whatever.

Following the authority cited above I am of opinion that "the Court can take action under S. 53 at any time during the pendency of the proceedings when a transfer open to objection under the said section is brought to its notice." I accordingly hold that the application was not barred by time and that Art. 181 had no application to this case. I dismiss the appeal with costs.

Appeal dismissed.

(1) 1924 Lah. 331.

1924 LAHORE 555

SCOTT-SMITH, J.

Jhandu and others—Convicts—Appellants.

v.

The Crown—Opposite Party.

Criminal Appeal No. 65 of 1924, Decided on 29th February 1924, from the order of the Magistrate 1st Class Ferozepur, with powers under S. 30 Criminal Procedure Code D/- 15th October 1923.

✱ (a) *Penal Code, S. 304—Who gave fatal blow being unknown none can be convicted of murder.*

Where only one blow was struck on the head which resulted in the death and there was no evidence to show which of the accused struck the fatal blow,

Held none of them can be convicted of culpable homicide. 37 P R 8914 Cr. Foll. (P 555, C 2)

✱ (b) *Penal Code, S. 325—Proof.*

Where three men attacked another with dangs and caused two separate grievous hurts,

Held: it can fairly be presumed that all intended to cause or knew that they were likely to cause grievous hurt. (P 555, C 3)

Nand Lal—for Appellants.

Abdul Rashid for the Government Advocate—for Opposite Party.

Scott-Smith, J.—Jhandu, Jaimal and Bhana have been convicted of the culpable homicide not amounting to murder of Natha, and Gurya has been convicted of abetment of that offence, and all have been sentenced alike to six years' rigorous imprisonment. They have filed a joint appeal to this Court.

The facts are not seriously disputed by Dr. Nand Lal who appears for the appellants. The occurrence was the result of the trespass of Gurya's cattle into Natha's melon field. They trespassed several times and on the third occasion Mahanda (P. W. 3) who was with Gurya turned them out and slapped Gurya on the face. Gurya cried out and the other three appellants came up from the village armed with *dangs* and attacked Mahanda and Natha. Grievous hurt was caused to Mahanda, and Natha received three injuries one of which resulted in the fracture of the skull, another caused abrasion to the cheek and the third resulted in the fracture of the left fibula.

Three main points were raised by counsel for the appellants :—

(1) That having regard to the first information report it is not at all probable that Gurya instigated the other appellants to beat the deceased ;

(2) That Bhana, according to the first information report, beat Mahanda, whilst his two companions beat the deceased ;

(3) That one of the prosecution witnesses, namely, Muhammad Din, states that Jhandu did not beat Natha in his presence, and this introduces an element of doubt as regards him.

Now, it must be remembered that the first information report is not like the deposition of a witness given in Court and cannot be considered to be exhaustive. It is also necessary to remember that none of the prosecution witnesses appears to have any enmity with any of the appellants and there is no reason why they should give false evidence in the case. The witnesses in Court state that Mahanda was attacked first by Bhana and that then he and his companions beat the deceased. I see no reason to doubt the correctness of their evidence, I do not doubt that Gurya instigated the others to beat Mahanda and Natha.

It was finally urged that there is no evidence as to which of the appellants gave the blow upon the head which resulted in the death of Natha and that having regard to *Agra* v. *Crown* (1), they cannot be convicted of culpable homicide. There is force in this argument. Only one blow was struck on the head and there is no evidence to show which of the appellants struck that blow. At the same time when three men attack another with *dangs* and cause two separate grievous hurts, it can fairly be held that they all intended to cause or knew that they were likely to cause grievous hurt.

I therefore accept the appeal so far as to alter the convictions in the case of Jhandu, Jaimal, and Bhana to one under S. 325 Indian Penal Code

(1) [1914] 37 P.R. 1914 Cr.-16 Cr.L.J. 209—27 I. C. 833—219 P. L. R. 1915.

and in the case of Gurya to one under S. 325/109 Indian Penal Code. These offences are not so serious as those of which the appellants have been convicted and I accordingly reduce their sentences in each case to one of four years' rigorous imprisonment including two months' solitary confinement.

Appeal partly accepted.

1924 LAHORE 556

ABDUL RAOOF AND MOTI SAGAR, JJ.

Maula Bakhsh-Plaintiff-Appellant.

v.

Mst. Tillo—Defendant-Respondent.

S. A. No. 1954 of 1920, Decided on 19th February 1924, from the decree of the District Judge, Jhelum, D/-9th August 1920.

Custom (Punjab) — Succession — Among Gujars of Jhelum District a step-mother is entitled to succeed equally with a son.

The entry in the Riwaj-i-am being in favour of a stepmother succeeding equally with a son among Gujars of the Jhelum District the onus of proving that this was not the custom is on the son. Entry in the Riwaj-i-am unsupported by instances possesses evidential value. Opposite party must dislodge the presumption arising in favour of such a custom by citing instances to the contrary. The oral evidence in such cases is of very little value. [P. 556, C. 1]

Nand Lal—for Appellant.
Ghulam Rasul—for Respondent.

Facts.—The plaintiff Maula Bakhsh is the son of one Qaim, *Gujar*. The defendant *Mt.* Tillo was the married wife of the said Qaim and the stepmother of plaintiff. Qaim having died, his property, about 650 *kanals*, was mutated in the names of the plaintiff and the defendant equally. This happened about 11 years ago. Ever since the defendant *Mt.* Tillo has been in possession and in enjoyment of it without any objection or difficulty. The present suit was instituted on the 9th of October 1919 for possession of the land in the occupation of the defendant on the ground that a childless widow among the *Gujars* of the Jhelum District had no right to succeed as an heir in the presence of a son of her deceased husband, and that in any case the defendant, being a prostitute, though married to Qaim, was not entitled to inherit. The trial Court, relying upon the general custom applicable to widows, as stated in paragraph 16 of Rattigan's Digest of Customary Law, held that a stepmother was not entitled to claim inheritance. On behalf of the plaintiff nine witnesses were produced to negative the custom set up by the defendant in her favour. The learned Subordinate Judge accepted the statements of these witnesses, as in his opinion they occupied a prominent position in the community and were supposed to know the custom applicable to the parties. On behalf of the defendant paragraph 50 of Talbot's Code of Tribal Custom was quoted and relied upon; but the learned Subordinate Judge refused to act upon it on the ground that no instances were quoted in favour of the special custom. He preferred to rely upon the answer given to Question 39, and also referred to the answer to Question 53. A large number of instances cited on behalf of the defendant were rejected on the ground that some of them did not relate to *Gujars* at all, while the others were only instances of mutations which could not be treated as good evidence. He decreed the plaintiff's claim and gave to the defendant 75 *kanals* of land for her maintenance to which alone, according to him, she was entitled.

Against this decision the defendant appealed. The plaintiff also appealed on the ground that no land at all should have been left in possession of the defendant as she was only entitled to maintenance in cash or grain. Mr. Malan, the District Judge of Jhelum, accepted the appeal of the defendant and dismissed that of the plaintiff, with the result that the suit was dismissed. Hence this second appeal by the plaintiff.

Abdul Roof, J.—[After stating facts his Lordship proceeded:—]

The question that we have to decide in this case is whether the entry in the *Riwaj-i-am*, relating to the right of stepmother to succeed to an equal share with a son should be relied upon or not, and whether the instances cited on bebalf of the defendant-res-

pondent could be treated as good evidence in support of the custom set up on behalf of the defendant. Having regard to the ruling of their Lordships of the Privy Council in the case of *Beg* v. *Allah Ditta* (1) there is no room left for a contention that such an entry unsupported by instances possesses no evidential value In our opinion, according to this ruling, it lay upon the plaintiff-appellant to dislodge the presumption arising in favour of such a custom by citing instances to the contrary. The oral evidence in such cases is of very little value. The oral evidence produced on behalf of the plaintiff ma', therefore, be ignored. The plaintiff's documentary evidence as compared with that of the defendant is meagre. It is true that most of the instances relied up on behalf of the defendant are those of mutations, but it has never been held that a mutation entry is no evidence at all. It is evidence, but it is to be decided in each case whether having regard to the circumstances of that particular case what value should be attached to it. Now, of the instances quoted on behalf of the defendant D-1, D-2, D-5, D-6, D-7, D-8, D-11, and D-12 are instances relating to *Gujars*. The others relate to *jats* and others ; but in this respect the *Jats* and the *Gujars* are to be treated on the same footing as the answer to Question 50 was given by all those tribes that are mentioned therein. Instances D-6, D-7, D-10 and D-12 prove that a stepmother was given an equal share with a son It is unnecessary to discuss each instance in detail. It is enough to say that taken along with the entry in the *Riwaj-i-am* the instances cited establish beyond all possible doubt that among the *Gujars* of Jhelum a stepmother is entitled to claim an equal share with a son. The mutation in favour of the defendant was made on the 6th of December 1908 and ever since it has stood unchallenged. This itself goes to show that no claim was put forward because it had no chance of success in the face of the custom existing in the Jhelum District. The view taken by the first Court that the entry in the *Riwaj-i-am* should not be acted upon is opposed to the rule laid down in *Beg* v. *Allah Ditta* (1).

There is no force in this appeal and we dismiss it with costs.

Appeal dismissed.

(1) [1917] 44 Cal. 749—44 I. A. 89—19 Bom. L. R. 388—12 P.W.R. 1917—21 M L T. 310—32 M.L.J 615—38 I. C. 354—45 P.R. 1917—15 A.L.J. 525—21 C.W.N. 842—26 C.L.J. 175 (P. C.)

1924 LAHORE 557

ABDUL RAOOF AND MARTINEAU, JJ.

Gopal Singh and another—Plaintiffs-Appellants.

v.

Mool Raj and athers—Defendants—Respondents.

First Appeal No. 1522 of 1920, Decided on 19th March 1924 from the decree of the Senior Sub. J. Gujranwala, D/-27th April 1920.

Custom (Punjab)—Pre-emption custom in the town does not necessarily exist in quarters outside the town.

There is no custom of pre-emption in a business quarter of recent growth which lies outside the walls of the town of Gujranwala. Evidence of its existence in certain parts of the old town is not sufficient to show that the custom exists also in the particular quarter. 87 P. R. 1890, 70 P. R. 1898, 84 P. R. 1910 Foll. [P. 558, C. 2.]

G. C. Narang and *Badri Das*—for Appellants.

Tek Chand and *Dewan Mehr Chand*—for Respondents.

Martineau, J.—The plaintiffs have sued for possession, by right of pre-emption of 11 *kanals* 2 *marlas*, of land at Gujranwala, which was sold by defendants Nos. 1 and 2 to defendants Nos. 3 and 4 on the 19th January, 1917. Of this land 4 *knanals* 12 *marlas*, which may be called plot A, belonged to Mr. Harkishen Lal, defendant No. 1, personally, and the remaining 6½ *kanals*, which may be called plot B, formed part of the property of *Sardar* Amrik Singh, deceased, whose executors were defendants Nos. 1. and 2. The Subordinate Judge has passed a decree for plot B, which

he finds to be agricultural land, but he has dismissed the suit for plot A, finding that that portion is urban property and that the plaintiffs have not proved that the custom of pre-emption prevails in the locality in which the land is situate. Both parties have appealed.

The first question for decision is whether the land in suit or any portion of it is agricultural. This land is part of an area of 148 *kanals* 9 *marlas* which was purchased by several persons from one Ram Das in 1906 for the purpose, as stated in the sale deed, of the construction of a market and other buildings. The purchasers partitioned the area among themselves, parcelled a part of it into *Ahatas*, some of which they auctioned, and also built a market and factories on a part of the lands. The site in dispute, which is 5 yards from the market, was also marked out into *Ahatas*, and defendants 3 and 4 have built a factory on it, having commenced the building the day after the registration of their deed of sale.

We agree unhesitatingly with the lower Court in finding that the plot A is urban property. That plot was included in the town *abadi* in the settlement of 1911-12, and at the time of the sale to defendants 3 and 4 it was enclosed by a wall, which as stated by D. W. 7 had been in existence for 3 or 4 years before the sale. There can be no doubt that at the time of the sale plot A was not agricultural land.

Plot B is part of *Khasra* No. 2512, which is 14 *kanals* in area. Although that *Khasra* Number was formerly under cultivation it is shown in the *Khasra Girdawari* as uncultivated during the whole of 1914 and 1915 and in the *Rabi* of 1916. It is entered as cultivated with *chari* in the *Kharif* of 1916, one Imamud-Din being shown as the cultivator, but this entry is not supported by other evidence. The Patwari, in saying that the whole of *Khasra* No. 2512 was under cultivation in *Kharif* 1916, is speaking only from the entry in the *Khasra Girdawari* and not from his own personal recollection, and the plaintiffs have not gone into the witness box or produced a single witness to prove that the entry is correct. Imam-ud-Din, who is entered as the cultivator, is not produced, and no one has stated that Imam-ud-Din or any one else cultivated the land. Mr. Harkishen Lal, one of the vendors, who has given evidence, does not say that the land in dispute was ever let to Imam-ud-Din, but says that he has never seen it under cultivation. The statements of other witnesses for the defendants, made in 1918, which are unrebutted, were to the effect that this land had not been under cultivation for, at any rate, the preceding ten years. We therefore think that the entry in the *Khasra Girdawari* for *Kharif* 1916, to which no presumption of correctness attaches, is not of any value. It is also to be observed that Karam Chand (D. W. 1) has stated that the well by which the land in dispute was formerly irrigated is not in working order. We find that no only plot A, but also plot B, is not shown to have been cultivated at the time of the sale in 1917 or for some years preceding that sale, and taking into consideration along with this the fact that the land in suit is part of an area which was purchased in 1906 for non-agricultural purposes, namely, for the purpose of construction of a market and other buildings, we hold that the plaintiffs have failed to prove that any portion of the land in suit was at the time of the sale in 1917 occupied or let for agricultural purposes or purposes subservient to agriculture or for pasture. The whole of the land must therefore be held to be urban property.

The next question is whether the custom of pre-emption has been proved to exist in the locality in which the land is situate. The land is in a business quarter of recent growth which lies outside the walls of the town of Gujranwala. No instance has been given of the existence of a custom of pre-emption in that quarter and evidence of its existence in certain parts of the old town is not sufficient to show that the custom exists also in the particular quarter in which the land in dispute is situate. It cannot be said that th custom exists throughout the town

because in a judgment given on page 18 of the printed paper-book it was held by the Chief Court that the custom alleged to exist in regard to certain non-agricultural land at Gujranwala was not proved. But even if the custom does exist generally in the old town it cannot on that account be presumed to exist in an outgrowth or extension of the town, and in this connection *Kishan Dial* v. *Ali Bakhsh* (1), *Umar Bakhsh* v. *Abdul Karim* (2), and *Allah Ditta* v. *Muhammad Nazir* (3), are cases in point.

The first of these cases related to property situated in a bazar which was a little way from the town of Batala and had grown up within the last 25 years. It was held that the plaintiff in order to succeed must prove positively that a custom of pre-emption existed in that particular quarter, and that he had failed to prove this.

The same view was taken in *Umar Bakksh* v. *Abdul Karim* (2), it being held that from the existence of a custom of pre-emption applicable to sites within the original limits of the town of Batala it could not be deduced that the same custom would apply to land occupied by business premises, which was situated in an outgrowth of the town.

In the third case, namely, *Allah Ditta* v. *Muhammad Nazir* (3), it was held that a new *abadi* of the town of Hafizabad, which consisted mostly, if not entirely, of shops, and extended up to the old quarters of the town, was to be regarded as a distinct sub-division of the town for purposes of pre-emption.

We hold therefore in agreement with the lower Court that the plaintiffs have failed to prove the existence of a custom of pre-emption in the locality in which the land in suit is situate. The suit consequently fails and it is unnecessary to go into the further question whether the vendeee would be entitled to compensation for the cost of the building and machinery which they have erected.

We dismiss the plaintiffs' appeal (No. 1522 of 1920) with costs, and accepting that of the defendants (No. 2165 of 1920) we reverse the decree of the lower Court and dismiss the suit with costs throughout.

Appeal dismissed.

(1) [1890] 87 P. R. 1890.
(2) [1898] 70 P. R. 1898.
(3) [1910] 84 P.R. 1910—7 I. C. 716—102 P.W.R 1910.

1924 LAHORE 559

SCOTT-SMITH AND HARRISON, JJ.

Gurdit Singh and others — Petitioners.

v.

The Crown—Opposite Party.

Criminal Revision No. 1160 of 1923, Decided on 7th March 1924, from the Additional Sessions Judge Lahore.

Criminal P. C., S. 198—Husband is person aggrieved by imputing unchastity to his wife.

In the case of defamation of a married woman her husband is a person aggrieved within the meaning of S. 198. 14 Mad. 379; 25 Bom. 151 (F. B.); 15 M. L. J. 224; 32 Cal. 435 Foll. 23 P.R. (Cr.) 1884 Dist. [P. 560 C. 2]

Ichhar Chand—for Petitioners.

Public Prosecutor — for Opposite Party.

Referring order.

Moti Sagar, J.—The Additional Sessions Judge of Lahore has reported this case to the High Court under S. 438 of the Criminal Procedure Code with a recommendation that the conviction of the present petitioners under S. 500 of the Indian Penal Code be quashed. The facts are briefly these:—In a criminal case under S. 456 of the Indian Penal Code the petitioners appeared as defence witnesses and in their statements made certain imputations against the character of one Mt. Ram Rakhi, wife of Kesar Mal, who is the complainant in this case. Kesar Mal thereupon brought a complaint under S. 500 of the Indian Penal Code against each of the four petitioners with the result that each of them was convicted and sentenced to two months' rigorous imprisonment. The learned Sessions Judge is of opinion that the conviction cannot be sustained inasmuch as the person

defamed is not the complainant but his wife Mt. Ram Rakhi. In coming to this conclusion the learned Sessions Judge has followed *Daood* v. *Empress* (1) in which it has been held that under S. 499 of the Indian Penal Code the reputation to be harmed must be the reputation of the very person concerning whom the imputation is made and not of some other person. There is no doubt that this authority is directly in point and supports the learned Sessions Judge in his view. A contrary view, however, has been held by the Bombay High Court in a Full Bench case reported as *Chhotalal Lallubhai* v. *Nathabhai Bechar* (2). The Madras High Court is also of opinion that in a case in which a married woman is defamed by the imputation of unchastity her husband is the person aggrieved by the defamation upon whose complaint the Magistrate may take cognizance of the offence unde S. 198 of the Code of Criminal Procedure, *vide Chellam Naidu* v. *Ramasami* (3). The learned Judges there observed that the reputation of a husband is so intimately connected with that of his wife that it would be unreasonable to hold that the defamation would ordinarily be not as hurtful to his feelings as it is to those of his wife. In my opinion the view taken by the Bombay and Madras High Courts is the sounder view, and I am inclined to think that the expression "some person aggrieved" in S. 198 of the Criminal Procedure Code is not necessarily limited to the person defamed but has a wider significance and includes also a husband who is undoubtedly a person aggrieved by the imputation of unchastity of his wife with whom he is living. As there is a conflict of authority upon this point between this Court and other High Courts in India, and as the question is one of great importance I think it would be proper if the case was decided by a Division Bench. I accordingly refer the case to a Division Bench.

(1) [1884] 22 P.R. (Cr.) 1884.
(2) [1900] 25 Bom. 151—2 Bom. L.R. 665 (F.B.)
(3) [1891] 14 Mad. 379—1 M.L.J. 242.

JUDGMENT

Scott-Smith, J.—The facts are given in the referring order. The point which we have to decide is whether when a married woman is said to have been defamed, her husband is a person aggrieved within the meaning of S. 198, Criminal Procedure Code, so as to enable a Court to take cognizance of an offence under S. 500, Indian Penal Code, upon a complaint made by him. The learned Sessions Judge was of opinion that the Court could not take cognizance of such complaint, and he based his opinion upon the case of *Daood* v. *Empress* (1). That case, however, appears to us to be distinguishable. There the husband prosecuted the accused persons for defamation of himself though the imputation was said to have been made concerning his wife. The Chief Court held that the conviction could not be sustained because there was no imputation concerning the husband of the woman though there might be defamation of the woman herself. The learned Judges did not consider the meaning of the expression "person aggrieved" in S. 198, Criminal Procedure Code. Its meaning was considered by a Division Bench of the Madras High Court in *Chellam Naidu* v. *Ramasami* (3) and it was held that when a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate may take cognizance of a complaint under S. 198, Criminal Procedure Code. This view was followed by a Full Bench of the Bombay High Court in *Chhotalal Lallubhai* v. *Nathabhai Bechar* (2), one Judge out of five dissenting. In *Anantha Goundan* v. *The King Emperor* (4) the view taken in the earlier Madras case was followed. In *Thakar Das Sar* v. *Athar Chandra Missir* (5) where the alleged offence was defamation imputing unchastity to a Hindu widow, it was held that her brother with whom she was residing at the time, was a "person aggrieved" within the terms of S. 198, Criminal Procedure Code. The Judges

(4) [1901] 15 M.L.J, 224-2Cr. L.J. 381.
(5) [1904] 32 Cal. 425.

considered the case reported as *Chhotalal Lallubhai* v. *Nathabhai Bechar* (2), and expressly disagreed from the view expressed by Ranade, J., the dissenting Judge.

We fully agree with the view of the majority of the Full Bench in the case of *Chhotalal Lallubhai* v. *Nathabhai Bechar* (2) and of the Madras High Court in the case of *Anantha Goundan* v. *King Emperor* (3) and hold that in the case of defamation of a married woman her husband is a person aggrieved within the meaning of S. 198, Criminal Procedure Code.

We therefore see no reason to interfere with the order of the Magistrate convicting the petitioners and reject the application for revision.

Application rejected.

1924 LAHORE 561

HARRISON AND ZAFAR ALI, JJ.

Gurubakhsh Singh—Plaintiff—Appellant.

v.

Bhagwan Singh—Defendant—Respondent.

S. A. No. 1620 of 1920, Decided on 21st April 1923, from the decree of District Judge Amritsar, D/-14th June 1920.

Limitation Act Art, 123—Governs a suit by a legatee against co-legatee.

One died in 1910 leaving the whole of his property to his two sons G and B by a will. The two legatees lived at peace with each other until recently and in the year 1919, G, brought a suit against his elder brother B. for his share in the estate, which he said B. had appropriated in its entirety.

Held: that Art, 123 applied and that the suit was in time. 1922 M. 457 Ref. [P 562 C 2]

Sagar Chand & *Lala Jagan Nath*—for Appellant.

Lala Badri Das—for Respondent.

Judgment. — One Hazura Singh died in 1910 leaving four sons. He is said to have disinherited two by a Will and to have left to the remaining two the whole of his property, which he asserted in the document to be self-acquired. The two legatees lived at peace with each other until racently and now in the year 1919, Gurbakhsh Singh brings a suit against his elder brother Bhagwan Singh for his share in the estate, which he says Bhagwan Singh has appropriated in its entirety. It has been held by both the lower Courts that the suit is barred by limitation, that Art. 123 does not apply, and that under Art. 120 also the suit is barred. On second appeal it is contended that, even if Art. 120 applies, six years have not elapsed since a demand was made by the plaintiff and, therefore, the suit it within time and further that Art. 123 does apply and govern the case. So far as Art. 120 is concerned, the plaint does not disclose the date of any demand but merely states vaguely that a demand was made. Counsel for the appellant contends that, under these circumstances, it is for the defendant to prove the negative that no demand was made within six years and that it is unnecessary for him in his plaint even to state that he has a cause of action within limitation. For this view he can adduce no authority and we find that, as the plaint does not disclose a demand within six years, even if Art. 120 did govern the case the suit would be clearly barred by time.

As to Art. 123, the real question is the applicability of *Maung Tun Tha* v. *Ma Thit* (1) and whether the view taken by the Full Bench of the Madras High Court in 43 Madras Law Journal :*Zamindar of Bhadrachalam & Palavancha* v. *Venkatadri Appa Rao* (2) more especially at page 500 [of M. L. J.] is to prevail as against many previous rulings. Article 123 says that a suit for a legacy or for a share of a residue bequeathed by a testator may be brought within 12 years and it has been held hitherto that the suit must be against a person who lawfully

(1) [1917] 44 Cal. 379—44 I. A. 42—19 Bom. L. R. 294—15 A.L.J. 96—32 M. L. J. 71—21 M. L. T. 97—38 I. C. 809—21 C. W. N. 527—26 C. L. J. 169—9 L. B. R. 56—10 Bur. L. T. 138 (P. C.)

(2) 1922 Mad. 457—46 Mad. 490—43 M.L.J. 486—(1922) M.W.N. 533—16 L. W. 369—70 I. C. 689.

represents the estate of the deceased and that it does not govern a case against an executor *de son tort*. The Privy Council ruling *Maung Tun Tha* v. *Ma Thit* (1) doubtless dealt with a case in which the parties were Buddhists and a question of Buddhist custom was involved. It is quite clear, however, that the suit was against an executor *de son tort*, and their Lordships observed at page 387 [of I. L. R.] that proof of the custom having failed the plaintiff was entitled to bring his suit to assert "a right which he was at liberty to assert within any period that was not outside the period fixed by Art. 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate." The fact that in the present case there was a Will does not affect the position, for the Article applies equally to the case of an intestate's estate and to one in which the deceased has left a Will. Counsel contends that where two men are nominated as beneficiaries under a will they are not legatees and the estate conferred upon them is not a legacy, but he cannot explain what they are if not legatees. Before the Madras High Court the question was argued at considerable length and it was held that Art. 123 applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances, that he is bound to deal with it as the estate of the deceased and that it, therefore, applies to suits for legacies against an executor *de son tort*. Here the defendant was certainly entitled under the will to a portion of the estate, but he is none-the-less an executor *de son tort* and, as explained by the Chief Justice of Madras, at page 500 [of M. L. J.] of the ruling, "an executor *de son tort* takes all the liabilities of an executor and it would be a curious thing if claims to legacies against an executor were not barred until the lapse of 12 years but claims against executors *de son tort* were barred in a shorter period That this Article applies to persons other than the executors in possession of an estate has been decided in several cases." The Privy Council ruling is then referred to and it is explained that what was there decided was that Art. 123 applies to a claim to a share of an estate against co-heirs in possession. We accept this view as obviously correct and indeed we are unable to understand how the Privy Council ruling admits of any other interpretation. We find that the suit was instituted within time. We accept the appeal and remand the case for decision on the merits. Costs will follow the event.

Appeal accepted.

1924 LAHORE 562

SCOTT-SMITH AND FFORDE, JJ.

Hafiz Feroz-ud-Din Ahmad—Plaintiff—Appellant.

v

Sardar Shah and others—Defendants—Respondents.

S. A. No. 2017 of 1920, Decided on 2nd April 1924, from the order of the District Judge Lahore, D/-29th April 1920.

(a) *Muhammadan Law—Gift and* hiba-bil-iwaz*—Possession is unnecessary in* hiba-bil-iwaz *unlike in gift.*

A *Hiba-bil-iwaz* has incidents very different from those of a simple gift inasmuch as the taking of possession is necessary to validate a gift pure and simple, whereas in the case of a *hiba-bil-iwaz* the taking of possession is not necessary. [P 563 C 2]

(b) *Evidence Act, S. 92—Parties and representatives — Representatives of parties to a deed.*

Parties cannot be allowed to adduce evidence to prove contrary to the terms of deed of gift that the transaction was in reality a *hiba-bil-iwaz*. [P 563 C 2]

Des Raj Sawhney—for Appellant.

Ram Chand Manchanda—for Respondents.

Scott-Smith, J.—This is a second appeal from the order of the Lower Courts dismissing the plaintiff's suit for possession of certain land in Mouzang gifted to him by Chaudhri Nabi Bakhsh by a registered deed of gift, dated the 14th March 1907. The suit was brought on the 12th March 1919, in other words two days before the expiration of 12 years from the date of gift. At the time when the

suit was brought Sardar Shah, respondent and Mehtab Shah his brother were in possession as vendees from Chaudhri Shaja-ud-Din, the son of Chaudhri Nabi Bakhsh to whom Sardar Shah and Mehtab Shah alleged it had been gifted by his father. The Courts below held that plaintiff had never obtained possession of the land and that therefore there was no valid gift in his favour in accordance with the Mahammadan Law which requires that a gift to be valid must be with possession. To get over the difficulty about possession plaintiff alleged that though the deed was executed as a deed of gift pure and simple in consideration of many years' friendship yet in reality Rs. 1,000 was paid by him to the donor and that the deed was really what is known as a *hiba-bil-iwaz*, and that to validate such a transaction the giving of possession is not necessary. The Lower Court dismissed the suit holding that plaintiff was precluded by S. 92 of the Indian Evidence Act from producing oral evidence to prove that the transaction was a *hiba-bil-iwaz* contrary to the terms of the deed which shows that it was a gift pure and simple.

In appeal it is contended firstly that S. 92 does not bar the admission of oral evidence to prove the real nature of the transaction and that in any case the chief defendants are not the representatives-in-interest of Chaudhri Nabi Bakhsh, a party to the deed. Finally it was urged that under proviso (2) to S 92 Indian Evidence Act plaintiff is entitled to prove the existence of a separate oral agreement as to a matter on which the deed of gift was silent. As regards the applicability of S. 92 Counsel referred us to *Maung Kyin* v. *Ma Shwe La* (1), *Saraj-ud-din* v. *Isab Haldar* (2), and *Sukumari Debi* v. *Kalipada Mukerjee* (3). None of these authorities appears to me to be in point. Moreover, in Saraj-ud-din's case the Judges quoted a *dictum* of Huda, J. in *Jidia Jan Bibi* v. *Sheikh Baktar* (4), in which it was pointed out that a *hiba-bil-iwaz* has incidents very different from those of a simple gift. This is clear from the very fact that the taking of possession is necessary to validate a gift pure and simple whereas in the case of a *hiba-bil-iwaz* the taking of possession is not necessary, see in this connection Mulla's Muhammadan Law, 7th Edition, page 123, *Khajooroonissa* v. *Rowshan Jahan* (5), and 10 C. W. N. 786 (P. C.) The same is the view of Sheikh Ameer Ali at page 63 of Volume I of his Muhammadan Law.

I also do not consider that proviso (2) to S. 92 has any applicability to the facts of the present case. It cannot be said that the payment of Rs. 1,000 as consideration is a separate oral agreement not inconsistent with the terms of the document itself within the meaning of the proviso. Further, I have no difficulty in holding that Sardar Shah and Mehtab Shah are the representatives-in-interest of Chaudhri Nabi Bakhsh, the original owner of the property, for they represent his estate so far as the property in suit is concerned.

I am, therefore, of opinion that the Courts below were right in holding that plaintiff could not be allowed to adduce evidence to prove contrary to the terms of the deed of gift that the transaction was in reality a *hiba-bil-iwaz*.

I would, therefore, dismiss the appeal with costs to Sardar Shah, respondent.

The appeal has already been dismissed as against the representatives of Mehtab Shah who died whilst the appeal was pending in this Court.

Appeal dismissed.

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(1) [1918] 45 Cal. 320—44 I. A. 236—15 A. L. J. 825—33 M.L.J. 648—3 Pat L. W. 185—6 L. W. 777—22 C.W.N. 257—23 M. L. T. 36—27 C. L. J. 175—42 I.C 642—20 Bom. L.R. 278—(1918) M. W. N. 300—9 L. B. R. 114—11 Bur. L.T. 21. (P. C.)

(2) 1922 Cal. 258.

(3) [1918] 45 I. C. 13.

(4) [1920] 24 C. W. N. 926.

(5) [1876] 2 Cal. 184—3 I. A. 291—26 W.R. 36—3 Sar. 629.

✱ 1924 LAHORE 564

CAMPBELL, J.

Muhammad Saddiq and others—Plaintiffs—Appellants.

v.

Khuda Bakhsh and others—Defendants—Respondents.

S. A. No. 256 of 1924, Decided on 7th April 1924, from the decree of the District J. Ambala, D/-3rd October 1923.

○ ✱ *Muhammadan Law—Alienation Mother being* de facto *guardian can't alienate minor's interest in immoveable property so as to bind the infants.*

Under the Mubammadan Law a person who has charge of the person or property of a minor without being his legal guardian and who may therefore be conveniently called a *de facto* guardian has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such a transferee if let into possession of the property under such unauthorised transfer resist an action in ejectment on behalf of the infant as a trespasser. 45 Cal. 878 P. C. Foll. [C. 564, C. 2]

Sagar Chand—for Appellants.

Shamair Chand and *Amar Nath Chona*—for Respondents.

Campbell, J.—In this suit plaintiffs who are the sons of *Mt.* Rahiman sued for possession of certain land sold by *Mt.* Rahiman purporting to act as their guardian to one Khuda Bakhsh. The plaintiffs alleged that the sale was neither for consideration nor for neeessity, and also alleged that *Mt.* Rahiman was not legal guardian of the plaintiffs.

The defendants were *Mt.* Rahiman and Khuda Bakhsh. *Mt.* Rahiman admittted the correctness of the plaint. Khuda Bakhsh asserted that the sales were for consideration and necessity and denied the allegation that *Mt.* Rahiman was not the plaintiff's legal guardian.

The trial Court framed no issues on the second point but decided that one of the two sales was binding on the plaintiffs and the other was not. The trial Court also recorded a finding that *Mt.* Rahiman was a proper guardian of the plaintiffs during their minority, referring to paragraph 107 of Wilson's Anglo-Muhammadan Law which deals not with guardianship of property but with the question of the custody of boys upto the age of 7 and the girls up to the age of puberty.

Both parties appealed to the District Judge and in their memorandum of appeal the plaintiffs distinctly asserted in paragraph No. 3 that *Mt.* Rahiman was not their lawful guardian.

The learned District Judge accepted the appeal of Khuda Bakhsh and dismissed that of plaintiffs holding that both sales had been directly for the benefit of the plaintiffs who were then minors. No specific reference is made in his judgment to the plaintiffs' contention that *Mt.* Rahiman was not their lawful guardian but at the end of the judgment the following passage occurs:—"*Mt.* Rahiman being the *de facto* guardian of the appellants at the time of the sale was competent to alienate on their behalf for consideration and necessity, provided it was for their benefit."

In *Imambandi* v. *Mutsaddi* (1), their Lordships of the Privy Council set themselves to lay down a definite rule on the question of how far and under what circumstances according to the Muhammadan Law a mother's dealings with her minor son's property are binding on the infant, and the rule which they declared was that,

"under Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may therefore be conveniently called a *de facto* guardian, had no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser."

If, therefore, the parties to the present suit are governed by Muhammadan Law the decision of the learned District Judge in the passage quoted above is clearly wrong.

It has been argued, however, by Mr. Shamair Chand for Khuda Bakhsh, respondent, that under S. 5 of the Punjab Laws Act in questions

(1) [1919] 45 Cal. 878—45 I. A. 73—35 M.L.J. 422—16 A.L.J. 800—24 M.L.T. 330—28 C.L.J. 409—23 C.W.N. 50—5 P.L.W. 276—47 I. C. 513—20 Bom. L. R. 1022—(1919) M. W. N. 91—9 L. W. 518 (P. C.)

regarding guardianship the rule of decision is firstly any custom applicable to the parties concerned, that the present parties being *Arains* they are presumably governed by agricultural custom that under the *riwaj-i-am* of the Ambala District, as embodied in the answer to question No. 24 on page 13 of Whitehead's Customary Law of the Ambala District, 1921, the mother is by custom the legal guardian of a minor next after the father and that this rule applies to all agricultural tribes of the district. This raises a question into which the lower Courts have not entered, but of which the determination is necessary for the proper disposal of the suit. There has been no decision by the learned District Judge of paragraph 3 of the plaintiff's memorandum of appeal, and I do not agree with Mr. Shamair Chand's contention that this ground must have been expressly given up before the learned District Judge.

The Lower Appellate Court must decide whether *Mt.* Rahiman was or was not the legal guardian; if it holds that she was not, a further question may arise whether the plaintiffs are obliged by law to restore the benefit obtained by them, if any, to the vendee. The decision that *Mt.* Rahiman was entitled as *de facto* guardian to alienate the property, I hold it to be erroneous on the present contents of the record and for that reason I accept the appeal, set aside the decree of the Lower Appellate Court and order both appeals filed before him to be decided again with reference to the above remarks. Costs in this Court will follow the event.

Appeal accepted.

1924 LAHORE 565

SHADI LAL, C. J. AND LUMSDEN, J.

Mt. Husain Bibi—Defendant—Appellant.

v

Hayat and others—Plaintiffs—Respondents.

S. A. No. 2306 of 1920, Decided on 1st May 1923, from the decree of the District Judge, Sialkot, D/- 12th August 1920.

Custom—Punjab—Ancestral property—Character is not lost by female intervening.

A daughter who succeeds in default of male heirs simply acts as a conduit to pass on the property and does not alter its character from ancestral to non-ancestral merely because she happens to be a female. 32 P.R. 1895 (F.B.) 74 P.R. 1899 16 P.R. 1903 Foll. [P. 566 C. 1]

Mukund Lal Puri—for Appellant.

Lala Joti Sarup—for Respondents.

Judgment.—One Jana, a *Jat* by caste, and a resident of *Mauza* Fatehgarh, in the Daska Tahsil of the Sialkot District, was succeeded by a daughter named *Mt.* Janan according to the Revenue Records, but described by the lower appellate Court as *Mt.* Izzat Bibi or Izzat Khatun. This lady had four sons one of whom was named Mahwan. Mahwan had a son Allah Ditta who died leaving a widow *Mt.* Fazl Bibi. On the latter's death a dispute has arisen over the estate of Allah Ditta, this estate consisting partly of proprietary land and partly of occupancy rights. The rival claimants are the daughter of Allah Ditta who supports her claim by an allegation that her husband was accepted as a *khana damad* and the defendants of the other sons of *Mt.* Janan. The latter have brought this suit for possession of the whole estate. The Trial Court granted them a decree in respect of the proprietary land but dismissed the claim so far as the land held under occupancy rights was concerned. Both parties appealed unsuccessfully to the District Judge and the daughter of Allah Ditta has now come up to this Court on second appeal.

The only points urged before us are (*a*) that the Courts below were wrong in holding that the property in regard to which a decree has been given is ancestral, (I) (*b*) that it had been fully established that the appellant's husband had been accepted as a *khana damad*.

In respect of (*a*) no attempt is made to deny that the property was owned by Janan, the common ancestor, and the arguments addressed to us are based on the fact that the property descended through *Mt.* Janan. It is urged that on this account the property has lost its ancestral character, that character being dependent on

purely agnatic descent. This question is, however, concluded by the Full Bench decision *Lehna* v. *Thakri* (1) where it was held by the majority of the Judges, constituting the Bench that a daughter who succeeds in default of male heirs simply acts as a conduit to pass on the property and does not alter its character merely because she happens to be a female. This decision was tacitly approved in *Jai Dial* v. *Santu* (2) and *Kala Singh* v. *Buta Singh* (3) and, so far as we are aware, has not been doubted in any published judgment of this Court. In the face of this authority, appellant's contention that the property is not ancestral must obviously fail.

The assertion that appellant's husband was accepted as a *khana damad* is supported by no evidence of any value and is directly negatived by the fact that, on the death of Allah Ditta, the property passed to his widow and not to appellant and her husband who indeed appear to have taken up their residence in the village only after Allah Ditta's death.

It follows from these findings that the appeal must be dismissed with costs and we order accordingly.

Appeal dismissed.

(1) [1895] 32 P.R. 1895 (F. B.)
(2) [1899] 74 P.R. 1899.
(3) [1903] 16 P.R. 1903—38 P.L.R. 1903.

1924 LAHORE 566

MOTI SAGAR, J.

Balwant Rai—Plaintiff.

v.

Niamat Khan and others—Defendants.

Reference Case No. 5 of 1923, Decided on 22nd May 1923, from the District Judge, Lahore with his letter No. 352, D/- 29th March 1923

Civil P. C., O. 46 R. 1—Questions on sanction applications can't be referred.

O. 46, R. 1, of the Civil Procedure Code refers to such questions only as may arise in the trial of the suit and not to questions arising on application for sanction to prosecute which cannot in any sense of the word, be considered as a trial of a suit. [P 567 C 1]

Shamair Chand—for Plaintiff.

Ghulam Mohyuddin and *Mallik Mohammad Hussain*—for Defendants.

Order.—One Niamat Khan brought a suit for redemption of a house at Muzang against Balwant Rai and others in the Court of Pandit Omkar Nath Zutshi, Subordinate Judge of Lahore. In the course of this suit Niamat Khan produced a receipt for Rs 1,100 purporting to have been signed and executed by Balwant Rai and claimed that he should be given credit for this sum in the accounts. The defendant, Balwant Rai, repudiated the receipt and alleged that it was a forgery. The Subordinate Judge sent the receipt to Mr. Brewster, Government Expert at Calcutta, for his opinion, who reported that it did not bear the signature of the defendant, and that it was forged. The Subordinate Judge, agreeing with the opinion of the Expert, held the receipt to be a forgery and disallowed the item. After the decision of the suit Balwant Rai made an application to the Subordinate Judge for sanction to prosecute Niamat Khan for producing a false receipt. The Subordinate Judge ordered notice to issue to the respondent on the 3rd of January 1923. Before this application could come on for hearing Pandit Omkar Nath Zutshi was transferred and was succeeded by Bawa Kanshi Ram. On the day of hearing a preliminary objection was taken on behalf of the respondent that the Court of the Subordinate Judge was not a permanent Court an' that, therefore, Bawa Kanshi Ram had no jurisdiction to entertain the application. Reliance was placed in support of this contention on *Phina Singh* v. *Empress* (1); *Emperor* v. *Dauli* (2); *Muhammad Ishaq* v. *Muqim-ud-din* (3); *Maula Baksh* v. *Lal Chand* (4) and *Jia Lal* v. *Phogo Mal* (5). The petitioner, on

(1) [1889] 25 P.R. 1889 (Cr.)
(2) [1909] 6 P.R. 1909 Cr.—12 P.W.R. 1909 Cr.—2 I.C. 812—104 P.L.R. 1909—10 Cr.L.J. 158.
(3) [1913] 7 P R.Cr. 1913 — 207 P.L R. 1913—19 I.C. 178—14 Cr.L.J. 178.
(4) [1916] 23 P.R.Cr. 1916—37 I.C. 473—18 Cr.L.J. 121.
(5) [1918] 22 P.R. 1918 Cr.—34 P.W.R. 1918 Cr.—47 I.C. 286—19 Cr.L.J. 914—138 P.L.R. 1918.

the other hand, relied on a recent judgment of this Court by Mr. Justice Martineau reported as *Tara Chand* v. *Emperor* (6), in which a contrary view was taken. The learned Subordinate Judge, finding that there was a conflict of authority upon this point, has referred the matter to this Court for decision under O 46, R. 1 of the Civil Procedure Code.

In my opinion this reference is incompetent and the section under which it has been made is altogether inapplicable. The section provides that where before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, refer the matter to the High Court for decision. I do not think that an application for sanction to prosecute is a suit or an appeal within the meaning of this section. Moreover, it seems clear from the wording of the section that the only questions which can be referred to this Court are those which arise pending the trial of the suit and that no questions which arise subsequent to the hearing of a suit except those which arise in the execution of a decree can form the subject of reference under this section. I have no hesitation in holding that O. 46, R. 1, of the Civil Procedure Code refers to such questions only as may arise in the trial of the suit and not to questions arising on application for sanction to prosecute which cannot, in any sense of the word, be considered as a trial of a suit. I think, therefore, that the Subordinate Judge had no power to make this reference and I decline to answer the question. The record will be returned, to the Subordinate Judge who will dispose of the case according to law.

Reference not answered.

(6) 1922 Lah. 479—23 Cr.L.J. 451—65 P.L.R. 1922.

† 1924 LAHORE 567

ABDUL RAOOF, J.

Bagh Singh — Defendant — Petitioner.

v.

Bhagwan Das—Plaintiff — Respondent.

Civil Rev. Petition No. 15 of 1923, Decided on 28th March 1923, from the order of the S. J. 1st Class Delhi, D/- 19th December 1922.

✱ *C. P. Code S. 10—Refusal to stay suit—No revision lies—C. P. Code, S. 115.*

No revision lies against an order refusing to stay a suit under S. 10 of the Civil Procedure Code, there being no case decided within S. 115. 1923 L. 69; 1922 L. 54, 42 A. 409 & 43 A. 564. F. B. Rel. on.

B. Tek Chand—for Petitioner

Kanwar Dalip Singh—for Respondent.

Judgment.—This is an application for revision made against an order refusing to stay a suit under S. 10 of the Code of Civil Procedure. A preliminary objection is taken to the hearing of this petition by Mr. Dalip Singh on the ground that no revision lies against the order as no case has been decided. In support of his contention he has relied upon the following rulings :—

Mela Ram v. *Rishi Kesh* (1), *Firm Ishar Das Dharm Chand of Amritsar* v. *Firm Buta Mal-Durga Das of Amritsar* (2), *Sultanat Jahan Began* v. *Sundar Lal* (3) and *Buddhoo Lal* v. *Mewa Ram* (4).

In my opinion, all these cases support the contention of Mr. Dalip Singh. It is true that there are certain decisions the other way also to which my attention has been called by Mr. Tek Chand, the Counsel for the applicant, but I find that the preponderance of the authorities is in favour of Mr. Dalip Singh's contention

I, therefore, accept the preliminary objection, and reject this application for revision with costs.

Application rejected.

(1) 1923 Lah. 69.
(2) 1922 Lah. 54.
(3) [1920] 42 All. 409—58 I. C. 90—18 A. L. J. 431.
(4) [1921] 43 All. 564—63 I. C. 15—19 A. L. J. 558 (F. B.)

✱ 1924 LAHORE 568

SCOTT-SMITH AND FFORDE, JJ.

Dil Bahadur—Convict—Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 51 of 1923, Decided on 23rd February 1923, from an order of the Additional Sessions Judge, Amritsar, D/- 7th December 1922.

✱ *Criminal P. C., S. 339—Sessions Judge can order commitment.*

A Sessions Judge is Competent to order the commitment of an accused person to whom conditional pardon has been tendered if he finds that the conditions of the pardon have not been fulfilled. 24 C. 492; Dist. 42 C. 856; 31 P. R. 1904. Foll. [P 569, C 1]

Pir Taj-ud-Din—for Appellant.

The Public Prosecutor—for Respondent.

Judgment.—The appellant Dil Bahadur has been convicted of having murdered Alam Singh and has been sentenced to death under S. 302 of the Indian Penal Code.

The facts are fully detailed in the long and careful judgment of the Sessions Judge and we need not recapitulate them. The body of the victim was discovered on the morning of the 12th April 1922. He had been last seen in the company of the appellant in Chhaju Mal-Duni Chand's *Dharamsala* near the Amritsar Railway Station. Birbal Munshi of the *Dharamsala* had an occasion to go to the Police Station on the morning when the body was discovered. On enquiring for the *Thandar* he was informed that the latter had gone to Raniwala bagh. On proceeding there he saw the body of the deceased and identified it as the body of a man who had put up at the *Dharamsala* on the previous day together with the appellant. Upon this evidence the appellant was interrogated by the Police and he thereupon admitted that, at the instigation of one Kharak Bahadur, he, together with Kharak Bahadur and a certain Kharke, had murdered the deceased. Kharak Bahadur and Kharke were arrested and tried for the murder and the appellant turned approver. On receiving pardon conditional upon turning approver he gave a very long and very detailed narrative not only of the crime, but of all the circumstances which led up to it. This statement is summarised in the judgment of the learned Sessions Judge and we need not set it out here. It is quite clear that if that statement is to be believed the appellant assisted the two men Kharak Bahadur and Kharke in murdering Alam Singh in the manner described with so much particularity. At the trial of those two men the appellant resiled from the statement upon the strength of which he had been given the pardon, and the result was that there was not sufficient evidence for a conviction and the two accused were necessarily acquitted.

In consequence of his refusal to give evidence his pardon has been forfeited, and he has been tried for complicity in the murder, convicted and sentenced to death.

As to his guilt there can be no doubt, his own statement has all the inherent appearance of truth, and his story is corroborated by the fact of his having produced for the Police the *kukri* with which he alleged that the crime was committed. This weapon he produced from under some leaves close to the spot where the murder took place.

The technical point was raised on behalf of the appellant that the forfeiture of the pardon should have been ordered by the Magistrate who granted it and not by the Sessions Judge and *Queen-Empress* v. *Manick Chandra* (1) was relied upon in support of this plea.

That case, however, was decided under the old Criminal Procedure Code then in force which has been radically altered by Act V of 1898, and the effect of the alteration is that the decision relied upon can no longer be regarded as an authority. This has been expressly decided in *Shashi Rajbanshi* v. *Emperor* (2), where the present law on the subject is fully discussed.

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(1) [1897] 24 Cal. 492.
(2) [1915] 42 Cal. 856—18 Cr. L. J. 65—26 I. C. 657—19 C.W.N. 295.

The point was also expressly decided in *King-Emperor* v. *Kadu* (3), a Full Bench ruling of this Court, where it was held that a Sessions Judge is competent to order the commitment of an accused person to whom conditional pardon has been tendered if he finds that the conditions of the pardon have not been fulfilled.

In the case before us the Sessions Judge has found that the conditions of the pardon have not been fulfilled, and he was, therefore, clearly entitled to commit the appellant for trial. The appellant did not plead the pardon in bar at the trial. At the former trial, when he was put in the witness-box as an approver, he did not even attempt to fulful the conditions upon which the pardon had been preferred ; but stated that he knew nothing of the murder. Before the Committing Magistrate he declared that the statement made upon the conditional pardon was false, and had been induced by Police pressure. The Sessions Judge has quite rightly found that the pardon has been forfeited and he has also quite rightly concluded that the statement upon which the pardon was conditioned, and which the appellant subsequently retracted, was true in all essential particulars. We are accordingly of opinion, that the appellant has been rightly convicted.

In view, however, of the fact that the accused did not take a leading part in the crime, and acted under the influence and at the instigation of the principal perpetrators, and in view also of his youth, we do not think he should suffer the extreme penalty. We accordingly dismiss the appeal and affirm the conviction but alter the sentence to one of transportation for life.

Appeal dismissed
Sentence altered.

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(3) [1904] 31 P. R. 1904 Cr.—176 P. L. R. 1905—1 Cr. L. J. 1082.

✱ 1924 LAHORE 569

LUMSDEN, J.

Abdul Qadir—Appellant.

v.

Muhammad Ibrahim Khan—Respondent.

Criminal Appeal No. 262 of 1923, Decided on 16th June 1923, from an order of the Sessions J. Sialkot, D/-3rd January 1923.

✱ (a) *Criminal P. C., S. 195—Delay if not explained is fatal.*

There is no limitation fixed for applications for sanction to prosecute but, in such cases no time should be lost in instituting proceedings. Delay obviously tends to prejudice the person against whom proceedings are to be taken.

[P. 569, C. 2 ; P. 570, C- 1]

✱ (b) *Criminal P. C., S. 195 — Grounds for sanction.*

Sanction should not be granted unless there is a reasonable expectation of a conviction.

[P' 570, C. 1]

G. C. Narang—for Appellant.

Sagar Chand—for Respondent.

Judgment.—This order disposes also of the connected Appeal No. 263 of 1923. It appears that the appellant, along with a number of other persons, was sent up for trial for offences committed under S. 17 of the Criminal Law Amendment Act, 1908, on the 18th November, and 1st December 1921. All the accused were discharged by the Magistrate who held that the facts proved did not constitute an offence under the Section in question. In that case two of the prosecution witnesses were a Police Sub-Inspector named Muhammad. Ibrahim Khan and a Head Constable called Ata Muhammad. Some six months after the order of dicharge, appellant put in applications under S. 195, Cr.P.C. for sanction to prosecute these two witnesses for perjury. These applications have been rejected by the learned Sessions Judge from whose order these appeals have been preferred.

As pointed out above, the applications were not made until six months after the discharge of the appellant. It is, no doubt, true that there is no limitation for application of this kind fixed but I am in entire agreement with the views expressed by the Allahabad High Court [*Yad Ram* v. *Risal* (1)] to the effect that in

(1) [1910] 7 A.L.J. 50—5 I. C. 469—11 Cr. L. J. 140.

such cases no time should be lost in instituting proceedings In the present case the appellant has no valid excuse for the great delay that has occurred. He alleges that owing to fear he could take no action and that fear was not alleged until the publication of some *communique* by Government This explanation is entirely unconvincing. On the other hand, it is significant that the applications were put in after the Trial Magistrate and the Deputy Commissioner had been transferred from the District. Delay of this kind obviously tends to prejudice the person against whom proceedings are to be taken. The Trial Magistrate would probably have been a valuable witness but as he has retired from the service he is no longer available, while the Deputy Commissioner who was a witness in the case, has gone to another part of the Province and his attendance could be secured only at considerable inconvenience. I hold, therefore, that these applications should have been rejected on account of their belated presentation.

The appeals must fail also on another ground. It is a well established principle that sanction should not be granted unless there is a reasonable expectation of a conviction. In the present cases the learned Sessions Judge has, after making every possible allowance in favour of the appellant, come to the conclusion in the course of a lengthy order that no perjury has been committed. After hearing and considering the arguments addressed by both parties I am satisfied that there is no likelihood of a conviction. The word intentionally' in S. 193, Indian Penal Code, cannnot be ignored and there is nothing to suggest that if any of the statements made by the witnesses were untrue, they were untrue to the knowledge of the defendants. The latter were dealing on both occasions with crowds and it is esly to understand how mistakes could arise and no sanction can be granted in respect of such mistakes.

It follows that both the appeals must de dismissed and I order accordingly.

Appeal dismissed.

✱ 1924 LAHORE 570

MARTINEAU, J.

Ballu Mal—Petitioner.

v.

Hardawari Mal—Respondent.

Civil Rev. No. 860 of 1923, Decided on 3rd May 1924, from the order of the District Judge Karnal, D/-24th October 1923.

(a) *Guardians and Wards Act, (VIII of 1890), S 19 (a)—No guardian of minor married female is to be appointed unless husband is unfit.*

S. 19 (a) probihits the Court from appointing a guardian of the person of a minor girl who is married and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person. [P 571, C 1]

✱ (b) *Guardians and Wards Act S. 11—A person to whom notice ought to have been issued but was not issued can apply for revision.*

A person who is not made party to the proceedings in a guardianship case but to whom a notice should have been issued under S. 11 of the Guardians and Wards Act as a person interested in the matter of the appointment of a guardian is entitled to move the High Court to interfere in revision. [P 570, C 2]

(c) *Hindu Law—Marriage.*

A marriage is not invalidated for want of the guardian's consent. [P 571, C 1]

Shamir Chand—for Petitioner.

Jagan Nath and *Sagar Chand*—for Respondent.

Martineau, J.—This is an application by one Ballu Mal for revision of an order passed by the District Judge of Karnal appointing the respondent, Hardwari Mal, to be the guardian of the person of his niece, Pista.

The petitioner was not made a party to the proceedings in the Lower Court, but he is certainly a person to whom a notice should have been issued under S. 11 of the Guardians and Wards Act, since he has, as found by learned District Judge, been married to the minor, and being a person interested in the matter of the appointment of a guardian he is entitled to move this Court to interfere in revision, see *Jhandeshun* v. *Baij Nath* (1).

(1) [1915] 1 O.L.J. 761—27 I.C. 121—18 O. C. 66.

The minor was given in marriage to Ballu Mal by her sister's husband Telu Mal without the consent of Hardwari Mal. But the contention of counsel for the respondent that the marriage was brought about by force or fraud, and is, therefore, invalid is not correct. There is no allegation that the minor was defrauded or that the marriage was performed against her will. She has taken no objection to the marriage, and in fact it seems that she wishes to remain with her husband. It is Hardwari Mal who objects to the marriage, and the fact is that Telu Mal hurried on the marriage in order to forestall him, but this fact would not render the marriage invalid, for it has been held in *Gajja Nand* v. *Emperor* (2) that a marriage is not invalidated by the want of the guardian's consent.

The Lower Court has overlooked S. 19 (a) of the Guardians and Wards Act, which prohibits the Court from appointing a guardian of the person of a minor girl who is married and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person. The learned District Judge, while he is of opinion that Telu Mal is unfit to be the minor's guardian, has expressed no opinion as to the fitness or unfitness of Balu Mal and that is the point to be decided.

I accept the application, set aside the order of the learned District Judge, and direct him to pass a fresh order after issuing notice to Ballu Mal and hearing him and determining whether Ballu Mal is unfit to be guardian of the person of the minor. The parties will bear their own costs in this Court.

Revision allowed.

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(2) 2 Lah. 288.

✱ ✱ 1924 LAHORE 571

Full Bench

SHADI LAL, C. J. BROADWAY AND HARRISON, JJ.

Sultan Singh — Defendant—Petitioner.

v

Murli Dhar and others—Plaintiffs—Respondents.

Mis. Case No. 412 of 1923, Decided on 2nd April 1924, Petition for leave to appeal in Civil Appeal No. 2617 of 1919, D/- 8th March 1923.

✱ ✱ *Civil P. C., S. 109 (a)—Final order, what is—Determining factor is not whether the decision of the Trial Court if restored by the Privy Council would put an end to suit altogether but whether the order decides the cardinal issues in the suit—Matter of procedure can never be a cardinal issue—Issue dealing with rights may or may not be.*

The determining factor is not the effect on the suit, a decision in favour of the applicant would have, if the proposed appeal to the Privy Council were successful, but the immediate effect on the suit of the order sought to be appealed against. An order is a "final order" within the meaning of S. 109 (a) only if it decides, or has the effect of deciding the cardinal issue in the suit, (that is an issue going to the foundation of the suit) and thus disposes of the rights of the parties in the litigation, it being permissible to examine not only the order, but, the circumstances of the case with a view to ascertaining the effect of the order on the suit. It is the nature of the order sought to be appealed against that determines the right to appeal, and an order is a "final order" within the meaning of S. 109 (a) only if it puts an end to the litigation between the parties or disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. [P. 578, C 2; P 579, C 1]

The pleadings of the parties gave rise to the following issues, (1) is the sanction of the Collector defective? (2) Have plaintiffs an interest in the trust? The trial Court, while holding that the consent of the Collector was not open to any valid objection, dismissed the suit *in limine* on the ground that the plaintiffs did not have such an interest in the trust as would entitle them to maintain the suit. On appeal by the plaintiffs a Division Bench of the High Court dissented from this conclusion, and decided that the plaintiffs had established such interest in the trust as was contemplated by S. 92 and remanded the case for trial on the remaining issues.

Held: the order of the High Court did not amount to a "final order." The test is not whether the decision of the trial Court, if restored by the Privy Council, would put an end to the suit altogether. The determination of the matter depends not only upon the nature of the issue itself but also upon its importance as compared with that of the other points arising

in the suit. The test laid down by the Privy Council in 47 C. 918 is by no means a certain one; a matter of procedure can never be treated as a cardinal point in the suit. Nor can an issue, which does not dispose of the rights of the parties belong to that category. There may, however, be other issues in a case which deal with the rights of the parties, but every one of them cannot be held to be a cardinal point. It is impossible to lay down any hard and fast rule which would solve the problem in every case, and it is the duty of the Court to determine in each case whether the order sought to be appealed against comprises a decision on a crucial issue which goes to the root of the case or whether it is a mere interlocutory order. 15 Bom. 155; 17 All. 112; 22 All. 220; and 47 Cal, 918 Foll. *Issacs & Son* v. *Sabstein* (1916) 2 K. B. 139; *Salaman* v. *Warner* (1891) 1 Q. B. 734 and *Bozsom* v. *The Altrincham Urban District Council* (1903) 1 K.B. 547 Foll. [P 580, C 1, 2]

Shamair Chand, and *Sagar Chand* —for Petitioner.

Kanwar Dalip Singh, and *Diwan Ram Lal*—for Respondents.

Broadway, J.—Three days before his death, which occurred on the 21st January 1907, one Balkishan Das B.A. executed a will of which he appointed Baldeo Pershad and Rai Bahadur Sultan Singh, the executors.

Under the terms of this will the creation of certain trusts was contemplated.

The plaintiffs, certain Khatris of Delhi having obtained the sanction required by S. 92 of the Civil Procedure Code, instituted a suit against the said executors, charging them with having failed to carry out the trusts and having misapplied the trust funds, asking for their removal and the preparation of a scheme of management etc., and claiming rendition of accounts.

The defendants contested the suit on various grounds and one of the issues settled was. "Have the plaintiffs an interest in the trust?" The learned District Judge, without going into the merits of the case, decided this issue against the plaintiffs and dismissed the suit. The plaintiffs appealed to the High Court and a Division Bench consisting of Mr. Justice Harrison and myself, held that the plaintiffs had an interest entitling them to sue, accepted the appeal and remanded the suit to the trial Court for disposal on the merits. The defendants then applied to this Court for leave to appeal to His Majesty in Council against this order of remand. Objection was taken to the grant of the necessary certificate on the ground that the order sought to be appealed against was not a 'final order' within the meaning of that expression in S. 109 (a) of the Civil Procedure Code.

For the applicants-defendants it was contended that an order was a 'final order' and therefore appealable, whenever the decision of the trial Court, if upheld by the Judicial Committee, would finally dispose of the main issue in the suit, a contention that appeared to be supported by the decision in 62 I. C. 776 (Cal.) On the other hand it was argued that an appeal was competent only when the order sought to be appealed against finally decided the rights of the parties in the suit a view supported, *inter alia* by 71 I. C. 339 (Oudh). Owing to this apparent conflict of authorities Mr. Justice Harrison and I referred the matter to a Full Bench for decision as to which of those two views should be adopted by this Court, and whether the order in the present case was a 'final order' carrying with it the privilege of an appeal.

These questions have been argued before this Full Bench by Mr. Shamir Chand for the applicants-defendants and Mr. Dalip Singh for the opposite party (plaintiffs).

Mr. Shamir Chand contended that the test to be applied was that enunciated by the Calcutta High Court in 62 I. C. 776 and urged that the order in this case was a 'final order' inasmuch as if their Lordships of the Privy Council were to restore the decision of the trial Court on the issue in question, the suit would come to an end. In addition to 62 I. C. 776 he cited the following authorities as supporting his contention :— 15 Bom. 155 P. C. 17 All. 112 P. C. 21 A. L. J. 686, 29 All. 184, 49 I C. 520 (Oudh), 45 I. C.. 192 (Patna), 1922 Mad. 510 35 Cal. 618, 47 Cal. 918 and 1922 P. C. 237.

On the other hand Mr. Dalip Singh contended that orders of remand dealing with questions relating to the frame of the suit, or jurisdiction, or

locus standi were merely interlocutory directing procedure, and decided no issue that could be regarded as a cardinal one, and that to decide whether an order was appealable the test applicable was the one laid down in 1924 Oudh 81. Applying that test. he urged that the order in the present case was not a 'final order' within the meaning of S. 109 (a) of the Civil Procedure Code.

He criticised the authorities cited by Mr. Shamair Chand, claimed that 47 Cal. 918 supported his own contention and referred to 52 P. R. 1907, 23 All. 152 and 220, 25 All, 629, 31 All. 545. 33 All. 391, 38 All. 150, 42 All. 174 1 A.L.J. 26, 5 A.L.J. 57, 1922 Bom. 383, 40 Cal. 635, 18 C.L.J. 124, 2 C.W.N. cccl. 46 I. C. 681 (Cal.) 38 Mad. 509, 45 I.C. 29((Patna), 67 I. C. 991 (Patna) and 60 I. C. 208 (Oudh).

Of the authorities cited at the Bar the most important are pronouncements of their Lordships of the Privy Council reported in 15 Bom. 155, 17 All. 112, and 47 Cal. 918, and I shall refer to them at some length.

In 15 Bom. 155 the plaintiff in the suit alleged that the defendant was accountable to him upon several claims.

The defendant alleged that he had legal defences to every one of those claims, and that he was not accountable at all. It had been held that the legal defences set up were valid as to some of the claims, and invalid as to others, " and therefore that the defendant must account." The decree did not, in so many words, declare the liability of the defendant but it " directed accounts to be taken which, he was contending, ought not to be taken at all."

It was held that the form of the decree was " exactly as if it affirmed the liability of the defendant to something on each one of these claims, if only the arithmetical result of the account should be worked out against him."

Lord Hobhouse then goes on to say " Now that question of liability was the sole question in dispute at the hearing of the cause and it is the cardinal point of the suit..... The real question in issue was the liability, and that has been determined by this decree against the defendant, in such a way that in this suit it is final.....that is finally determined against him and therefore.....the decree is a final one within the meaning of S. 595 of the Code " (S. 109 (a) of the present Code).

In 17 All. 112 the plaintiff rested her claim on a certain document which she alleged operated as a will and under which certain of the defendants had acquired the properties in suit which they had conveyed to her.

On the evidence led the trial Court found that no valid will had been made and dismissed the suit. On appeal the High Court decided the validity of the will in favour of the plaintiff and, purporting to act under S. 562 of the Civil Procedure Code (O. 41, R. 23 of the present Code) remanded the cause for disposal of the remaining issues. A subsequent application for a certificate to appeal to the Privy Council was refused on the ground that the order was not a final one.

Special leave to appeal was applied for and granted. The reasons for granting leave were given by Lord Hobhouse who said.....

" The next (defence) went to the foundation of the plaintiff's claim, being a denial that Ibn Ali made any valid gift to the grantors of the plaintiff. The Subordinate Judge took the evidence and heard the case. He decided against the plaintiff on the question of Ibn Ali's suit which defeated the suit, and made it unnecessary to give judgment on the other issues. The plaintiff appealed from this decree, and the High Court decided that Ibn Ali had made a valid gift; and they remanded the case under S. 562 of the Civil Procedure Code to be disposed of on the other issues according to law."

He then points out that leave to appeal had been refused by the High Court on the ground that the remand was under S. 562 of the Civil Procedure Code and that it was " the established practice of the Court to treat such orders of remand as not being final orders," and proceeds " Probably the practice referred to is quite correct. But then the remand contemplated by S. 562 is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. That is not the present case .....To establish the will of Ibn Ali was the first step in the plaintiff's case, and on her failing to

do that, her whole suit failed, but that does not make the point a preliminary point decided so as to exclude essential evidence. Nor does it appear that any such evidence was excluded."

He then holds that the remand order fell more properly under S. 565 and, referring to 15 Bom. 155 held that "In this case the will of Ibn Ali is the cardinal point of the suit, and as after the decision of the High Court that can never be disputed again, their order is final, notwithstanding that there may be subordinate inquiries to make."

It will be seen that in each of these cases what was looked at was the order against which an appeal was sought and in each of them it was held that the said order was final because it decided the cardinal point in the suit, what remained to be done being regarded as subordinate.

In 47 Cal. 918 suits for alleged breaches of certain contracts for the sale of cotton had been instituted. Each contract contained an arbitration clause and the defendants applied for a stay of proceedings under S. 19 of the Indian Arbitration Act, 1899, with a view to the issues being referred to arbitration under the clause.

The trial Court granted the application but on appeal the Judicial Commissioners of Sind set aside the orders of stay. Leave to appeal was granted by the Judicial Commissioners on the ground that if the stay applied for had been granted it would have finally terminated the suits. At the hearing of the appeal a preliminary objection was raised as to whether the orders appealed against were final orders within the meaning of S. 109 (a) of the Civil Procedure Code. The objection was allowed by the Board, Viscount Cave saying that "an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the Court in the ordinary way."

Coming now to the other cases cited; In 1924 All. 119 leave to appeal was granted in the following circumstances:—Certain persons had obtained a mortgage decree in their favour and in execution of this decree had exhausted all the property covered by the decree without having satisfied their demand. They applied to the first Court for the preparation of the decree covering the unsatisfied balance under the provisions of O. 34 R. 6 of the Code of Civil Procedure. The judgment-debtors objected that the application for a decree under the aforesaid rule and order was barred by limitation. The execution Court allowed the objection and dismissed the application. On appeal the High Court held that the application was within time and ordered that the application should be readmitted and disposed of in accordance with law. Under the circumstances this order amounted to a direction that a decree under O. 34 R. 6 of the Civil Procedure Code should be prepared, the details being left for the Execution Court to settle.

17 All 112 P. C. was referred to and it was held that the order in question disposed of one substantial objection raised by the judgment debtors to the decree-holders, application and that even if the said order was not a final one leave to appeal should be accorded.

In 62 I. C. 776 the placitum probably goes beyond what was intended to be laid down in the judgment. A suit had been dismissed on the ground that the trial of the question raised in it was barred b the result of a decision, in an earlier suit which had been pending when the present suit was instituted. The opposite view was taken by the High Court and the case was remanded for trial on the merits. 17 All. 112 and 35 Cal. 618 were referred to and leave to appeal was granted on the ground that "the decision of the High Court was in respect of a cardinal issue in the suit, and therefore was a final decree for the purpose of appeal to His Majesty in Council."

I do not think 29 All. 184 P. C. affords any assistance. The main question appears to have been whether one Raja Mukand Singh was the son of Raja Partab Singh. The first Court held that he was not as the

evidence showed that he was the adopted son of Raja Kishan Singh and the suits were dismissed. This finding was reversed on appeal by the High Court who remanded the cases, under S. 562 of the Civil Procedure Code to the Trial Court for a decision on the other issues. It is not clear what these other issues were, but the finding arrived at was obviously one which went to the root of the case. An appeal was preferred to the Privy Council and the report does not show that the finality of the order was questioned.

In 49 I. C. 520 (Oudh) the suit was based on a bond. The defendant pleaded limitation as one of the main defences. The first Court gave effect to this plea and dismissed the suit. On appeal the suit was held to be within time and the suit remanded, under Order 41 rule 23, for trial on the merits. Leave to appeal was granted on the ground that as the plea of limitation was the main and substantial defence the order was a final one and leave to appeal should be granted. In his concurring judgment Daniels, A. J. C. points out that Limitation was "the only defence which goes to the root of the claim."

45 I. C. 192=3 Pat. L. J. 339 is a decision of the Patna High Court, in which while Miller, C. J. held that the order was final and appealable Chapman, J, was of opinion that the order was interlocutory, merely directing procedure.

Sir Dawson Miller considered that it was "not easy and perhaps impossible to reconcile the numerous decisions that have been given with regard to the meaning of the words decree or final order and similar expressions in the different High Courts of this Country" but referred to 5 Bom. 155 and came to the conclusion that the decision of the High Court in execution proceedings amounted to a "decree" as defined in S 2 (2) of the Civil Procedure Code.

1922 Mad. 510 is a decision of the Madras High Court. A suit for dissolution of partnership and taking of accounts was dismissed as being barred by limitation. On appeal the High Court reversed the finding and remanded the case to the trial Court with a direction to frame a preliminary decree and take further proceedings according to law. Leave to appeal to the Privy Council was granted on the ground that the order was final inasmuch as it finally disposed of the rights of the parties. 47 Cal. 918 was followed.

In 35 Cal. 618 it was held that the cardinal point in the suit was whether a notice issued under S. 167 of the Bengal Tenancy Act had been properly served. The trial Court had dismissed the suit holding it had not. The High Court took a different view and held it had been properly served and remanded the case to be tried out on the remaining issues. Leave to appeal was granted.

1922 P. C. 237 does not carry the matter any further. Leave to appeal had been granted by the High Court and a preliminary objection was taken at the hearing that the order under appeal was not final as it directed the taking of accounts without a finding as to the liability to account. The objection was disallowed without any discussion and it would appear that this case would clearly come within the purview of the discussion in 15 Bom. 155.

In 52 P. R. 1907 a suit had been dismissed on the ground that the plaintiff had no *locus standi* to sue. The decision was reversed on appeal by the Chief Court and the case remanded for a decision on the merits. Leave to appeal to His Majesty in Council was refused as it was held that the order sought to be appealed was not a final one as it did not determine the suit.

In 23 All. 152 P. C. the High Court had held that an order by an Execution Court disallowing mesne profits for a period of more than six years was a final order open to appeal and this view was upheld by the Privy Council. Lord Hobhouse says in the course of his judgment "His (the Execution Court's) decision is a final one in its essence and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a

case, which is final against the party denying liability to account and is appealable....." An obvious reference to 15 Bom. 155 which was, however, not specifically cited.

In 23 All. 220 P. C. a decree had been granted *ex parte* and an application under S. 108 Civil Procedure Code 1898 had been summarily dismissed. The High Court set aside the dismissal of the application to set aside the *ex parte* decree and remanded the case, under S. 562 Civil Procedure Code, to be disposed of on the merits. Leave to appeal was granted and it was held by their Lordships of the Privy Council, on an examination of the order and the judgment on which it was based that "the true intendment of the order was that the first Court was to decide the application under S. 108, Civil Procedure Code anew and in accordance with law and that therefore the appeal to the Board was incompetent, the order not being a 'final order."

In 25 All. 629 the suit had been dismissed as barred by time. The High Court had reversed this decision and, holding the suit to be within limitation, had remanded the case under S. 562 Civil Procedure Code for decision on the merits. An application for leave to appeal was refused it being held that an order of remand under S. 562 Civil Procedure Code was not appealable to His Majesty in Council though it may possibly be so if it had the effect of deciding finally the cardinal point in the suit. 17 All. 112 was referred to.

In 31 All. 545. one *Mt.* Sohan Bibi had brought a suit for "a declaration that a transfer of certain property effected by a compromise and a decree be declared to be null and void so far as she herself was concerned, upon the death of one *Mt.* Manki Bahu the widow of one Babu Harish Chandra."

It had been found that *Mt.* Manki Bahu had validly adopted. *Mt.* Sohan Bibi's father *Mt.* Manki Bahu had compromised a suit against her by which compromise certain property had been transferred. A decree had been passed on this compromise. It was this compromise and decree and the transfer effected thereby, that were attacked in this suit which had been dismissed by the trial Court on the ground that *Mt.* Sohan Bibi was not entitled to maintain it and that it was barred by limitation. The appellate Court while affirming the adoption differed as to the right to sue and limitation and remanded the suit.

A certificate was refused on the ground that the question of adoption was not "the cardinal point" in the case and that the order sought to be appealed had determined only a part of the case leaving other matters still to be determined. 17 All. 112 was discussed at length and distinguished. The view taken appears to have been that an order of remand which decides only one of the important issues in a suit cannot be a 'final order.'

In 33 All. 391 the suit had been dismissed by the trial Court as barred by S. 43 of the Civil Procedure Code (now Order 2 Rule 2). The High Court found that the suit was not concluded by S. 43 Civil Procedure Code and remanded the case for a decision on the facts. Leave to appeal was refused after a consideration of 17 All. 112; it being held that the order was an interlocutory one.

In 38 All. 150 the Ganges Sugar works Company applied under paragraph 17 of the second Schedule to the Civil Procedure Code to file an alleged contract to submit to arbitration. The trial Court dismissed the application on the sole ground that the agreement was invalid, not being under the seal of the Company. The High Court reversed this decision and remanded the case under Order 41 Rule 23 of the Civil Procedure Code for trial on the other issues. An application for leave to appeal to His Majesty in Council against the order of remand was made and was refused by a Full Bench of the High Court. It was recognised that the meaning of the expression 'final order' was not clear and that the cases in the various High Courts where the question as to what was a 'final order' and

had been discussed and decided were conflicting. The application was dealt with on its own circumstances and it was held that although the decision of the High Court was upon a very important issue in the suit, it did not finally decide the dispute between the parties as there were still other defences set up which remained to be decided and the order of remand was therefore, not a 'final order.'

In 42 All. 174 the issue decided by the order of remand in favour of the plaintiffs was that the suit was not barred by the rule of *res judicata*. Leave to appeal to the Privy Council was refused and it was held that appeals to His Majesty in Council in matters interlocutory in their nature should only be allowed to be preferred when the decision puts an end to the litigation and finally decides the rights of the parties.

In 1 All. L. J. 26 a suit for a declaration that certain property was endowed for the purposes of a mosque and for other charitable purposes was dismissed on the ground that it came within the purview of S. 239 of the Civil Procedure Code 1882 (now S. 92) and the consent necessary thereunder had not been obtained. On appeal the High Court held that S. 239 Civil Procedure Code, 1882 did not apply and no consent was necessary. The suit was remanded for disposal on the merits. An application for leave to appeal to His Majesty in Council was refused, it being held that no cardinal issue *i. e.* no issue going to the foundation of the suit, had been determined by the order in question which was therefore not a 'final order' giving a right to appeal.

In 5 A. L. J. 57 two of the pleas raised were that the suit was barred by limitation and also by the rule of *res judicata*. The trial Court overruled the plea as to limitation but gave effect to the plea of *res judicata* and dismissed the suit. On appeal the High Court affirmed the decision as to limitation but held that the plea of *res judicata* was bad and remanded the case under S. 562 of the Civil Procedure Code. An application for leave to appeal to His Majesty in Council was refused on the ground that the order of remand did not have the effect of determining a cardinal point in the suit. Reference was made to 2 C. W. N. ccci where a plea of limitation was decided in favour of the defendants but reversed on appeal. Leave to appeal to the Privy Council had been refused and special leave to appeal was applied for. Their Lordships of the Privy Council refused the application holding the order was not a 'final order.'

In 1922 Bom. 383 a decree had been passed on a compromise. On appeal the High Court sent down certain issues for findings, and after the findings were returned set aside the decree and remanded the suit to be proceeded with in the ordinary course as if there had been no compromise. Leave to appeal to the Privy Council was refused on the ground that the order of remand was not 'final' as it did not put an end to the litigation between the parties or dispose so substantially of the matter in issue between them as to leave merely subordinate or ancillary matters for decision.

In 40 Cal. 635 the question now under discussion was not before the Judicial Committee and the case affords no assistance.

In 18 C. L. J 124 an order deciding that the suit as framed was not barred by the Chota Nagpur Tenancy Act and remanding the suit for trial on the merits was held by the High Court not to be a final order.

In 46 I. C. 681 (Calcutta) the plaintiff had sued the defendants in their individual capacity for possession of certain property and for a declaration of his rights. The trial Court dismissed the suit apparently on the ground that the defendants could not be sued in their individual capacity. The High Court set aside the order of of dismissal and remanded the suit for a retrial directing that the defendants "should be sued personally as well as executors" and one of them "as the residuary legatee and heir of Jogendra Nath". The substance of the order was looked at and it was held that the order was neither a decree nor a 'final order' within the

meaning of S. 109 (a) of the Civil Procedure Code.

In 38 Mad 509 orders of the High Court deciding in one case that the pleadings held insufficient by the trial Court were sufficient, and in the other that the application of S. 43 of the former Code in bar of the suit was wrong and remanding the cases for trial on the merits, were held to be merely interlocutory and therefore not appealable.

In 45 I. C. 290 (Patna) it was held that the order of the High Court setting aside a decision of the trial Court that the trial of the suit was barred by the rule of *res judicata* and remanding the case for a trial on the merits was not a final order inasmuch as it only decided one of the questions in dispute between the parties and did not conclude the case.

In 67 I. C. 991 (Patna) the order sought to be appealed to the Privy Council had been passed on a petition of revision, the decision of the execution Court being affirmed Leave to appeal was refused, the principle followed being that the order was not final as it did not finally determine the rights of the parties in controversy in the suit.

In 1924 Oudh 81 during the pendency of a suit for pre-emption the plaintiff gifted the property on the ownership of which he based his claim to pre-empt the property sold, to his son The gift included a right to continue the pending suit for pre-emption. The son applied to be added or substituted as a plaintiff but the trial Court held that the right of pre-emption was not transferable and the donee could not continue the suit He also held that the donor had lost his right of pre-emption by transferring the property, the ownership of which had given him that right and dismissed the suit. On appeal these findings were set aside and the case remanded to the Court below for trial on the merits. An application was made for leave to appeal to his Majesty in Council against this order of remand but was refused on the ground that the order in question did not finally decide the rights of the parties in the litigation which did not depend mainly on the determination of the right of the donee to sue but depended largely on determination of the other issues raised in the defence.

In 60 I. C. 208 (Oudh) applying the definition given in 47 Cal. 918 P. C. that "an order is final if it finally "disposes of the rights of the parties", it was held that an order deciding that an incorporated body is a judicial person legally competent to discharge the functions of an executor and, as such, to apply for probate, but without deciding whether it is entitled to the grant of probate was not a final order within the meaning of S. 109 (a) Civil Procedure Code.

After a careful consideration of these authorities I have arrived at the conclusion that the pronouncements of their lordships of the judicial Committee in 15 Bom. 155; 17 All. 112; 22 All. 220; and 47 Cal. 918 make it abundantly clear that Mr. Shamair Chand's contention is untenable, and that the determining factor is not the effect on the suit, a decision in favour of the applicant would have, if the proposed appeal to the Privy Council were successful, but the immediate effect on the suit of the order sought to be appealed against. I also consider that it has been laid down by these pronouncements that an order is a "final order" within the meaning of S. 109 (a) of the Civil Procedure Code only if it decides, or has the effect of deciding the cardinal issue in the suit, (that is an issue going to the foundation of the suit and thus disposes of the rights of the parties in the litigation, it being permissible to examine not only the order but, the circumstances of the case with a view to ascertaining the effect of the order on the suit.

I take this to be the view of the majority, if not of all, of the authorities examined above, and I think the probability is that it would be possible to reconcile the different view taken by the small minority if all the facts of those cases were known.

This view is also in consonance with the English authorities on the point.

In *Isaacs and Son* v. *Substein* (1) it was laid down that the nature of the order in each case would determine whether it was final or interlocutory, and that if the order finally disposed of the rights of the parties it should be treated as a final order, but if it did not, it was an interlocutory order from which an appeal was not entertainable. See also *Salaman* v. *Warner* (2) *Bozsom* v. *The Altrinchan Urban District Council* (3) referred to by Viscount Cave in 47 Cal. 918.

In *Standard Discount Co.* v. *La-Grange* (4), Brett L, J says.

> No order, judgment or other proceeding can be final which does not at once affect the status of the parties for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff".

My answer to the first part of the reference, therefore, is that, it is the nature of the order sought to be appealed against that determines the right to appeal, and that an order is a "final order" within the meaning of S 109 (a) of the Civil Procedure Code only if it puts an end to the litigation between the parties or disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. Having regard to the above it follows that my answer to second part of the reference is in the negative as the order sought to be appealed against does not decide the rights of the parties in the litigation.

I would therefore refuse the application with costs.

Shadi Lal, C. J.—This application for leave to appeal to His Majesty in Council arises out of an action brought by certain *Khatris* of the town of Delhi for the administration of a trust alleged to have been created for public purposes of a charitable nature. The plaintiffs claimed to have an interest in the trust, and after reciting that they had obtained the consent in writing of the Collector for instituting the suit, they asked the Court to grant them the various reliefs specified in Sub-S. (1) of S. 92 of the Civil Procedure Code. The suit was resisted on several grounds which need not be set out here *in extenso*. It is sufficient to say that the pleadings of the parties gave rise to seven issues, of which only the following two are material for the purposes of this application:—

(1) Is the sanction of the Collector defective?

(2) Have plaintiffs an interest in the trust?

Now, the trial Court, while holding that the consent of the Collector was not open to any valid objection, dismissed the suit *in-limine* on the ground that the plaintiffs did not have such an interest in the trust as would entitle them to maintain the suit. On appeal by the plaintiffs a Division Bench of the High Court dissented from this conclusion, and decided that the plaintiffs had established such interest in the trust as was contemplated by S. 92. The learned Judges accordingly set aside the decree dismissing the suit, and remanded the case for trial on the remaining issues. The defendants have made the present application for leave to appeal to the Privy Council, and the question debated before us is whether the order of the High Court amounts to a 'final order' as contemplated by S. 109 of the Civil Procedure Code. The learned Counsel on both sides have invited our attention to a large number of decided cases in support of their respective contentions, but they admit that there is a conflict of judicial authorities in India as to the test to be applied in deciding whether a particular adjudication is or is not a final order for the purposes of appeal to His Majesty in Council.

The controversy is practically confined to the determination of the question whether an order made by a High Court reversing the decree of

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(1) [1916] 2 K. B. 139—85 L.J.K.B. 1433—114 L. T. 924—60 S.J. 444—32 T. L. R. 370.

(2) [1891] 1 Q. B. 734—60 L. J. Q. B. 624—39 W. R. 547.

(3) [1903] 1 K. B. 547—72 L. J. K. B. 271—51 W. R. 337—67 J. P. 397—19 T.L.R. 266

(4) [1877] 3 C.P.D. 67 (71)—47 L. J., C. P. 3—37 L. T. 372—26 W. R. 25.

the trial Court dismissing the suit on a preliminary point and remanding the case for decision on the remaining issues should or should not be treated as a final order within the meaning of S. 109. Now, there are two views on the subject. According to one view, which appears to have been adopted by the Calcutta High Court, the test is whether the decision of the trial Court, if restored by the Privy Council, would put an end to the suit altogether. If this view is to prevail, almost every order of remand reversing the dismissal of a suit on a preliminary point would be appealable to the Privy Council. The other view is that no order can be treated as final unless it finally determines the rights of the parties.

I consider it unnecessary to refer to all the judgments cited at the Bar, because the principle to be deduced from the judgments of the Privy Council *in Rahimbhoy Habibbhoy* v. *C. A. Turner* (5) *Saiyid Muzhar Hossein* v. *Mt. Bodha Bibi* (6) and, *Ram Chand Manjimal* v. *Govardhan Das Vishandas Ratan Chand* (7) is to the effect that an order comprising the decision of the High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one that can never, while that decision stands, be disputed again, is a final order for the purposes of appeal to His Majesty in Council notwithstanding that there may be subordinate inquiries yet to be made in disposing of the suit. It will be observed that the question in each case is whether an issue, upon which the High Court has pronounced its opinion is or is not a cardinal point in the case, and it is not always easy to answer this question. It seems to me that the determination of the matter depends not only upon the nature of the issue itself but also upon its importance as compared with that of the other points arising in the suit. The test laid down by the Privy Council is by no means a certain one, and it is on account of this uncertainty that the High Courts in India have expressed divergent opinions as to whether an order of remand determining a question such as that of the limitation of a suit constitutes a final order as contemplated by the section.

There can be little doubt that a matter of procedure can never be treated as a cardinal point in the suit. Nor can an issue. which does not dispose of the rights of the parties belong to that category. There may, however, be other issues in a case which deal with the rights of the parties, but I do not think that every one of them can be held to be a cardinal point. It is impossible to lay down any hard and fast rule which would solve the problem in every case, and it is the duty of the Court to determine in each case whether the order sought to be appealed against comprises a decision on a crucial issue which goes to the root of the case or whether it is a mere interlocutory order.

Now, the only matter decided by the High Court in the case is that the plaintiffs have established their *locus standi* to bring the action. No decision on the rights of the parties has yet been given, and I consider that an issue of that character deciding purely a preliminary point and not dealing with the merits of the dispute, cannot be regarded as the principal matter in controversy between the parties within the meaning of the rule laid down by the Privy Council.

My answer to the question submitted to the Full Bench is that the order of remand in this case is not a final order, and that the test of finality is whether the order as made finally disposes of the rights of the parties.

Harrison, J.—I agree and have nothing to add.

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(5) [1891] 15 Bom. 155—18 I. A. 6 (P. C.)

(6) [1895] 17 All. 112—22 I. A. 1 (P. C.)

(7) [1920] 47 Cal. 918—24 C.W. N. 721—18 A.L.J. 591—22 Bom.L.R R. 606—39 M.L.J. 27— 56 I. C. 302—12 L. W. 15—(1920) M. W. N. 407—28 M.L.T. 87 (P. C.)

✱ 924 LAHORE 581

SCOTT-SMITH AND FFORDE, JJ.

Ranga and others—Appellants.

v.

The Crown—Respondent.

Cr. Appeal No. 1268 of 1923, Decided on 17th March 1924, from the order of Sessions Judge, Rawalpindi, D/- 9th November 1923.

✱ *Evidence Act, S. 32—Questions with answers by signs owing to throat being cut are admissible under clause (5).*

Where the man's throat had been cut and he could not speak but he wss said to have replied to the questions put to him by means of signs.

Held: that the questions put to the deceased and the signs made by him taken together might properly be regarded as "verbal statements" made by a person as to the cause of his death within the meaning of S. 32. 7 All. 385 (F. B.); 1922 Cal. 409 Foll. [P. 581, C. 3]

Muhammad Iqbal—for Appellants.

Public Prosecutor—for Respondent.

Scott-Smith, J.—This is an appeal by Ranga and four others from the order of the Sessions Judge of Rawalpindi convicting them of the murder of one Mahabat of village Hasal. Two of the appellants, Manga and Dadu, have been sentenced to death and the other three, Ranga, Hasham and Sawar, to transportation for life. The appeal is a joint one filed by counsel, and the cases of those sentenced to death are also before us for confirmation of the sentences under S. 374, Criminal Procedure Code.

The murder was committed at about midnight on the night between the 26th-27th of August 1923. The moon was full on the 26th August and was shining brightly at the time of the occurrence. The facts have been given very fully and clearly in the judgment of the learned Sessions Judge and need not be repeated at length. Fazal Kadir, head constable of Jatli Police Station (P. W. 7). heard a noise coming from the direction of Jatli village at about 1 A. M. on the 27th August. He took two constables with him and went to Jatli and found that many people had collected who told him that they heard a cry of *maryaya* coming from the south-east of the village. He went with the villagers in that direction and found Mahabat lying on the ground very severely injured. The man's throat had been cut and he could not speak, but he is said to have replied to the questions put to him by means of signs. He was taken to the hospital at Daultala, which is near the place where he was found, where he was treated by Dr. Shiv Ram, Sub-Assistant Surgeon, whose statement is on pages 8-10 of the printed record. He also questioned the wounded man and received answers by signs. The same process was repeated by *Bhai* Narain Singh, Honorary Magistrate (P. W. 13) at about 9 A. M. on the 27th August. He recorded the statement, Exh. P. B. at page 15 of the record, which has been put in evidence as a dying declaration under S. 32 of the Indian Evidence Act. In the same way the statements of the wounded man made to the Sub-Assistant Surgeon and to the head constable have been put in under the same section.

Dr. Sir Muhammad Iqbal, appellants' counsel, while admitting that the authorities are in support of the proposition that these statements are admissible, has asked us to hold that they are inadmissible. We have referred to the following authorities:—*Buta* v. *Empress* (1), wherein it was held that a dying declaration made by signs, given in response to questions put is admissible in evidence. *Queen-Empress* v. *Abdullah* (2), wherein it was held by a Full Bench of five Judges (Mahmood, J. dissenting, that the questions put to the deceased and the signs made by her taken together might properly be regarded as "verbal statement" made by a person as to the cause of her death within the meaning of S. 32 of the Indian Evidence Act, and were therefore admissible in evidence under that section.

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(1) [1886] 2 P. R. 1886 Cr.
(2) [1885] 7 All. 385—(1885) A.W. N. 78 (F. B.)

Emperor v. *Sadhu Charan* Das (3), wherein a Division Bench of the Calcutta High Court, following *Queen-Empress* v. *Abdullah* (2), held that a reply made by a person unable to speak, in answer to a question put to him, taken together with the question, amounts to a "verbal" statement within the meaning of S. 32 of the Evidence Act. [His Lordship after holding that the statements are admissible dealt with the evidence and in conclusion dismissed the appeal.]

Appeal dismissed.

(3) 1922 Cal 409—49 Cal 600—26 C. W. N. 414.

✱ 1924 LAHORE 582

BROADWAY AND CAMPBELL, JJ.

Fitzholmes, etc.—Judgment-Debtors—Appellants.

v.

Bank of Upper India, Ltd.—Decree-Holders—Respondents.

F. A. No. 37 of 1924, Decided on 29th January 1924, from the decree of the District Judge, Ambala, D/- 20th October 1923.

✱ *Civil P. C., Order 34, rule 5 — Preliminary decree confirmed on appeal can be made final within 3 years of the appellate decree—Limitation Act article 181.*

Preliminary decree passed by the trial Court merges in the decree of the Court of appeal and the latter is the only decree which can be made final. Application for final decree is accordingly within time under article 181 if made within 3 years of the appellate decree.

[P. 583, C. 1]

Barkat Ali—for Appellants.

Mir Muhammad Khan and *Obedulla*—for Respondents.

Broadway, J.—The point for determination in these two cases is whether certain applications made by the plaintiff-decree-holder under Order 34, rule 5 of the Civil Procedure Code for a final decree for sale are or not barred by limitation. The preliminary decrees for sale were passed by the trial Court on the 21st of August 1919, the decrees fixing a period of six months within which the mortgage monies were to be paid. The defendant-judgment debtors preferred appeals to this Court which were finally disposed of on the 7th of March 1923, the decrees passed by the trial Court being affirmed. On the 13th of March 1923 the plaintiff filed applications for making the decrees final. The judgment debtors then raised an objection that the applications were premature inasmuch as they had been made within six months from the date of the decree of this Court. This objection was given effect to.

Subsequently on the 11th of October 1923 the plaintiff-decree holder once more moved the trial Court under Order 34, rule 5 of the Civil Procedure Code and final decrees were passed on the 20th of October 1923.

The judgment debtors have now come up to this Court, in appeal, through Mr. Barkat Ali, and it has been contended that the only decrees which could be made final were the decrees passed by the trial Court and that, as applications to make decrees final were governed by Article 181 of the Indian Limitation Act, the said applications were barred having been made more than 3½ years after the preliminary decrees passed by the trial Court. Mr. Barkat Ali further contended that the pendency of an appeal to this Court did not prevent the plaintiff-decree-holder from making applications to make the decrees final and that, limitation having once commenced to run would continue to do so by operation of S. 9 of the Limitation Act. He cited a number of authorities from an unauthorised publication known as the Indian Cases as well as one or two authorities published in the authorised reports. Beyond citing them, however, Mr. Barkat Ali did not think it necessary or worth while to read any of these authorities or parts thereof to us. The facts of those which he did take the trouble to explain had no bearing on the point for determination. The question now before this Court was considered by a Full Bench of the High Court in Allahabad in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (1) where it was held that the

(1) [1917] 39 All. 641—42 I.C. 93—15 A.L.J. 734 (F.B.)

only decree which could be made final was the decree of the appellate Court. No authority has been cited taking a contrary view, and that view is, to some extent, supported by the remarks of their Lordships of the Privy Council in *Abdul Majid* v. *Jawahir Lal* (2). In my opinion the preliminary decrees passed by the trial Court in these two cases merged in the decrees of this Court on appeal and the only decrees which could be made final were the decrees of this Court. The applications were admittedly within time so far as the decrees of this Court were concerned, and I would therefore, dismiss both appeals with costs.

Appeals rejected.

(2) [1914] 36 All. 350—1 L.W. 483—12 A.L.J. 624—16 Bom. L.R. 395—18 C.W.N. 963—19 C.L.J. 626—27 M.L.J. 17—23 I.C. 649—(1914) M.W.N. 485—16 M.L.T. 44 (P.C.)

1924 LAHORE 583

CAMPBELL, J.

Ganga Ram—Plaintiff—Petitioner.

v.

Natha Ram and another—Defendants—Respondents.

Civil Rev. Petition No. 11 of 1923, Decided on 4th May 1923, from the order of the Subordinate Judge, Second Class, Lahore, D/- 10th November 1922.

(a) *C. P. Code, O. 40, R. 1 — Court has jurisdiction over receiver even when suit is no longer pending.*

A Court which appoints a Receiver has authority to pass the orders necessary for winding up his charge even though the suit is no longer pending. (P. 584, C. 1)

(b) *C. P. Code, S. 144 — Powers under the section are not confined to that section alone—C. P. Code, S. 151.*

The power of a Court to grant restitution is not confined to cases covered by the provisions of S. 144 but under that section, read with S. 151, may be extended to other cases. (P. 584, C. 1)

Lala Daulat Ram—for Petitioner.

Harcharan Das Kumar — for Respondents.

Judgment.—The facts of the case are these :—

Ganga Ram, one of the partners in a Cotton Factory, sued for dissolution and rendition of accounts against the other partners. In November 1919 a preliminary decree was passed and a Receiver was appointed, Lala Darshni Dial, Pleader, Chunian. He, by permission of the Court, leased the Factory by auction and the successful bidder was Ganga Ram himself for Rs. 4,325, for one year. The conditions of sale were that one-fourth of the rent should be paid at the end of the sale and the remaining three-fourths at the time of transfer of possession which was to be not later than the 4th September 1921.

On the 8th December 1921 the Court sanctioned the lease to Ganga Ram and directed the Receiver to deposit in Court the whole of the lease money. This the Receiver did not do.

On the 25th May 1922 the whole suit was dismissed on a finding that it had abated.

On the 7th August 1922 Natha Ram and Dial Chand, two of the defendants, applied for an order to the Receiver to deposit the lease money in Court. Notice was issued to the Receiver and to Ganga Ram who appeared on the 10th November 1922 when the Court passed the order of which revision is sought.

This order shows that Ganga Ram alleged (1) that he had restored possession of the Factory to the partners who represent 14/16ths share, (2) that he had paid 1/4th of the rent to the Receiver at the time of the sale, *viz.*, Rs. 1,081-4-0, (3) that he had paid Rs. 1,231-2-9 to the partners owning 12-16ths of the Factory and (4) that he had spent the remaining Rs. 2,012-9-3 on repairs to the machinery. The Court ordered him to deliver possession to the applicants as well as to the other partners and to deposit in Court the 3/4ths of the rent which he has not paid to the Receiver. It was remarked that he could claim for anything spent on repairs by a separate suit.

It is contended now by Ganga Ram that this order was passed without jurisdiction and that it was illegal in

so far as it directed refund of the amount spent on repairs and of Rs. 1,231-2-9 paid to the partners of 12/16ths share.

As regards the latter point it would seem that there was no necessity for directing Rs. 1,231-2-9 to be paid again, since, even if a substantial fraction of the rent is to be deducted for the Receiver's charges, the share of the partners owning three-fourths is not likely to be less than Rs. 1,231-2-9. The Court might well reconsider this matter. According to the terms on which the lease was sold the lessee was not entitled to deduct anything out of the rent towards repairs. He was to take over the machinery as it was and was to hand it back in the same state.

The learned Counsel for the respondents informs me that his clients have obtained joint possession of the Factory with the other partners and so this part of the order is now of no practical importance.

On the question whether the lower Court had jurisdiction in the circumstances to pass an order directing Ganga Ram to pay the three-fourths of the rent which according to his agreement he should have paid when he took possession, I have heard a good deal of argument much of which is not relevant to the point. On behalf of Ganga Ram it is contended that when the suit was dismissed the Court became *functus officio* and could not pass any subsequent order about the subject-matter of the suit. It has, however, been laid down, *e. g.*, in the Privy Council ruling *Administrator General of Bengal* v. *Prem Lall Mullick* (1), cited by the lower Court, that a Court which appointed a Receiver has authority to pass the orders necessary for winding up his charge even though the suit is no longer pending, and it has also been ruled, although in situations which are not precisely similar, that the power of a Court to grant restitution is not confined to cases covered by the provisions of S. 144, but, under that section, read with S. 151, may be extended to other cases. Here the order dismissing the suit reversed the preliminary decree and also rendered it necessary that the position previous to the appointment of the Receiver should be restored. Ganga Ram undoubtedly had the exclusive use of the Factory for at least a year and, as matters turned out, was not entitled to the exclusive enjoyment of the proceeds. In default of authority that the order passed by the Court below was beyond the scope of S. 151, I am not prepared to interfere.

The petition fails and is dismissed with costs.

Petition dismissed.

(1) [1895] 22 Cal. 1011—22 I.A. 203—5 M.L.J. 157—6 Sar. 660 (P.C.)

1924 LAHORE 584

LE ROSSIGNOL AND HARRISON, JJ.

Mt. Bhoti—Defendant—Appellant.

v.

Rijhu and others—Plaintiffs—Respondents.

S. A. No. 2512 of 1920, Decided on 18th January 1924, from the decree of the District Judge, Hoshiarpur and Kangra Districts, D/- 16th June 1920.

Custom (Punjab)—Succession—Widows succeed jointly — Unchastity therefore does not affect succession on death of one.

Widows of a childless male proprietor succeed as joint tenants and on the death of one the other merely absorbs her share by virtue of her survivorship. There is no succession in such cases and the question of the unchastity of the surviving widow does not arise.

[P. 585, C. 1]

Mehr Chand Mahajan — for Appellant.

Respondents were not represented.

Harrison, J.—The plaintiffs are the collaterals of one Bisakhi, who disappeared many years ago leaving two widows, Mt. Bhoti and Mt. Radho. Both succeeded jointly to his land, and Mt. Radho died in March 1918. The whole of the land was then entered in the name of Mt. Bhoti. The present suit is based on the allegation that Mt. Bhoti has remarried, the plaintiffs claiming the whole of the land of Bisakhi.

It has been held both by the trial Court and the learned District Judge that it has not been established that Mt. Bhoti has remarried, but that it

is proved that she has been leading an immoral life. On the analogy, therefore, of Civil Appeal No. 728 of 1905 decided by the District Judge of Kangra, the learned District Judge has given the plaintiffs a decree for half of the land held by Bisakhi, *i.e.*, the portiön which fell to the share of Mt. Radho, on the ground that a Ghirth widow cannot succeed by custom if it be proved that she had become unchaste before succession opened out.

On second appeal it is urged that there is no question of succession in this case as there was a joint tenancy held by both widows. This is, in our opinion, the correct view. Mt. Bhoti was in possession of the whole as one of the joint tenants even during the life-time of Mt. Radho, and, on the latter's death in virtue of her survivorship she merely absorbed the remaining share, and, inasmuch as there was no succession the question of her unchastity did not arise.

We, therefore, accept the apeal and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

✱ 1924 LAHORE 585

MOTI SAGAR, J.

Allah Ditta and others—Convicts—Petitioners.

v

King Emperor—Opposite Party.

Cr. Rev. Petition No. 62 of 1923 Decided on 3rd April 1923 from an order of the Sessions Judge Gujranwala, D/- 26th October 1922.

✱ (*a*) *Penal Code, S. 75—Separable offences.*

Attempting to stop people from proceeding by a train and throwing stones at them after the train has started are distinct offences. [P. 587 C. 2]

✱ (*b*) *Criminal P. C., S. 439—Going into facts and revising convictions without application is not illegal.*

There is no provision of law which debars a Court of revision from going into the evidence if it is of opinion that it is necessary to do so in the interests of justice. The High Court in revision has power to scrutinise the evidence to find out whether the convictions of the accused who did not appeal are justified. [P. 586 C. 1; P. 587 C. 1]

Gokal Chand Narang — for Petitioners.

Zafar Ullah Khan for the Government Advocate—for Opposite Party.

Judgment.—The facts of the case out of which this application for revision has arisen are given in ample detail in the judgment of the Courts below and need not, therefore, be repeated here at length. Briefly stated they are as follows:—

In February 1922 a big *mela* was organized at Lahore in honour of the visit of his Royal Highness the Prince of Wales. In order to make the function a success a large number of villagers from the *mufassil* were invited to join and take part in the festivities. Special facilities were provided for their travelling in the way of reserved compartments and reserved carriages in the railway trains. For the convenience of the passengers coming from the western districts of the Punjab it was arranged that a special train should also run from Laiamusa to Badami Bagh in which all those, who were desirous of joining the *mela*, should be able to travel free of charge. This train was so timed as to pass Gujranwala at about 4 in the evening. Before the arrival of the train a large number of persons belonging to the Khilafat Committee, the Congress Committee and the Sikh League, who were opposed to the visit of his Royal Highness, assembled at the railway platform with the avowed object of asking people not to go to Lahore and boycott the *mela*. When the train arrived the crowd numbered between 400 and 500 persons. They, at first, persuaded the people to refrain from going but when they found that their attempts in this direction were proving fruitless their persuasions took a more violent form. They abused the passengers, took out their luggage, and, in some cases, dragged them out of the train. Those who wanted to get into the train at Gujranwala were forced to go back and insulted in every possible manner. When the train left and was in motion, stones were also thrown with the result that several glass-pans were broken and some of the passengers, who were inside the compartments, were seriously hurt. There were some police constables in plain clothes on special duty at the railway platform on this occasion. After the departure of the

train they went back to the Police station and made a report to the Sub-Inspector, Ghulam Rasul, as to the incidents that had taken place on the railway station. The Sub-Inspector incorporated their report in his confidential diary and submitted it to his superior officer, the Superintendent of Police, for inspection. The latter officer ordered an inquiry into the matter and this led to the arrest of 21 persons and to their being placed before the District Magistrate to take their trial under S. 147/149 of the Indian Penal Code and S. 127 of the Indian Railways Act. After a protracted trial, lasting for about two months, all the 21 accused were convicted by the learned District Magistrate and sentenced to various terms of imprisonment as set forth in his judgment, dated the 20th of May 1922. Of the 21 persons so convicted 17 were non-co-operators and did not prefer an appeal to the Sessions Judge. The other four, namely, Allah Ditta, Aya Singh, Gopal Singh and Mula Mal did prefer an appeal which was, however, dismissed.

They have now filed an application for revision to this Court. The case has been argued at considerable length by Dr. Gokal Chand Narang, for the petitioners, and it has been contended that the prosecution has been guilty of a large number of irregularities which have prejudiced the case of the accused to a considerable extent. It is pointed out that the First Information Report has not been placed on the record, that no opportunity was given to the accused to cross-examine the prosecution witnesses in respect of certain new matter introduced in the re-examination of those witnesses, that certain documents which the accused wanted to produce in evidence were not allowed to be produced, that a free use was made of the *zimnis* without an opportunity being given to the accused to inspect them, and that advantage was taken by the prosecution of the fact that a large number of the accused were non-co-operators. I do not think there is any force in these contentions and they must be overruled. It is clear from the evidence that the First Information Report was prepared from the confidential diaries, which had been submitted to the Superintendent of Police for inspection on the 25th of February 1922. The report so prepared has been placed upon the record, and it is only the confidential diaries which have been withheld on the ground that they were privileged documents. In my opinion the learned Sessions Judge was right in holding that they could not be produced and, in any case, I do not think that the accused have, in any way, been prejudiced by their non-production. As to the objection that the accused were not allowed to cross-examine witnesses, it is clear that the objection is frivolous, and that every latitude was given to the accused to cross-examine witnesses at any length they liked. The objection that documents were not allowed to be produced is certainly not well founded. There is no application on the record showing that the accused wanted to summon any documents which was disallowed by the District Magistrate. As to the *zimnis* it is obvious from the judgment of the learned District Magistrate that they were referred to only in the interests of the accused and not to their prejudice. In my opinion the objections raised are palpably frivolous and they must be overruled.

The main question in the case is whether the evidence upon which the convictions are founded is or is not worthy of credit. It is contended by Mr. Zafar Ullah Khan for the Crown that the evidence has been believed by two Courts and that it is not the practice of this Court to go behind a finding of fact in revision. There is no doubt that ordinarily this is so, but I do not think there is any provision of law which debars a Court of revision from going into the evidence if it is of opinion that it is necessary to do so in the interests of justice. In the present case it is all the more desirable that I should examine the evidence inasmuch as a large number of the accused are non-co-operators who did not even prefer an appeal to the lower appellate Court. It is urged by Dr. Gokal Chand that now that the whole case

is before me I should scrutinise the evidence with a view to find out if the convictions of the other accused, who did not file an appeal, were justified. Mr. Zafar Ullah Khan, for the Crown, does not dispute the powers of a Court of revision to do so and concedes that I can go into the evidence and see if all the accused have been rightly convicted.

I have carefully read the evidence against each of the accused, and the conclusion at which I have arrived is that so far as the present petitioners are concerned, there is abundant evidence upon the record to justify their convictions. A large number of witnesses have come forward to state that all the four accused were seen on the railway station taking part with the crowd in the excesses committed upon the passengers and also throwing stones at the railway train when it was in motion. I do not see any reason to disbelieve these witnesses and must, therefore, uphold the convictions.

Of the other 17 accused, Ladha Singh has been convicted of rioting under S. 147 of the Indian Penal Code. In my opinion this conviction is wholly unjustified, and the gentleman is entitled to an honourable acquittal. He denies his presence at the railway platform at the time when the disturbance in question took place, and there is evidence on the record to show that he is telling the truth. A large number of prosecution witnesses have stated that they did not see him on the platform and it appears to me that the witnesses, who have deposed to his presence, are either telling lies, or that they mistook some other person for him. Some of the witnesses have even gone so far as to say that he participated in throwing stones at the passengers. I do not think that a gentleman of Ladha Singh's position and antecedents would be guilty of such an offence. I hold that Ladha Singh was not on the railway station on the 23rd of February 1922, and that he did not take part in the excesses committed on that occasion. I, therefore, acquit him.

The next case which requires consideration is that of the accused, Banka Dayal. He has been convicted under two sections, namely 147, Indian Penal Code, and 127, Indian Railways Act. He admits his presence at the railway station, but denies that he threw stones at the passengers, or that he took part in any of the acts of rowdyism perpetrated by the crowd on the railway station. As to his presence on the station and his persuading people not to go to Lahore there is sufficient reliable evidence, the veracity of which I have no reason to doubt. The evidence as to his having thrown stones at the moving train is, however, conflicting, and I do not think that upon the evidence produced he should have been convicted of an offence under S. 127 of the Indian Railways Act. Even the prosecution evidence shows that he was asking people to desist from doing so, and it is impossible to believe that a man who was persuading others not to do an act by which the safety of the passengers would be endangered would be guilty of participating in that very offence himself. I consequently set aside his conviction under S. 127 of the Indian Railways Act and acquit him of that charge.

With regard to the other 15 accused I entirely concur with the finding of the learned Sessions Judge that their guilt is fully established, and that there is no occasion to interfere with their convictions.

It has been contended by Dr. Gokal Chand that the accused should not have been convicted of two offences under S. 147 of the Indian Penal Code, and S. 127 of the Indian Railways Act inasmuch as the stone throwing was part and parcel of one and the same transaction, and that no separate offence was committed by those who have also been convicted under S 127 of the Indian Railways Act. I do not think there is any force in this argument. The throwing of stones at the railway train was a distinct offence by itself which had no connection with the offence of rioting committed under S. 147 of the Indian Penal Code. It has been found that the object of the crowd assembled at the railway station was to prevent people from going to

Lahore by force or violence. This offence was complete as soon as the train had left, and it cannot be said that the stones were thrown in furtherance of the common object for which they had collected at the railway station. In my opinion these accused have been rightly convicted of the two offences, and I uphold the convictions.

As to sentence, however, I am inclined to think that two years' rigorous imprisonment under S. 127 of the Indian Railways Act is rather excessive. Taking all the circumstances of the case into consideration, I am of opinion that a sentence of one year's rigorous imprisonment under that section would be quite sufficient to meet the ends of justice.

I accordingly accept the petition, set aside the conviction of Ladha Singh and direct that he be released forthwith. Banka Dayal's conviction under S. 127 of the Indian Railways Act is set aside, but his conviction under S. 147, Indian Penal Code, and the convictions of the other 19 accused are, however, maintained. The sentences of those who have also been convicted under S. 127 of the Indian Railways Act are reduced to one year's rigorous imprisonment each. The sentences under the two Ss. 147, Indian Penal Code, and 127 of the Indian Railways Act shall, however, run concurrently as ordered by the learned District Magistrate.

Order accordingly.

✱ 1924 LAHORE 588

BROADWAY, J

Suleman and others—Convicts-Petitioners.

v.

The Crown—Opposite Party.

Cr. Mis. No. 142 of 1923, Decided on 29th February 1924, for annulling the order of the Sessions Judge, Karnal D/- 14th April 1923.

✱ ***Criminal P. C, S. 517—Property produced not proved to belong to complainant should be delivered to persons producing it. Cr. P. C. S. 520.***

Where certain property alleged to be stolen during dacoity is not proved to belong to complainant or to have formed part of the property taken at the dacoity, it should be delivered to the person by whom it has been produced, complainant being left to his remedy in the Civil Court. [P 589 C 1]

Shamair Chand—for Petitioners.

Diwan Ram Lal-for Opposite Party.

Broadway, J.— This is an application under S. 520 of the Criminal Procedure Code, 1898, in which four applicants, through Mr. Shamair Chand ask for the reversal of an order of the Sessions Court under S. 517 of the Criminal Procedure Code. These four applicants were convicted of having been concerned in a dacoity and sentenced to various terms of imprisonment. On appeal I found it impossible to uphold the conviction, holding that the approver's statement had not been sufficiently corroborated as against each of these four persons. The corroboration set up by the prosecution had been the production of certain articles, said to have been stolen during the dacoity and various sums of money in cash. The learned Sessions Judge has, on a reference to the police diaries and the evidence in the case, come to the conclusion that the articles and cash alleged to have been produced by each of these four applicants should be returned, not to them but to the representative of the complainant. Although Mr. Shamair Chand attacked the jurisdiction of the learned Sessions Judge in the first ground of the application he has not made any reference to this before me. His contention has been that the learned Sessions Judge wrongly referred to the police diaries or rather to the statement of the applicants as recorded therein as having been made, inasmuch as although such statements would be *admissible* they had not been proved In my opinion the statements of the applicants made to the police would be admissible for the purposes of these proceedings. At the same time I am doubtful whether they could be examined without proof, more especially as the circumstances in which they were made would have an important bearing on the point now under consideration. I have refreshed my memory of the case by a reference to my judgment acquitting the appel-

lants, and it seems to me that it would be unsafe to direct the payment of the money to the representative of the complainant. The possession of this money was regarded by the prosecution as a strong indication of the guilt of the applicants. Had I been able to hold, with any reasonable degree of certainty, that this money formed part of the stolen property I would have unhesitatingly maintained the conviction. So far as the cash is concerned, therefore, I must direct that it be returned to the applicants as recovered f om them. Mr. Shamair Chand mentioned a tin canister. It seems scarcely worthwhile to discuss the question of the ownership of an article of so small a value. In regard to the jewellery and other articles I think it would be equally unsafe to hold them to belong to the complainant or to have formed part of the property taken at the dacoity. Had it been possible for me to hold that these articles had been indentified as the property of the complainant the conviction of the applicants would not have been interfered with.

In these circumstances on the material before me I consider that the articles and cash produced, during the investigation, by these four applicants should be made over to them respectively, the representative of the complainant being left to his remedy in the Civil Court.

Petition allowed.

✱ 1924 LAHORE 589

MOTI SAGAR, J.

Mt. Gauhran—Judgment-Debtor--Objector—Appellant.

v.

Chandu Lal and another — Decree-holders and Judgment-Debtor—Respondents.

Mis. F. A. No. 311 of 1923, Decided on 6th June 1923, from an order of the Subordinate Judge First Class Simla, D/- 11th November, 1922.

✱ *Civil Procedure Code, S. 47 & O. 21, R. 58 — Attachment — Objection by party against whom suit was dismissed—Appeal lies as from an order under S. 47.*

A defendant against whom a suit has been dismissed is a party to the suit, within S. 47 and therefore if an objection lodged by such a person to the attachment of certain property in execution of the decree passed in the suit is dismissed, the order dismissing the objection is open to appeal under S. 47 though the objection is wrongly described as one under O. 21, R. 58. [P. 590, C. 1]

Lala Gobind Ram Khanna—for Appellant.

Bakshi Tek Chand and *Lala Faqir Chand*—for Respondents.

Judgment.—This appeal arises out of execution proceedings. The property in dispute is situated at Sabathu in the Simla District, and belonged originally to one Mt. Ganeshi who executed a deed of mortgage in respect thereof in favour of the present decree-holders in 1906. After the execution of the mortgage-deed in 1908 Mt. Ganeshi assigned her rights in the property to Mt. Gauhran, the present appellant. In 1915 the mortgagees brought a suit in the Court of the Subordinate Judge of Simla to enforce their mortgage impleading both Mt. Ganeshi and Mt. Gauhran as defendants to that suit. The case was subsequently referred to the arbitration of Mr. Jai Lal and Mr. Mir Muhammad Khan who gave their award on the 7th June 1917 and passed a simple money decree in favour of the plaintiffs for Rs. 7,700 against Mt. Ganeshi only exempting Mt Gauhran altogether from the operation of that decree. The award was couched in the following terms:—

"Our award is that simple money-decree be passed in favour of the plaintiffs against Mt. Ganeshi only for Rs. 7,700. No future interest and parties to bear their own costs. The execution of the decree will be deferred till three months after the conclusion of the War but in the meantime the property recited in the mortgage-deed will be subject to a lien for the payment of the decree."

On the 3rd April 1916 a decree was passed by the learned Subordinate Judge against Mt. Ganeshi in the terms of the award. Subsequently, the decree was put into execution and the property at Sabathu which had been mortgaged with the decree-holders attached in execution of that decree. An objection was filed by Mt. Gauhran against this attachment

under O. 21, r. 58 of the Civil Procedure Code and it was prayed that the property attached should be released inasmuch as it did not belong to the judgment-debtor and was not made the subject of a charge under the decree. The learned Subordinate Judge disallowed the objection holding that the objector was a party to the suit and that, therefore, it was not competent to her to lodge her objections under O. 21, r. 58 which was meant only for third parties. He further held that the assignment in her favour was made subsequent to the mortgage and it was, therefore, not binding upon the decree-holders. Against this decision an appeal has been preferred to this Court through Mr. Gobind Ram and I have heard Mr. Tek Chand and Lala Faqir Chand on behalf of the decree-holders and the judgment-debtor.

A preliminary objection is raised that no appeal lies, inasmuch as the objection lodged was under O. 21, r. 58, and that an order made on an objection under that provision is not appealable under the Civil Procedure Code. I am unable to agree with the contention. Mt. Gauhran, the present appellant, was clearly a party to the suit, and O. 21, r. 58 had no application to her case. The mere fact that the objection was lodged under a wrong section does not disentitle the appellant to plead that the objection was really under S. 47, and that O. 21, r. 58 was relied on under a mistaken view of the law. Under S. 47, Civil Procedure Code, a defendant against whom a suit has been dismissed is a party to the suit and I have no hesitation in holding that the suit against Mt Gauhran was, for all intents and purposes, dismissed under the award given by the arbitrators. She was, therefore, a party to the suit and fully competent to lodge an appeal under S. 47 of the Civil Procedure Code.

Next, it is contended that the judgment-debtor's representative has not been made a party to the appeal within the time of limitation and that the appeal should, therefore, be dismissed in its entirety. I fail to understand how the representative of the judgment-debtor was a necessary party to the appeal. The dispute only related to the property which was in possession of Mt. Gauhran who filed an objection in the Court below. In my opinion the objector was the only necessary party to this appeal and it was wholly unnecessary to implead the judgment-debtor who was merely a formal party to the case. Moreover, it should be observed that the judgment-debtor's representative made an application to this Court for his being impleaded as a respondent to the appeal. That application was granted by Mr. Justice Martineau on the 4th May 1923 and he was allowed to be impleaded as a respondent to this appeal. I do not see any force in this objection and overrule it.

On the merits there can be no doubt that the order of the lower Court is wrong and must be set aside. The decree was obviously a simple money-decree and in execution attachment could only be effected against the property which belonged to the judgment-debtor. Long before the decree was passed, an assignment of the property at Sabathu had been made in favour of Mt. Gauhran, and she was in possession as an owner. There was no decree against this property and I fail to see how attachment could be taken out against the property which was not owned by the judgment-debtor. There is no doubt that the property was at one time mortgaged to the decree-holders, but the effect of the award given by the arbitrator and of the decree obtained on the basis of that award was that the mortgage was cancelled and in lieu thereof a single money-decree granted in favour of the plaintiffs-decree-holders. It is not, therefore, now open to the decree-holders to say that they can attach this property because it was once held by them under a mortgage. Whatever rights the plaintiffs had under this mortgage became merged in the decree and they are not now entitled to go behind it. I accept the appeal and direct that the property should be released from attachment. The respondents should pay the costs of the appellant in this appeal.

Appeal accepted.

✱ 1924 LAHORE 591

CAMPBELL, J,

Raja and others—Convicts—Appellants.

v

King Emperor—Respondent.

Criminal Appeal No. 766 of 1923, Decided on 19th November 1923, from an order of the Magistrate First Class Gujrat. D/- 25th April 1923.

✱ *Criminal P. C., S. 154—Prosecution is not tied to the joint information report.*

The prosecution is bound by practice to produce in Court the First Information Report made to the police but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is tied down tightly to the words of the First Information Report would recognise the recording officer as possessing an authority which in no way belongs to him and would be more dangerous. [P 591 C 2]

Zafar Ullah Khan—for Appellants.

M. Saleem—for Respondent.

Judgment.—Of the eight appellants, Raja, Bahadur and Dadu, have been convicted under S. 304, Indian Penal Code, and the remaining five, Mahla, Shahu, Ahaman, Khawaja and Raushan, have been convicted under Ss. 325 and 324, Indian Penal Code. In all eight cases S. 149 Indian Penal Code has been applied.

These convictions are the result of an occurrence which took place on the 15th April and resulted in the death of one Allah Dad. According to the findings of the Magistrate some cattle belonging to Raja appellant; trespassed in the field of Gahna and Lehna on the 13th April and were beaten and driven out by Gahna. On the 15th April Raja arrived with a body of supporters and attacked the people who were cutting wheat in this field. Allah Dad was one of these persons and five of the assailants beat him and caused his death. These were Raja, Bahadur and Dadu appellants and two men who have absconded. The remaining five injured Lehna and Budho who attempted to rescue Allah Dad.

The learned Counsel for the appellants has confined himself mainly to a plea on behalf of these latter five appellants based on the ground that their names were not mentioned in the First Information Report. The injury to Allah Dad was first reported to a Head Constable named Lal Khan who was in a neighbouring village. He arrived on the scene and recorded a statement by Allah Dad which he sent by one Mahla (not the appellant of that name) to the Police Station. The statement of Mahla was written down there as the First Information Report and according to it the same five persons, who attacked Allah Dad, also injured Lehna and Budha, and the appellants Mahla, Shahu, Ahman, Khawaja and Raushan, were not mentioned. In Court Mahla stated that he did mention these names and that the report as recorded was not correct. Lal Khan deposed that the names of these five persons were given to him in the village and that he did not mention any names in his letter to the Police Station but merely enclosed the dying declaration of Allah Dad in which the five assailants of the declarent alone were mentioned. It is urged for the appellants that these explanations should be rejected and that the contents of the First Information Report must be presumed to be correct.

The Police Officer, who wrote the report, has not been produced as a witness. Thus the report is not proved to have been correctly written down and the only evidence on the question of correctness is that of Mahla who says that the document is not correct. In such cases the prosecution is bound by practice to produce in Court the First Information Report made to the police but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is tied down tightly to the words of the First Information Report would recognise the recording officer as possessing an authority which in no way belongs to him and would be most dangerous. In the present instance we have the report as placed on the record without the testimony of the

person who wrote it against the assertion of Mahla, the reporter, who says that five names given by him were not taken down. Several witnesses have deposed that Mahla, Shahu, Ahman, Khawaja and Raushan did attack, and beat Lehna and Budha and Lehna and Budha have themselves said so. No reason is apparent why they should implicate the appellants falsely or deliberately substitute for the names of those actually responsible for the injuries the names of other persons. On the evidence the guilt of these five appellants is established and there is no good reason for intefering with their convictions.

The convictions of the remaining three appellants, Raja, Bahadur and Dadu are not challenged and the evidence justifies the finding of the learned Magistrate. It is pleaded, however, on behalf of Raja that the sentence imposed upon him of seven years' rigorous imprisonment is excessive in comparison with that of five years' rigorous imprisonment imposed upon Bahadur and Dadu. The learned Magistrate's reason for making the distinction is that Raja was the leader of the party and palpably responsible for the whole occurrence. The witnesses may have exaggerated his actions, and indeed, if this were not held to be the case. the appellants might have found themselves convicted of a much graver offence, but with due allowance for this I consider that the sentence is not excessive.

I dismiss the appeal.

Appeal rejected.

1924 LAHORE 592

MARTINEAU, J.

Anup Chand — Defendant — Appellant.

v.

Mt. Kawal Kaur and others—Plaintiffs—Respondents.

F. A. No. 602 of 1923, Decided on 22nd October 1923, from an order of the Junior Sub-Judge, Jhang, D/- 30th January 1923.

Civil P. Code, O. 21 R. 90—Objection to sale must be enquired into.

Executing Court cannot set aside a sale of land effected in execution of a decree without any inquiry into the objection made to the sale. Any irregularity or fraud alleged in the objection must be proved. [P 593 C

Shamair Chand—for Appellant.

Lala Faqir Chand—for Respondents.

Judgment.—The Subordinate Judge has set aside a sale of land effected in execution of a decree without any inquiry into the objection which was made to the sale. This he was not competent to do. A sale may be set aside under O. 21, R. 90, Civil Procedure Code, on the ground of a material irregularity or fraud in publishing or conducting it, but the irregularity or fraud must be proved, and the Court must also be satisfied that the person applying to have the sale set aside has sustained substantial injury by reason of such irregularity or fraud. The objection put forward in this case was that there had been no sale at the spot and Mr. Faqir Chand contends that there was, as a matter of fact, no sale and that the bids were fictitious. This objection must be inquired into before the sale can be set aside.

I accept the appeal, set aside the lower Court's order and direct the Subordinate Judge to pass a fresh order after he has made inquiry into the objection regarding the sale.

The parties will bear their own costs in this Court.

Appeal accepted.

1924 LAHORE 593

MARTINEAU, J.

The Firm Prithi Singh-Jamayatrai Plaintiffs—Appellants.

v.

The Firm Harsukh Das-Jhog Mal —Defendants—Respondents.

Mis. F. A. No. 271 of 1923, Decided on 22nd May 1923, from an order of the Subordinate Judge, First Class, Delhi, D/- 28th December 1922.

C. P. Code, S. 20—Principal can't ask agent to make payment at principal's place of business.

In the absence of an agreement to the contrary, or of special circumstances showing a different intention, the principal cannot, where the agent carries on business elsewhere call upon him to render an account at his own place of business, on the ground that the money or goods were sent to the agent from such place. 76 P. R. 1896 foll. [P. 503, C. 2.]

Sundar Das—for Appellants.

Lala Tirath Ram—for Respondents.

Judgment.—This is an appeal from an order of the Subordinate Judge of Delhi returning a plaint, the learned Judge holding that the Delhi Court had no jurisdiction to try the case.

The defendants, who carry on business in Bombay, used to send goods to the plaintiffs, who deal in gold and silver in Delhi, and the latter used to send money to the defendants. The plaintiffs sue for the amount which they allege to be due to them, with interest.

It is alleged by the plaintiffs that the defendants' *Munim*, Prag Das, came to Delhi and that they entered into the contract with him there. There is only some oral evidence of an ordinary nature in support of this allegation, and I agree with the lower Court in rejecting it. As observed by the learned Subordinate Judge it is improbable that the defendants, who have extensive business dealings, with their head office at Bikanir and branches at Bombay, Calcutta, Madras, and Kot Kapura, would have sent a man to Delhi to solicit work.

The contract not being shown to have been made in Delhi, the question that remains for consideration is where any money that may be due from the defendants under the contract would be payable. Now the plaintiffs have admitted that the defendants were their Commission Agents, and the lower Court has followed *Muhammad Shaffi* v. *Karamat Ali* (1) in which it was held that, in the absence of an agreement to the contrary or of special circumstances showing a different intention, the principal cannot, where the agent carries on business elsewhere, call upon him to render an account at his own place of business, on the ground that the money or goods were sent to the agent from such place. That decision has been followed in later rulings referred to by the learned Subordinate Judge, and it is in point here.

Counsel for the appellants argues that, as the defendants sent goods to the plaintiffs at Delhi, a presumption arises that the money due from them to the plaintiffs would be payable at Delhi, but no such presumption would in my opinion arise. The postal charges for goods sent by the defendants were paid by the plaintiffs, as the latter have admitted, and under S. 91 of the Contract Act the delivery of the goods by the defendants to the Post Office or to the Railway in Bombay for transmission to the plaintiffs would be a delivery to the plaintiffs.

The plaintiffs have not been able to show that any money that may be due to them from the defendants is payable at Delhi, and it must, therefore, be held, in accordance with the authorities followed by the lower Court, that the suit is triable at Bombay and not at Delhi.

I dismiss the appeal with costs.

Appeal dismissed.

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(1) [1896] 76 P.R. 1896.

1924 LAHORE 594

MARTINEAU, J.

Secretary of State for India—Defendant—Appellant

v.

Charanjit Lal-Plaintiff-Respondent.

S. A. No. 203 of 1924, Decided on 30th April 1924, from the decree of the District Judge, Amritsar, D/-19th October 1923.

(a) *Railways Act, S. 72—Absence of watch in the night amounts to wilful neglect.*

Where the wagon containing the lost Ghi was sealed, but not locked and there was a halt of several hours at one station during the latter part of the night and there were no *chaukidars* keeping watch on the train during the halt.

Held: that the loss was due to the wilful neglect of the Railway. 1924 Patna 315 Dist.

[P. 594, C. 2.]

(b) *Civil P. C,. S. 100—Wilful neglect.*

Finding that there was wilful neglect on the part of the Railway is a finding of fact.

[P. 594, C. 2.]

(c) *Railways Act, S. 72—Running train.*

A "running train" means a train in motion between stations. [P. 594, C. 2.]

(d) *Railways Act, S. 77—Notice to Secretary to Govt. Railway Dept. in case of Govt. Railway is valid.*

Notice of a claim to the Agent of the Railway though addressed to the Secretary to the Government of India, Railway Department, who in acknowledgment which he sent to the claimant stated that the claimant's letter had been sent to the Agent of the Railway for disposal is a sufficient notice.

[P. 594, C. 2 & P. 595, C. 1.]

Jai Lal,—for Appellant.

Shamir Chand and Sagar Chand—for Respondent.

Martineau, J.—The plaintiff has been given a decree against the Secretary of State for the value of 24 tins of *ghi* lost out of a consignment of 150 tins which had been booked by the North Western Railway from Gharinda to Sialkot and rebooked from Sialkot to Amritsar. The wagon containing the *ghi* was sealed, but not locked, and the seals were intact upto Gujranwala. The train reached Muridke at 12 58 a. m. and remained there for several hours. It does not appear from the evidence that the seals were examined at the time when the train reached Muridke, but the Guard saw them at 8 a. m. and found that they had been broken, and it was then discovered that 24 tins of *ghi* were missing. The Courts below have found that as the wagon had not been locked, and there were no *chaukidars* keeping watch on the train during the halt at Muridke, the loss was due to the wilful neglect of the Railway administration, which is therefore liable under the terms of the risk note.

The Secretary of State has preferred a second appeal and the learned Government Advocate has cited *E. I. Ry. Co.* v. *Gopiram* (1), in support of his contention that there was no wilful neglect on the part of the railway. But in the first place the loss of the consignment in that case was discovered as soon as the train arrived at the station where it first stopped, so that the case is not similar to the present one in which there was a halt of several hours at Muridke before the loss was discovered. In the second place the lower appellate Court's finding that there was wilful neglect on the part of the railway is a finding of fact, which cannot be contested in second appeal.

There is nothing to support the theory that the goods were stolen from the running train, and the probability seems to me that they were stolen during the long halt at Muridke. The learned Government Advocate contends that the train was a running train all the time until it reached its destination, even while it was not in motion, but he can cite no authority in support of this contention, and I agree with the view of the lower appellate Court that a "running train" means a train in motion between stations.

The only other contention on behalf of the appellant is that the notice required by S. 77 of the Indian Railways Act was not given.

It is true that the notice instead of being addressed to the Agent of the Railway, was addressed to the Secretary to the Government of India, Railway Department, but in the acknowledgement which the latter sent to the plaintiff it was stated that the plaintiff's letter had been sent to the

(1) 1924 Patna 315.

Agent of the North Western Railway for disposal.

From this it may reasonably be presumed that the Agent of the Railway received the notice of the cliam. The learned Government Advocate relies on *E. I R. Co.* v. *Jethmull* (2) but the notice given by the plaintiff in that case was a notice of a claim against a railway different from the railway which was really liable for the loss, so that the ruling is not in point.

I agree with the Courts below that the notice required by law was given by the plaintiff in the present case.

The appeal fails and I dismiss it with costs.

Appeal rejected.

(2) [1902] 26 Bom. 669—4 Bom. L. R. 495.

✱ ✱ 1924 LAHORE 595

LE ROSSIGNOL, ABDUL RAOOF AND HARRISON, JJ.

Anantia and another—Petitioners.

v.

The Crown—Opposite Party.

Criminal Revision No. 1087 of 1923, Decided on 18th January 1924, from the order of the District Magistrate, Ferozepore, D/- 23rd May 1923.

✱ ✱ *Criminal Procedure Code, S. 248—Whether application is for withdrawal or compounding is question of fact — Withdrawal against one is not effectual against others. (Contra Harrison, J.)*

Per Harrison, J.—The withdrawal of a case is by no means the same as compounding an offence. The section does not contemplate a partial withdrawal nor withdrawal against one of several alleged offenders. There is no difference in the procedure to be followed in withdrawing a complaint of a compoundable nature and one which is not compoundable.

[P. 596, C. 1 & 2]

Per A. Raoof, J.—Whether apetition is one for withdrawal or compromise is to be judged from the fact whether the accused consented to it or not. The compounding of an offence signifies that the person against whom an offence has been committed has received some gratification to act as an inducement for his desiring to abstain from prosecution. The distinction between a withdrawal and composition is pointed out in 21 C. 103 at 113.

[P. 598, C. 1]

Per Le Rossignol, J.—It is a question of fact whenever a complaint is withdrawn under S. 248, whether it is withdrawn as a whole or in part. If the withdrawal of a complaint implied the physical withdrawal of the document on which the complaint is written it could be contended that the complaint is withdrawn against all the persons implicated; but where the complainant states circumstances which may or may not satisfy the Magistrate that there are sufficient grounds for permitting the complainant to withdraw the complaint against one or all of the accused that does not amount to complete withdrawal; there is nothing in S 248 which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against one of the accused. 30 C. W. N. 1209; 21 Cal. 103, 112; 9 P. R. (Cr.) 1896. Foll.

P. 598, C. 2 & P. 599, C. 1 P. 599, C. 1]

Nand Lal—for Petitioner.

D. C. Ralli—for the Crown.

Harrison, J.—The facts in this case are that the complainant presented a complaint in which five persons were accused of having committed offences under S. 426, Indian Penal Code. He subsequently presented a petition purporting to withdraw his complaint against one of the accused on the ground that he had apologised. This man was discharged and the case proceeded against the remainder, of whom two were acquitted, as the evidence against them was held to be insufficient, and two were convicted. Their appeals were dismissed and these men now apply for revision on the ground that the complaint was withdrawn under S. 248, and inasmuch as withdrawal against one accused was impossible, [*Shyam Behari Singh* v. *Sagar Singh* (1)] the case could not proceed against them. On the other hand, it is urged by Mr. Ralli, who has appeared for the Crown, that a complaint may be withdrawn against any one of the accused and can continue against the remainder on the analogy of the compounding of an offence with one offender but not with all.

As regards this question of compounding a portion of a case there has been a conflict of authority: *Ram Kishen* v. *Crown* (2) followed *Muthia*

(1) [1919] 1 Pat. L.J. 32—53 I.C. 824—20 Cr. L.J. 824.

(2) [1920] 1 Lah. 169—121 P.L.R. 1920—56 I. C. 229—21 Cr. L. J. 437.

Naick v. *King-Emperor* (3), which dissented from *Chandar Kumar Das* v. *Emperor* (4), which in its turn has been followed by the Patna High Court in *Shyam Behuri Singh* v. *Sagar Singh* (1) and *Saroj Kumar Mukherji* v. *Emperor* (5). This controversy, however, has been set at rest by the wording of the new Code, for S. 345, paragraph 6 runs as follows :—

"The composition of an offence under this section shall have the effect of an acquittal of the accused (with whom the offence has been compounded)" and on the principle of "*unius inclusio alterius exclusio*" it will not have the effect of an acquittal of the accused with whom the offence has not been compounded. This, however, is by no means the same thing as saying that under S. 248, which has been left unaltered a portion of a complaint can be withdrawn and the rest survive. What actually happened in this case was that the complainant put in a petition before the Court not asking for permission to withdraw but stating that he did withdraw against one of the accused as there had been an apology and he wished the case to proceed against the remainder. On this the Magistrate wrote a brief order containing two mistakes namely, that the case was dismissed against the particular accused, who was discharged. The case should not have been dismissed and the accused should not have been discharged but acquitted. The order concluded by saying that the case would continue against the remainder. The question to be decided is whether that order was legal or not. The withdrawal of a case is by no means the same as compounding an offence, for cases can be compounded which cannot be withdrawn and *vice versa* cases can be withdrawn which cannot be compounded. Only a summons case can be withdrawn and the offences which are compoundable are those enumerated in the list, which includes both summons and warrant cases. However numerous may be the offenders or the offences alleged to have been committed, the complaint is one, and the plain english of the section runs that the complainant may withdraw his complaint with the permission of the Magistrate. In my opinion this does not contemplate a partial withdrawal nor withdrawal against one of several alleged offenders and, in spite of the fact that a man may compound with one of the accused and so automatically bring about his acquittal while continuing his case against the remainder, I can see no reason for stretching the plain words of S. 248 for the mere sake of uniformity, or for holding that there is any difference in the procedure to be followed in withdrawing a complaint of a compoundable nature and one which is not compoundable.

In this case it is urged that the complainant never wished to withdraw his complaint as he qualified his application with the *proviso* that he should be allowed to continue it against the remaining accused and that he only withdrew against one. It is also urged that, inasmuch as he speaks of an apology, it must be held that he had actually compromised with this one individual, that the compromise automatically operated as an acquittal and therefore there could be no question of withdrawal. The apology was the reason for the action which he took and cannot be confused with it. He used the word "withdraw" and though of course it was open to the Magistrate to tell him that it would be more effective, as the offence was compoundable, to compound with the one individual if he wished to do so, the Magistrate did not do so. He took action on the application and thereby permitted the withdrawal. Inasmuch as that withdrawal could not be partial but must be complete, there was in my opinion a withdrawal of the whole complaint.

I would therefore accept the application for revision and acquit the two petitioners.

Abdul Raoof, J.—This petition for revision came on for decision before me sitting singly. I made the follow-

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(3) [1917] 41 Mad. 323—43 I.C. 592—19 Cr. L.J. 176.
(4) [1902] 7 C.W.N. 176.
(5) [1921] 23 Cr. L.J. 432—67 I.C. 592.

ing order in which the necessary facts of the case were stated by which I referred the case for decision to a Division Bench :—

" An important and interesting question has been raised by Dr. Nand Lal in this petition for revision. It appears that five persons were charged under S. 426 of the Indian Penal Code with the offence of committing mischief by causing hurt to a filly belonging to the complainant. Against one of the accused, namely, Thakar, the complainant withdrew his complaint with the result that the Magistrate discharged Thakar as the offence was compoundable under S. 345 of the Criminal Procedure Code. Two of the accused, namely, Narain Singh and Dhaunkal were acquitted as the evidence did not establish any case against them. The remaining two, namely, Anantia and Naraina were convicted and sentenced to undergo one month's rigorous imprisonment and Rs. 25 fine each or in default to undergo further 15 days' rigorous imprisonment. They appealed against the order of the Magistrate, 2nd Class, to the District Magistrate who has upheld the convictions and sentences. The petitioners have come up in revision to this Court upon various grounds stated in the petition for revision. The first ground taken is that the case against Thakar, one of the alleged accused, having been withdrawn by the complainant, the case against the petitioners must also be taken to have been withdrawn. In support of this contention Dr. Nand Lal has relied upon the following cases :—

Shyam Behari Singh v. *Sagar Singh* (1) ; *Saroj Kumar Mukherji* v. *Emperor* (5) and *Chandar Kumar Das* v. *Emperor* (4). The last case which is the basis for the decision of the two previously mentioned cases has been dissented from by a Division Bench of the Madras High Court in the case of *Muthia Naick* v. *King-Emperor* (3). I have not been referred to any decided case of this Court. The importance of the question raised requires that the matter be considered by a larger Bench. I accordingly refer this case to a Bench of two Judges with the further recommendation that the Crown should be represented at the hearing of the case."

The case came up for hearing before a Division Bench composed of my learned brother Mr. Justice Harrison and myself. There being a difference of opinion as to the purport of the petition of the complainant by which he withdrew his complaint we have written separate judgments recording separate orders. There was clearly a conflict of opinion as to the consequences of the compounding of an offence with one of several accused persons. This controversy, however, has now been set at rest by the wording of the present Code of Criminal Procedure, for S. 345, paragraph 6, now provides that " the composition of an offence under this section shall have the effect of an acquittal of the accused (with whom the offence has been compounded)."

The crucial question, however, to be decided in this case is whether the application made by the complainant on the 7th of February 1923 purporting to withdraw the complaint against one of the accused came under S. 248 of the Criminal Procedure Code or whether it came under S. 345 of the Code. It was worded thus :—

" The case noted in the heading is pending in your Court. As Thakar accused has apologised to me through the members of the brotherhood I, the complainant, would not conduct the case against him and would rather withdraw it. I, have, therefore, put down these few words in the form of a deed of withdrawal so that the same may serve as an authority."

On this petition the Court made the following order :—

" With reference to the application of the complainant it is ordered that the complaint against Thakar, accused, be dismissed and he be let off The case shall proceed against the other accused persons.

Dated the 7th February 1923."

The wording of this petition leaves no doubt on the point that it was made in consequence of an amicable settlement between the accused Thakar and the complainant and must be treated as one coming under S. 345, Criminal Procedure Code. My learned brother is of opinion that, because the complainant purported to withdraw the complaint, his petition must be treated as one coming under S. 248 of the Code. I regret I cannot agree

with him. We must take into consideration the substance and not merely the form. Whether a petition is one for withdrawal or compromise is to be judged from the fact whether the accused consented to it or not,—*Bayan Ali* v. *Emperor* (6). The compounding of an offence signifies that the person against whom an offence has been committed has received some gratification to act as an inducement for his desiring to abstain from prosecution [see *Murray* v. *Queen Empress* (7) and *Haidayat Ali* v. *Queen-Empress* (8)]. A lawful composition may be effected within the scope of this section for any consideration or gratification. It is not necessary that the consideration should be of a monetary character. [*Mahomed Kanni Rowther* v. *Inayathalla Sahib* (9).] All that the law requires is that there must be some arrangement between the parties settling their differences [see *Haidayat Ali* v. *Queen-Empress* (8) and *Emperor* v. *Hilaram* (10)]. The distinction between a withdrawal and composition is pointed out in *Murray* v. *Queen-Empress* (7) [see also *Empress* v. *Khushali Ram* (11)].

Having regard to what was held in these cases the conclusion is irresistible that the case fell under S. 345 of the Code of Criminal Procedure. The offence with which the accused was charged was compoundable as the table attached to S. 345 of the Code clearly shows. I am, therefore, clearly of opinion that the complainant could have compounded the offence against one of the accused and the complaint could proceed against the remaining accused persons. As already pointed out paragraph 6 of S. 345 of the present Criminal Procedure Code leaves no doubt on the point. I would, therefore, reject the petition for revision.

(6) [1916] 20 C.W.N. 1209—1 Pat. L. W. 21—37 I.C. 315—18 Cr. L.J. 107.
(7) [1893] 21 Cal. 103.
(8) [1896] 9 P.R. 1896 Cr.
(9) [1916] 39 Mad. 946—2 L.W. 1200—31 I.C. 813—18 M.L.T. 602—16 Cr L.J. 803.
(10) [1908] 10 Cr. L.J. 228.
(11) [1888] 19 P.R. 1888 Cr.

Le Rossignol, J.—This application for revision arises out of a complaint of mischief instituted against five persons. The offence is compoundable under S. 345, Criminal Procedure Code. and the complainant informed the Magistrate that as one of the accused had apologised to him he withdrew the complaint against that individual and the case proceeded against the remaining accused two of whom were eventually convicted. The convicts came to this Court in revision and contended that as the complaint had been withdrawn in respect of one accused it must be taken to have been withdrawn against the petitioners also. The case of *Chandar Kumar Das* v. *Emperor* (4) has been cited on behalf of the petitioners whilst for the Crown reliance is placed upon the case of *Muthia Naick* v. *The King-Emperor* (3).

The learned Judges of the Division Bench have differed on the law point and the case has been sent to me for disposal under the orders of the Chief Justice.

The proposition approved in *Chandar Kumar Das* v. *The Emperor* (4) was that if a complaint is compounded the withdrawal of the case is in respect to the offence and therefore a composition with one of the accused is a composition with all. The Madras ruling respectfully but completely dissented from this view and the matter has been set at rest in the new Code which provides that only that accused with whom the offence has been compounded shall be acquitted by reason of the composition. One of the Judges of the Division Bench, however, holds that, inasmuch as S. 248, Criminal Procedure Code, does not in so many words provide for a withdrawal of a complaint as against one of several accused only, the complaint, if withdrawn, must be a withdrawal in respect of all the accused.

The matter is in reality of academical interest only, for though the complainant used the phrase withdraw the complaint, he in fact meant that the offence had been compounded. It seems to me to be a question of fact whenever a complaint is withdrawn under S. 248 whether it is with-

drawn as a whole or in part. If the withdrawal of a complaint implied the physical withdrawal of the document on which the complaint is written, it could be contended that the complaint is withdrawn against all the persons implicated. What happens in fact is that the complainant states circumstances which may or may not satisfy the Magistrate that there are sufficient grounds for permitting the complainant to withdraw the complaint against one or all of the accused and it seems to me quite contrary to all notions of justice that a complainant should be placed upon the horns of a dilemma, that he should be forced either to forego his remedy against four guilty persons or run the risk of the complete failure of his complaint on the ground that one of the accused persons has been wrongly implicated. Let us suppose that a complaint is brought *bona fide* against five persons and that in the course of the proceedings the complainant receives information which satisfies him that his original information was incorrect in regard to one of the five accused Is he bound to continue the complaint against the person who, he is satisfied. had no share in the offence? That course is opposed to all notions of justice. On the other hand, must he relinquish his relief against the persons whom he really believes to be guilty, merely because he has made a mistake or been misinformed regarding the guilt of the 5th accused? This, too, is in conflict with all ideas of justice.

My conclusion then is that there is nothing in S. 248 which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against one of the accused. I accordingly dismiss the petition for revision.

Petition dismissed.

✱ 1924 LAHORE 599

CAMPBELL, J.

Ata Muhammad—Defendant—Appellant.

v.

Pir Khan—Plaintiff—Respondent.

S. A. No. 481 of 1923, Decided on 1st May 1923, from a decree of the District Judge Attock at Campbellpur, D/- 20th November 1920.

✱ (a) *Limitation Act, S. 12—Copy applied for on the day of judgment—That day can't be excluded twice.*

Where application for copies is made on the same day the judgment is pronounced, that day cannot be excluded twice, once as the day on which judgment was pronounced and the second time as one of the days requisite for obtaining copies. The day on which judgment is pronounced has to be excluded first and then the time requisite for obtaining copies has to be excluded. [P 600 C 1]

✱ (b) *Limitation Act, S. 5—Difficulty of communication between pleader and client—Delay not excused.*

Where communication between client and pleader was interrupted by heavy rain,

Held: that it was not a sufficient cause to excuse even one day's delay. [P 600 C 1]

M. S. Bhagat—for Appellant.

M. Sleem—for Respondent.

Judgment.—This appeal and its companion case, Appeal No. 482 of 1923, are barred by limitation. The decrees appealed from were passed on the 20th of November 1922. Applications for copies of the judgments and decrees were made the same day and the copies were supplied on the 28th of November. The appeals were filed in this Court on the 27th of February 1922, that is to say, on the 91st day from the 29th November.

The learned Counsel for the appellants has attempted to argue that the appeals are within time by the following calculation :—

10 days in November;
31 days in December;
31 days in January;
27 days in February;

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99 days=Total
—9 days spent in obtaining copies.

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90 days=result.

This result is, however, fallacious since it depends upon the 20th of November being excluded twice once as the day on which judgment was pronounced and the second time as one of the days requisite for obtaining copies. It is clear from S. 12 of the Limitation Act that the day on which judgment is pronounced has to be excluded first and then the time requisite for obtaining copies has to be excluded. The learned Advocate for the appellants on this being pointed out to him has conceded that the appeals are one day out of time but he has asked me for indulgence under S. 5 of the Limitation Act on the ground that his client had difficulty in raising the money for Counsel's fee and that communication between his clients and himself was interrupted by heavy rain at the end of February. He has exhibited a letter purporting to be from one of the appellants in which these matters are mentioned. I cannot, however, admit that due diligence has been shown by the appellants. They had their copies ready on the 28th of November and there is nothing to show that they were diligent from that day onward in taking steps to institute their appeals. I dismiss with costs both appeals as time-barred.

Appeals dismissed.

✱ 1924 LAHORE 600

SCOTT-SMITH AND HARRISON, JJ.

Hari and another—Convicts—Petitioners.

v.

The Crown—Opposite Party.

Criminal Revision No. 1612 of 1923, Decided on 18th March 1924, from the order of the Sessions Judge, Rawalpindi, D/- 24th August 1923.

Arms Act, XI of 1878, S. 19 (f)- Sikhs are exempt from prosecution for possessing a sword.

Sikhs are exempt in virtue of Schedule II 3 (6) from prosecution under S. 19 (f) for possessing a sword or Kirpan [P 601 C 2]

Niamat Rai—for Petitioners.

Public Prosecutor—for Opposite Patry.

Harrison, J. — Hari Singh and Kishan Singh have both been convicted under S. 19 (f) of the Indian Arms Act of being in possession of swords, and their appeal has been dismissed by the Sessions Judge.

The application for revision presented by them has been referred to a Division Bench by Moti Sagar, J., for the decision of the question of whether they are exempt in virtue of Schedule II 3 (6). They claim that as Sikhs they are entitled to possess one Kirpan each. They admit that the two weapons in question are swords 36 inches in length with curved blades measuring 28 inches, but they contend that the two words "Kirpan" and "sword" are interchangeable and synonymous and therefore the provision of the Arms Act, which forbids the possession of a sword without a license, does not apply to them as Sikhs so long as they only have one such weapon each.

Counsel for the Crown, on the other hand, has drawn our attention to the fact that both the words "sword" and "Kirpan" are used in the same Schedule and he contends that had they been synonymous, one word or the other would have been selected and would have been used throughout. He relies on the judgment delivered by Le Rossignol, J., and reported in *Bachhitar Singh* v. *Emperor* (1) in which it was held that there was a difference in the meaning of the two words, that "sword" was the wider and the more comprehensive word and included "Kirpan" and that a person claiming exemption under the provisions of the Schedule must show that the weapon in question was distinguishable from an ordinary sword and possessed the necessary peculiarities, whatever they might be, which made a certain type or pattern of sword a Kirpan. Some years have passed since that judgment was delivered and the Crown lawyers have apparently not yet discovered what are the distinguishing features of a Kirpan, and counsel who appeared before us was unable to give us any assistance beyond asserting

(1) 1922 Lah. 141—8 P.W.R.Cr. 1922—22 Cr.L.J. 78.

that there was a difference between the meanings of the two words and that the accused must be held to be guilty until and unless they discover the unknown differences and can explain them to the Court and can prove that these differences are to be found in the particular weapons owned by them. This verges in our opinion perilously near to throwing the onus of establishing innocence on the accused. If there be such a difference, and it is known or ascertainable, it should be made public in the notification so that the world at large and the Sikhs in particular may know exactly where they stand. It is generally believed that a kirpan—or Sikh Sword—is or was a straight weapon with a straight handle and the miniatures or emblems, which are made for wearing in the pagri, are undoubtedly in this shape, but no such distinction is claimed to exist by counsel for the Crown, and it is clear that no limit has been placed on the length of the weapon which the Sikhs may wear. In Burma such a limit has been fixed, but beyond the fact that a Sanskrit word is used in the notification as opposed to the English no attempt has been made in the Punjab to explain or define the exact nature of the exempted weapon. In Monier William's Sanskrit Dictionary the word is defined as meaning a sword or sacrificial knife, and so also in Platts' Hindustani Dictionary the word is treated as naturalised into the Urdu language and is shown as meaning a "sword". In the Punjabi Dictionary, compiled by Bhai Maya Singh, Member of the Khalsa College Council, a kirpan is described as an iron knife kept by Sikhs in their turbans. It has never been contended that the notification refers to this miniature emblem to the exclusion of a weapon too large to were in a pagri. We find in Mr. Macauliffe's classical work on the Sikh Religion at page 95 of Volume V, that the kirpan is described as a sword, and the author goes on to explain that the 10th Guru directed his disciples to wear the five outward and visible signs of their religion and also enjoined on them the practice of arms. It is contended with great force that when he so ordered the wearing of a sword, he can only have meant that it should be a weapon suitable for the purpose of practising arms and not merely a religious emblem, such as was subsequently adopted by many people in order to comply with the letter of the commandment. Counsel for the accused attaches great value to the communique issued by the Punjab Government on 10th March 1922 directing officers not to interfere with the wearing of swords or kirpans by Sikhs provided certain salutary restrictions are observed. He relies on this to show that whatever the difference may or might be, it is not a difference which Government considered of any practical importance, in that it used both words when issuing the directions. Counsel for the Crown objects that this communique is not admissible in evidence. It has not, of course, the force of a notification under the Arms Act and as giving the opinion of the Government or any individual Government officer it is not admissible, but as showing the action taken by Government for however long or short a time it does throw light on the position and as such is, in our opinion, admissible.

It is established therefore that the original commandment of the Guru directed his followers to wear swords and to practise arms. The word used for describing the sword was kirpan and may have been so selected because it began with a "k". It is not known whether the kirpan at that time was of a recognised shape or size. In Sanskrit and Urdu the word means "sword." There is popularly supposed to be a distinction, in that a kirpan is a sword of a peculiar shape, and this distinction, if it really exists, has hitherto baffled all definition

Until Government in a notification qualifies the word as used in the Schedule by fixing the length or describing the shape or both, the word can only be understood and read as meaning a sword, and therefore a Sikh possessing or wearing one sword has committed no offence. We accept the application and acquit Hari Singh and Kishan Singh.

Appeal allowed.

1924 LAHORE 602

MARTINEAU, J.

Firm Gobind Ram Ram Chander—Defendants—Appellants.

v.

Firm Rulia Ram Naulta Ram —Plaintiffs—Respondents.

F. A. No. 1726 of 1923, Decided on 21st November 1923, against an order of the District Judge, Ambala, D/-10th April 1923.

(a) *Civil P. C., S. 47 — Appeal lies against stay of execution (case law discussed).*

A decision that execution shall not take place does determine a right for the time being and may have far reaching results. An appeal lies from the order staying execution.

[P. 603, C. 1]

(b) *Civil P. C., O. 41, R. 5—Power of trial Court.*

After an appeal is filed it is only the appellate Court which can order stay of execution under O. 41, r 5 (1) and recourse cannot be had by the Trial Court to S. 151 in order to override the provisions of that rule.

[P. 603, C. 1]

Shamair Chand—for Appellants.

Dalip Singh for *Tek Chand* — for Respondents.

Judgment. — The respondents obtained a decree against the appellants, and an appeal to the District Court was dismissed. A second appeal was preferred to the High Court and is still pending. The respondents took out execution of the decree on the application of the judgment-debtors the Executing Court ordered that execution be stayed on the judgment-debtors' furnishing security, holding that it had power to stay execution under the provisions of S. 151 of the Civil Procedure Code. The decree-holders appealed to the District Judge, who held that the order was appealable and set it aside. The judgment-debtors have filed a second appeal in this Court, contending that the order of the Executing Court staying execution was not one determining any question within S. 47 of the Civil Procedure Code and was, therefore, not a decree and not appealable.

In *Jogodishury Debea* v. *Kailash Chandra Lahiry* (1) it was held that an order in execution proceedings could come under S. 244 of the old Civil Procedure Code (corresponding to S. 47 of the new Code) only when it determined some question relating to the rights and liabilities of the parties with reference to the relief granted by the decree and in *Rama Prasad Roy* v. *Anukul Chandra Roy* (2) the Calcutta High Court held that an order refusing to stay execution was not an order determining such a question. In *Rajendra Kishore* v. *Mothura Mohan* (3) also the same High Court held that an order staying or refusing to stay the execution of a decree was not an order determining a question relating to the execution of the decree within the meaning of S. 47 of the Code and was, therefore, not appealable, being of opinion that the omission from that section of the words "or to the stay of execution thereof" which had been inserted in S. 244 of the Old Code by the amending Act of 1888 showed that a change in the law had been intended.

The Bombay High Court has also held in *Janardan Trimbak* v. *Martand Trimbak* (4) that an order for stay of execution of a decree is not appealable.

The Madras High Court, on the other hand, has taken a different view in *Subramania Pillai* v. *Kumaravelu Ambalam* (5), where the learned Judges said that the words relating to stay of execution might have been omitted in S 47 because they were regarded as superfluous.

In this Court it has been held by LeRossignol, J., in *Sardar Khan* v. *Fateh Din* (6) and by Scott-Smith, J., in *Fitzholmes* v. *Waryam Singh* (7) that an order for stay of execution of a decree is appealable, and the only ruling to the contrary to which I have been referred is one of Harrison, J., in *Fitzholmes* v. *Waryam Singh* (7), a very brief judgment, in which *Rajendra Kishore* v. *Mothura Mohan* (3) was followed, as no authority was apparently cited on the other side. In *Sardar Khan* v. *Fateh Din* (6) the view

(1) [1897] 24 Cal. 725—1 C.W.N. 374 (F. B.)

(2) [1915] 20 C.L.J. 512—27 I. C. 444.
(3) [1920] 25 C.W.N. 555—55 I.C. 228.
(4) [1920] 45 Bom. 241—59 I C. 523—22 Bom. L.R. 1212.
(5) [1916] 39 Mad. 541—33 I.C. 66.
(6) 1922 Lah. 480.
(7) 1923 Lah. 514.

taken was that specific reference to stay of execution in S. 47 of the present Code was rendered unnecessary by the alteration of the opening words of the section as compared with S. 244 of the old Code. This is, in my opinion, the correct view for in S. 244 of the old Code the questions which were to be determined by the Executing Court were specified, whereas, as was pointed out in *Chidambaram Chettiar* v. *Krishna Vathiyar* (8), the scheme of the corresponding S. 47 of present Code is not to specify any particular questions at all, but to include all questions relating to the execution, discharge, or satisfaction of a decree as being within its scope. The question whether execution of a decree is to be stayed seems to me to be obviously a question relating to the execution of the decree, and I agree also with LeRossignol, J.'s observation in *Sardar Khan* v. *Fateh Din* (6) that a decision that execution shall not take place does determine a right for the time being and may have far reaching results.

I hold, therefore, that an appeal lay in the present case from the order staying execution.

On the merits of the case nothing has been urged before me on behalf of the appellants and I think the learned District Judge was right in setting aside the order of the Executing Court.

It was only the appellate Court which could order stay of execution under O. 41,r. 5 (1) and recourse cannot be had to S. 151 in order to override the provisions of that rule. Moreover, as pointed out by the learned District Judge, a stay of execution had originally been allowed only on the understanding that the judgment-debtors were to obtain an order for stay from the High Court, and they do not appear to have attempted to obtain such an order.

The appeal is dismissed with costs.

Appeal dimissed.

(8) (1917) 40 Mad. 233—21 M.L.T. 24—(1917) M.W.N. 44—37 I.C. 836—5 L.W. 132—32 M.L.J. 13.

1924 LAHORE 603

CAMPBELL, J.

Firm Maghi Mal-Kharaitiram—Plaintiffs—Petitioners.

v.

Firm Gopi Ram-Ramchand—Defendants—Respondents.

Civil Rev. Petition No. 808 of 1922, Decided on 9th May 1923, from the order of the Senior Subordinate Judge, Ferozepore, D/- 1st August 1922.

C. P. Code, S. 115—Wrong order in appeal from refusal to set aside ex parte *decree is revisable.*

Where a District Judge on appeal against an order refusing to set aside an *ex parte* decree, has misunderstood and misapplied the law, he has committed a material irregularity in the exercise of his jurisdiction, and his order is open to revision by the High Court.

[P. 604, C. 1]

Faqir Chand—for Petitioners.

Gobind Ram Khanna — for Respondents.

Judgment.—The preliminary objection is raised that there should be no interference in revision since an erroneous order setting aside a decree *ex parte* can be attacked in appeal against any subsequent decree that might be passed. This objection is effectively disposed of by three rulings of the Punjab Chief Court, *Manohar Lal* v. *Sadiqa Begam* (1), *Fazal* v. *Hashmati* (2) and *Sughru Mal-Harcharan Das* v. *Sham Lal-Gokal Chand* (3).

In the first case a Division Bench ruled that in an application to have an *ex parte* decree set aside where the lower Court fails to determine an essential point of limitation the omission amounts to a material irregularity and a revision is competent.

In *Fazal* v. *Hashmati* (2) it was held by a Single Judge that an error made by a Court in setting aside an *ex parte* decree is not an error affecting the decision of the case within the meaning of S. 105 of the Code of Civil Procedure.

(1) [1916] 101 P.R. 1916—37 I.C. 892—202 P.W.R. 1916.
(2) [1916] 40 P.R. 1916—31 I.C. 914—133 P.W.R. 1916.
(3) [1918] 146 P.W.R. 1918—46 I.C. 777.

In *Sughru Mal-Harcharan Das* v. *Sham Lal Gokal Chand* (3) it was ruled, also by a Single Judge, that in an application to set aside an *ex parte* decree the burden of proving want of knowledge of the decree within 30 days of the application is on the applicant and where a District Judge on appeal against an order refusing to set aside an *ex parte* decree has misunderstood and misapplied the law he has committed a material irregularity in the exercise of his jurisdiction.

The history of the present case is as follows :--An *ex parte* decree was passed on the 30th of August 1921. The judgment-debtors, Gopi Ram-Ram Chand, applied on the 13th of February 1922 for an order setting aside the *ex parte* decree, alleging that they had become aware of the decree two or three days before the date of their application. The application was not supported by affidavit. Notice was issued to the decree-holders who appeared on the 16th of March 1922 and the 31st of March 1922 was fixed for the evidence of the applicants. On the 31st of March 1922 the applicants' Counsel stated that he had no evidence to produce

The First Court dismissed the application holding, *inter alia*, that it was barred by time. Appeal was made to the Senior Subordinate Judge who reversed the decision of the lower Court and set aside the *ex parte* decree. The learned Senior Subordinate Judge decided that the defendants had not been served with summons for the suit as required by law. He did not touch the question of whether the application to set aside the *ex parte* decree had been presented in time.

Obviously, he was wrong and, obviously, the defendants who made no affidavit and produced no evidence, have failed to discharge the onus which lay upon them of establishing that their application was within time. Furthermore, there is indication that they did have knowledge of the suit, if not of the decree. On the 26th of August 1921 on the application of the plaintiffs a telegram was sent to the defendants directing them to appear in Court on the 30th of August. The fact of this telegram being sent and received was not denied by the defendant in his grounds of appeal to the lower appellate Court He mentioned it as having been sent and complained that the order contained in it was not warranted and was illegal.

I accept the petition, set aside the order of the lower appellate Court and dismiss with costs throughout the petition for setting aside the *ex parte* order.

Petition allowed.

✱ 1924 LAHORE 604

CAMPBELL, J.

Firm Mul Chand-Hut Chand—Decree-Holders—Petitioners.

v.

Firm Ganda Mal-Rallia Ram and another—Judgment-Debtors—Respondents.

Civil Rev. Petition No. 21 of 1922 Decided on 2nd February 1923, from an order of the District Judge, Amritsar, D/- 1st August 1921.

C. P. Code, S, 47—Order declaring decree executable against property only of judgment-debtor is a decree.

Order declaring that a decree-holder can proceed against the property but not against the person of the judgment-debtor is a decree as it conclusively determines the right of the parties with regard to one of the matters for determination under S. 47, that is to say, the personal liability of the judgment-debtors to satisfy that decree. [P. 605, C. 1]

Jai Gopal Sethi—for Petitioner.

Badri Das and *Nanak Chand for Sunder Das*-for Respondent.

Judgment.—The preliminary objection is taken that no revision lies in this case since a second appeal would lie. The objection must be sustained.

The facts are these. In execution of a decree a warrant of arrest was issued against Sant Ram, one of the judgment-debtors. This warrant was not executed and was re-called. The judgment-debtor presented an application under S 47, Civil Procedure Code, that his person was not liable for the decree. The First Court held that the decree could not be executed at all against the judgment-debtors who are the firm Ganda Mal-Rallia

Ram of which Sant Ram is one of the proprietors. The decree-holders appealed, stating their appeal to be under S. 47. The lower Appellate Court held that the decree-holders could proceed against the property but not against the persons of the judgment-debtors.

There is no doubt that this order of the lower Appellate Court falls within the definition of a decree given in S. 2 (2) of the Code of Civil Procedure. It conclusively determines the right of the parties with regard to one of the matters for determination under S. 47, that is to say, the personal liability of the judgment-debtors to satisfy that decree.

The learned Counsel for the petitioners has asked me to convert the revision into an appeal. One very strong reason stands in the way of my doing so, namely, that as an appeal the petition would be hopelessly out of time and, if it had been filed as a second appeal, thare are no possible grounds on which time could have been extended. The lower appellate Court sits at Amritsar. Its judgment was delivered on the 1st of August 1921. Three days only were spent in obtaining copies-the 1st to 3rd October—and the petition for revision was not presented to this Court until the 30th of November 1921. The only explanation forthcoming for the delay is that the petitioners were advised that a revision application was competent; but there was no reason why the revision application should not have been put in in October and they have shown no such diligence as to entitle them to what would be a very substantial concession at the expense of the other side.

The petition fails and is dismissed with costs.

Petition dismissed.

✱ 1924 LAHORE 605

SCOTT-SMITH, J.

Bhika—Convict—Appellant.

v.

King Emperor—Opposite Party.

Criminal Appeal No. 648 of 1922, Decided on 6th November 1922, from an order of the Magistrate First Class, Ambala, D/-5th July 1922.

✱ *Criminal P. C., S. 512—Evidence recorded during absence of accused can't be used—Where witness is unable to remember details of occurrence but his memory can be refreshed under Evidence Act, S. 159.*

A deposition recorded under S. 513 can only be given in evidence if the deponent is dead or is incapable of giving evidence or his attendance cannot be procured without an unreasonable amount of delay, expense or inconvenience. The mere fact that he is unable to remember the details of the occurrence does not render him incapable of giving evidence within the meaning of the section and his previous deposition cannot be put in evidence against the accused person. The proper procedure in such a case is to read out his previous deposition to the witness under the provisions of S. 159 of the Evidence Act to refresh his memory and then to ask him whether he remembers the details of the occurrence. [P 606, C 1 & 2]

Anant Ram—for Appellant.

Des Raj Sawhney — for Opposite Party.

Judgment.— Bhika appeals through Counsel from the order of a Magistrate invested with S. 30 powers convicting him of the attempted murder of Mt. Faizan under S. 307, Indian Penal Code, and sentencing him to seven years' rigorous imprisonment.

The occurrence took place so long ago as the 30th October 1911. The appellant absconded soon afterwards and evidence was recorded by Mr. Seymour in his absence under the provisons of S. 512, Criminal Procedure Code. The witnesses examined by Mr. Seymour were *Mt.* Faizan, *Mt.* Goman, Mughal and Dr. Ghose The same witnesses have been examined now. *Mt.* Faizan in her deposition before the lower Court stated that she and the appellant, had quarrelled over something, which she did not remember. The appellant beat her and then went away. The statement previously recorded by Mr. Seymour under S. 512, Criminal Pro-

cedure Code, was then read out to her and she admitted it to be correct. Mt. Goman said, that she did not remember anything at all. The Magistrate then read out her previous statement which she admitted to be correct. The Magistrate admitted the statements of these two women as evidence under the provisions of S. 512, Criminal Procedure Code. He did not admit the previous statement of Mughal, because the latter denied that he had been examined at all by Mr. Seymour and said that he knew nothing about the alleged occurrence.

Now, under S. 512 Criminal Procedure Code, a deposition recorded thereunder may, on the arrest of the absconding person, be given in evidence against him on his trial for the offence with which he is charged if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable. In the present case the witnesses examined under S. 512, Criminal Procedure Code were not dead and actually appeared in Court, and, therefore, the only point to be considered is, whether they were incapable of giving evidence. The learned Magistrate was of opinion that, because they could not remember the details of the occurrence to which they previously deposed, they should be considered as incapable of giving evidence. In my opinion, this is not a meaning which can be attached to the words in question. If a witness had become dumb or insane he could very properly be said to be incapable of giving evidence. But in the present case the witnesses were actually produced in Court, and did give evidence and replied to the questions put to them in cross-examination. When they did this, I fail to see how they can be said to be incapable of giving evidence.

Mr. Anant Ram contends that it was improper for the Magistrate to read out their previous statements and treat them as substantive evidence in the case. In my opinion, his argument is a sound one. What the Magistrate could have done was to refresh the memory of the witnesses by reading out their depositions to them under the provisions of S. 159 of the Indian Evidence Act. He should, then, after doing this, have asked them whether they remembered the details of the occurrence in question. This he did not do. I hold that his procedure was faulty and that the previous statements recorded by Mr. Seymour cannot be admitted as evidence against the appellant.

On the merits of the case I do not think the Magistrate was justified in convicting the appellant of attempted murder under S. 307, Indian Penal Code. The injuries that are said to have been inflicted by a razor were on the woman's neck and fingers and were very trivial. It appears to me quite possible that the appellant only intended to cause simple hurt to *Mt.* Faizn or at most to disfigure her. He has already suffered four months, imprisonment out of the sentence imposed upon him and, under the circumstances of the case, I do not think it necessary to order a re-trial.

I accept the appeal and setting aside the order of the lower Court order that the appellant be discharged and released from custody.

Conviction set aside.

1924 LAHORE 606

CAMPBELL, J.

Desu—Defendant—Appellant.

v.

Chuhar Singh and others—Plaintiff & Defendants—Respondents.

S. A. No. 482 of 1922, Decided on 6th January 1923 from the decree of the District Judge, Amritsar, D/- 21st November 1921.

Punjab Tenancy Act, S. 5 (1) (d)—Jagirdar includes maufidar—By occupation for 20 years without service he becomes occupancy tenant.

Where a person continuously has occupied the land in suit for more than 20 years as maufidar without condition of service he can not be ejected at the mere pleasure of the proprietors or because he is a minor.

[P 607, C 2 & P 608, C 1]

Faqir Chand—for Appellant.

M. Obedulla—for Respondents.

Judgment.—This suit was lodged by Chuhar Singh, one of the owners of Mauza Dogri, Amritsar District, for a declaration that one Desu, a recorded muafidar of 60 kenals 2 marlas of land had no concern with that land. The necessary permission under Act XXIII of 1871, was obtained by the plaintiff. The suit was tried by an Assistant Collector and his order dismissing the suit was registered by order of this Court as a decree of a Civil Court. On appeal the learned District Judge reversed the finding and granted the plaintiff the decree prayed for. A second appeal has been preferred by Desu.

The first objection argued on his behalf is that the plaintiff could have sought further relief than a mere declaration and, therefore, could not obtain a declaratory decree under S. 42 of the Specific Relief Act. This contention has undoubted force. Desu pleaded in the Trial Court that he was in possession of the land in suit. The question whether he was in possession was put in issue and decided in the affirmative. The decision on this point was not specifically challenged in the plaintiff's appeal to the lower Appellate Court. The object of the suit is clearly to put an end to any connection between Desu and the land in suit and there is no explanation of why the plaintiff did not or could not ask for a decree for possession or dispossession. The dismissal of the suit by the First Court, it should be noted, proceeded on other grounds, namely, that Desu was an occupancy tenant.

It is claimed in second appeal that this finding was correct and it appears to be so. There was no evidence produced in the suit except copies of the Revenue Records. These show that the muafi of the land in suit was first granted in 1853 to one Gopal Das for so long as a certain dharamsala existed. Subsequently, the grant was renewed in perpetuity by a letter of the Government of India dated the 20th October 1858. Later on, in 1890-91, it was noted in the records that good character was a condition of holding the muafi. In 1887 and 1890 Buta Ram, muafidar, is alluded to as khidmatguzar of the dharamsala. He was the great-grand-father of Desu. The learned District Judge considered that the land in suit nad been dedicated to the dharamsala and for the maintenance of the person in charge thereof, and that there were no permanent rights in the land but only temporary rights belonging to that person, who was for the time being khidmatguzar of the dharamsala. He found that Desu was a minor, and, therefore, unable to perform the necessary services as khidmatguzar and that the village proprietors were entitled to make any arrangements for that work which they pleased and to place any other person in possession of the land whom they might select for the purpose.

These findings are scarcely supported by the copies of the Revenue Records on the record, which certainly do not indicate that Desu can be evicted at will by the village proprietors. The land, it is true, is part of the shamilat deh, but since 1887 at least, when Buta Ram, Desu's great grand-father, is recorded as in possession, Desu and his fore fathers have held uninterrupted possession as muafidars without any recorded condition of service whatsoever. The muafi, as already stated, is recorded as perpetual and in 1865 the proprietors apparently declared that they would never disturb the then incumbent. This 1865 entry makes it quite clear that the muafidar was not a village servant of the character of the holder of a small assignment in lieu of services who was the subject of the decision in *Sohna* v. *Khawaja* (1) on which Counsel for the plaintiff-respondent relies. It has been ruled several times that the word "jagirdar" in S. 5 (*i*) (*ii*) of the Punjab Tenancy Act includes *muafidar*, *e. g.*, *Jodh Singh* v. *Kishen Singh* (2); *Lahna Singh* v. *Hira Singh* (3); *Ganda* v. *Ganpat Rai* (4) and *Dogar Mal* v. *Secretary of State* (5), and it is clearly proved that Desu and his predecessors

(1) [1915] 4 P. R. 1915 Rev—31 I. C. 238—5 P. W. R. 1915 Rev.
(2) [1896] 8 P. R. 1896 Rev.
(3) [1897] 1P. R. 1897 Rev.
(4) [1897] 2 P. R, 1897 Rev.
(5) [1904] 4 P. R, 1904 Rev.—82 P, L, R, 1904 Rev.

in-interest have continuously occupied the land in suit for more than 20 years. In these circumstances, he cannot be ejected at the mere pleasure of the proprietors or because he is a minor.

I accept the appeal, set aside the decree of the lower Appellate Court and restore the order of the First Court dismissing the suit. The plaintiff-respondent will pay the appellant's costs throughout.

Appeal accepted

✱ 1924 LAHORE 608

ABDUL RAOOF, J.

Muhammad Bakhsh and another — Plaintiffs—Appellants.

v

Malik Musa and another— Defendants—Respondents.

S. A. No. 670 of 1922, Decided on 31st October 1922, from a decree of the District Judge, Multan, D/- 13th December 1921.

✱ *Civil P. C. O,. 7, r. 18—Failure of plaintiff to produce document does not attract the operation of O. 17 R. 3—C. P. C., O. 17 R. 3.*

The provisions of O. XVII, r. 3 of the Code are not applicable to non-production of a document which ought to be produced in Court by the plaintiff when the plaint is presented. [P 608 C 1]

Hargopal—for Appellants.

Judgment.—This was a suit for pre-emption. The plaint was presented on the 24th of February 1921. The details of the land in suit were given in the plaint. A copy of the sale-deed containing the details of the land was also filed with the plaint The revenue papers were, however, not filed. The Court made the following orders— *Paroha patwari shamil nahin hai, Peshi ainda par pesh ho, i. e.*, revenue papers are not filed let them be produced at the next hearing. The 24th of March 1921 was then fixed for hearing. On that date the plaintiff produced the *jamabandi* of the land in suit. The Settlement Entries as required by Rule III, clause 2, printed at page 13 of the instructions relating to the practice in the trial of the civil suits, were, however, not filed. The Trial Court, therefore, on this date made an order rejecting the plaint. Against this order an appeal was preferred to the lower Appellate Court and the learned Judge of that Court dismissed the appeal.

The plaintiff has come up in second appeal to this Court and it has been contended by Mr. Hargopal on his behalf that the order of the rejection of the plaint was not justified under the circumstances of this case. His contention is that O. 17, R. 3 was inapplicable to this case inasmuch as the time had not been granted to the plaintiff on his application to produce the Settlement entries. He has further contended that the order is not justified even under the provisions of O. 7, r. 11, because, according to this rule, the Court is bound to reject the plaint upon the grounds mentioned in clauses (*a*), (*b*), (*c*) and (*d*) and that the present case was not covered by any of those clauses. The penalty provided for non-production of a document which ought to be produced in Court by the plaintiff when the plaint is presented is to be found in r. 18 of O. 7. In my opinion there is force in the contentions put forward by the learned Counsel. In the first place, I am of opinion that O. 17, r. 3, was not applicable, and, even if it was, the Court was not justified in rejecting the plaint, but it was its duty to have proceeded to decide the suit what it was. Of course, the plaintiff will not be entitled to put in the revenue entries without the leave of the Court as contemplated by r. 18, O. 7. I am supported in this view by the decision in *Murli Dhar Kanshi Ram* v. *Narain Das* (1).

In view of the above remarks, I must accept the appeal and setting aside the order of the Court below remand the case to the Court of first instance through the Appellate Court with the direction that it be placed upon its original number in the register of pending suits and be disposed of according to law. I order accordingly. Costs will abide the result.

Appeal allowed.

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(1) [1913] 169 P.L.R. 1913—19 I.C. 472—107 P.W.R. 1913.

✱ 1924 LAHORE 609.

SCOTT-SMITH AND FFORDE, JJ.

Mam Chand—Appellant.

v.

The Crown—Respondent.

Cr. Appeal No. 54 of 1924, Decided on 8th May 1924 from the order of the Sessions Judge, Hissar, D/- 14th December 1923.

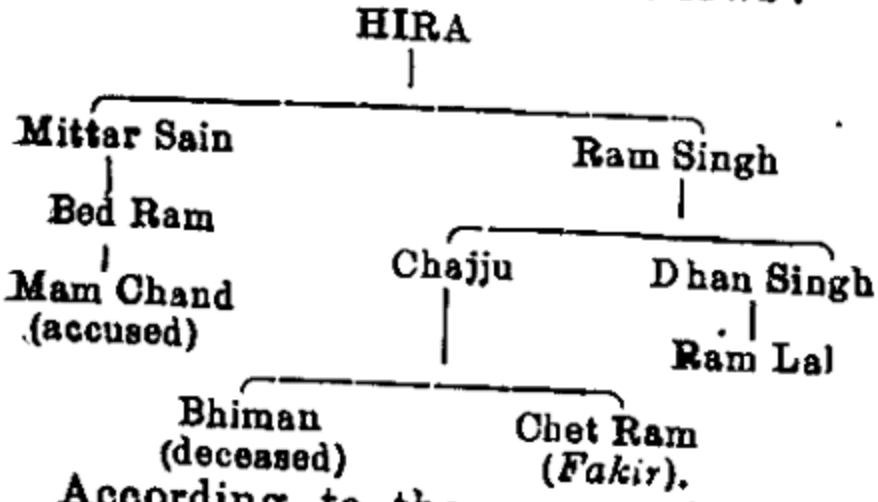
✱ *Evidence Act, S.* 157—*Evidence before Committing Magistrate may be corroborated by statement during police investigation—Criminal P. C., S.* 288.

The object and effect of section 288 of the Criminal Procedure Code is to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court. Such a deposition is "testimony" within the meaning of section 157 of the Evidence Act, which, a prior statement by the witness during the police investigation is admissible in evidence to corroborate. 1923 Mad. 20 and 27 Cal. 295 Foll. [P. 610, C. 1 & 2]

Nanwan Mal—for Appellant.

Public Prosecutor—for Respondent.

Scott-Smith, J.—Mam Chand, appellant, has been convicted by the Sessions Judge of Hissar of the murder of Bhiman, his cousin, on or about the night of the 13th February 1922, and has been sentenced to death. The pedigree-table from which the relationship of the appellant to the deceased will appear is as follows:—



According to the prosecution, the motive for the murder was to get possession of Ram Lal's land which was in the possession of Bhiman. Ram Lal shortly before his death made a gift of 7½ *bighas* of land to Mam Chand, but died before mutation was effected. Bhiman appeared and claimed the land as Ram Lal's heir and mutation was effected in his favour. According to the evidence Mam Chand did not contest the mutation in Bhiman's favour, and the two of them lived quite happily together in Mam Chand's house. I therefore agree with the learned Sessions Judge that there is no clear evidence in this case of any motive for the murder on the part of Mam Chand. It appears from the evidence of Ram Chandar, *lambardar* (P.W. 5), that when Bhiman did not appear in the village for 2 or 3 days, he asked Mam Chand where Bhiman had gone to. Mam Chand said that he had gone to Delhi to see the *jalsa* there. A few days later people returned from the *jalsa*, but Bhiman did not come back. The witness again asked Mam Chand who replied that Bhiman might have gone to see his brother Chet Ram who is a *bairagi* and lives in Jasana. No trace of him was found there, and shortly afterwards Mam Chand disappeared from the village. The *lambardar* then on the 28th February reported the disappearance of Bhiman at the police station. On the 1st March the Sub-Inspector came to the village and was told by *Mussammat* Nihali (P. W. 2), the wife of Mam Chand, that her husband had killed Bhiman and buried him inside the *kotha*. The Sub-Inspector sent information of this to the Sub-Divisional Magistrate of Palwal, and on the 3rd March the latter together with the Civil Surgeon came to the village, and the place pointed out by *Mussammat* Nihali was dug up and the corpse of Bhiman was discovered buried there. There were numerous wounds on the body which indicated that he had been killed with blows of a sharp-edged weapon. A search was made for Mam Chand who could not be found, and he was not arrested until the 9th September 1923 on which day he presented a complaint (Exhibit P. S.) (page 8 of the paper-book) in the Court of the District Magistrate Gurgaon, in which he accused Ram Chandar and others of the murder of Bhiman.

The chief witness for the prosecution is *Mussammat* Nihali. In her statement (Exhibit P. N.) (page 9 of the paper-book) made before the Committing Magistrate, she at first said that she did not know anything about the death of Bhiman, though she admitted that his corpse was recovered from the corner of his house. When further questioned she admitted that

her husband had killed Bhiman with a *gandasa* and had then buried the body in the *kotha*. She resiled from this statement at the trial, and the statement made by her before the Committing Magistrate was put in evidence under the provisions of section 288 of the Criminal Procedure Code. In order to corroborate this statement, a statement made by her before the police (Exhibit P. F.) (printed on pages 4 and 5 of the paper-book) was proved and put in evidence. A preliminary question arises whether it was admissible to prove the statement (Exhibit P. F.) in order to corroborate that made by the witness before the Committing Magistrate and transferred under the provisions of section 288 of the Criminal Procedure Code. Section 157 of the Indian Evidence Act says that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. Now, it is not denied that the statement (Exhibit P. F.) might be proved in order to corroborate the testimony of *Mussammat* Nihali, but the question is whether the statement of *Mussammat* Nihali transferred under section 288 of the Criminal Procedure Code is the "testimony" of a witness within the meaning of section 157 of the Evidence Act. Section 288, Criminal Procedure Code, lays down that the evidence of a witness duly taken in the presence of the accused before the Committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined be treated as evidence in the case. It was held by a Division Bench of the Madras High Court in the case of *Velliah Kone* v. *Emperor* (1), that the object and effect of section 288 of the Criminal Procedure Code is to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court, and that such a deposition is "testimony" within the meaning of section 157 of the Evidence Act, which a prior statement by the witness is admissible in evidence to corroborate. I agree fully with the decision in that case and would hold that the evidence of the witness *Mussammat* Nihali recorded before the Committing Magistrate is, by the operation of section 288 of the Criminal Procedure Code, just as much evidence in the case as that recorded at the trial in the Sessions Court and is, therefore, "testimony" within the meaning of section 157 of the Indian Evidence Act. A Division Bench of the Calcutta High Court in the case of *Queen-Empress* v. *Jadub Das* (2), said that it had been long settled by the decisions of that Court that unless there was something to show the truth of the former statement it should not be preferred to the statement made subsequently in the Sessions Court, that is to say, there should be something to corroborate that statement on some material point. I do not see in what better way the statement made by *Mussammat* Nihali in the Committing Magistrate's Court can be shown to be correct than by the proof of a former statement made by her to the same effect. The part of the statement (Exhibit P. F.) on page 5, lines 31 to 49 of the paper-book, corroborates the statement made by her before the Committing Magistrate, printed at page 9, lines 26 to 40. No doubt the evidence of such a witness must be received with great caution, and probably it would not be safe to base a conviction upon it unless it were corroborated by other evidence. It is clear from the evidence of the doctor that there was blood on the walls of Mam Chand's house in which the body was found buried. It is also proved that Mam Chand falsely stated that Bhiman had gone away to Delhi. It is further proved that a few days later Mam Chand absconded from the village and was not seen again for more than 18 months. He and Bhiman were living together in the house where Bhiman's dead body was found buried, and it cannot be believed that Bhiman could have been

(1) 1923 Mad. 20—45 Mad. 766—43 M. L. J. 222—16 M. L. W. 239—(1922) M. W. N. 506—31 M. L. T. 175—24 Cr. L. J. 417.

(2) [1899] 27 Cal. 295—4 C. W. N. 129.

murdered and his body buried there without Mam Chand being privy to it.

I, therefore, consider that there is ample evidence in this case on which to base the conviction of Mam Chand for the murder of Bhiman, and I would accordingly dismiss the appeal and confirm the sentence of death.

Fforde, J.—I agree.

Appeal dismissed.

1924 LAHORE 611

BROADWAY AND CAMPBELL, JJ.

Thakar Das, etc.—Defendants—Appellants.

v.

Mt. Putli—Plaintiff—Respondent

F. A. No. 385 of 1920, Decided on 24th March 1924, from the decree of the Senior Subordinate Judge, Delhi, D/-3rd January 1920.

(a) *Guardian and minor—Sale in favour of minor can be upheld.*

A sale in favour of a minor can be enforced, especially when the consideration for the sale had been paid in full to the vendor, as, after that the minor is under no further obligation to any one. 30 C. 539 P. C. Dist. 40 M. 308 F. B. Foll. [P 612 C 2 P 613 C 1]

(b) *Hindu Law—Joint Family—Manager can't bind others by acknowledging time-barred debts—Limitation Act S. 19.*

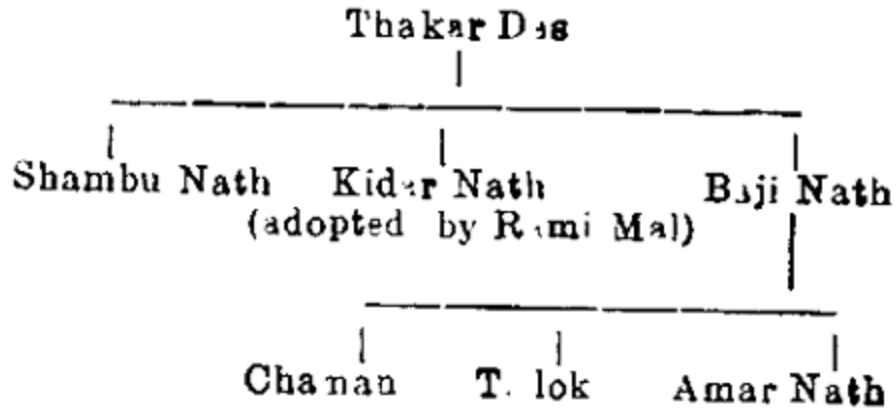
A Hindu Manager can bind himself in an acknowledgment of a time-barred debt but he cannot bind his co-parceners. [P 613 C 2]

Sheo Narain and Dalip Singh—for Appellants.

Tek Chand and Mehr Chand Mahajan—for Respondent.

Broadway, J.—The suit out of which this appeal has arisen was instituted by *Mt.* Putli, a minor, acting through her husband, Sat Narain. She claimed from the defendants a sum of Rs. 5,127. During the pendency of the suit she attained majority and, at her instance, her next friend was discharged and she was allowed to proceed with the suit in her own name.

The following pedigree-table will show the relationship between the defendants:—



One Ram Rachhpal was also made a defendant. He is connected with Kidar Nath through Kidar Nath's adoptive father. The suit as against Ram Rachhpal was dismissed as being barred by time. As against the other defendants, the plaintiff's claim was decreed. The trial Court, apparently through an oversight, did not allow interest from date of suit to date of realisation, and refused to allow the plaintiff's costs. Against this decree the defendants have preferred this appeal. Ram Rachhpal was made one of the appellants, although the suit as against him had been dismissed. The plaintiff filed cross objections through Mr. Tek Chand, claiming interest from date of institution of the suit till date of decree and costs.

The facts are given and discussed at great length in the judgment of the trial Court, and it is only necessary to state them briefly here. It appears that in 1907 Kidar Nath was concerned in certain litigation with one Nathu Mal. It became necessary for Kidar Nath to prefer an appeal to the Privy Council and he was called upon to deposit Rs. 4,000 or security to that extent in connection with that appeal. His natural father Thakar Das was in the employ of Rai Bahadur Lala Sri Kishen Das as his Head Clerk. He asked Rai Bahadur Lala Sri Kishen Das for assistance. Ultimately he, Kidar Nath, Shambu Nath, Baij Nath and Ram Rachhpal are said to have gone together to Rai Bahadur Lala Sri Kishen Das and asked him to arrange for this Rs. 4,000. Out of consideration for his employee Rai Bahadur Lala Sri Kishen Das agreed, and it appears that a fixed deposit to the extent of Rs. 4,000 with the Allahabad Bank was tendered to the Chief Court. The fixed deposit was refused and ultimately Government Promi

sory Notes of the face value of Rs. 4,000 were acquired and deposited with the Registrar of the Chief Court. Kidar Nath lost his appeal in the Privy Council. In the meantime on the 26th of September 1913 Rai Bahadur Lala Sri Kishen Das was adjudicated an insolvent by the High Court of Bombay, and the official assignee took possession of his estate including all outstandings. The official assignee transferred the out standings, including the present claim to one Chhabil Das, the necessary assignments being drawn up. Chhabil Das in his turn transferred the present claim to *Mt.* Putli, then a minor, under a deed dated the 2nd of November 1917. On the basis of this assignment *Mt.* Putli sought to recover the amount.

The suit was filed on the 1st of December 1917. It has been shown that the debt sought to be recovered was incurred on the 18th February 1907. The defendants set up various pleas, one of these being that the assignment to Chhabil Das by the official assignee was invalid, and another being that the suit was barred by limitation. The plea of limitation rested on the assertion by the defendant that the transaction sued upon was not a loan made by Rai Bahadur Lala Sri Kishen Das, but was really one by which Rai Bahadur Lala Sri Kishen Das became a surety to the extent of Rs. 4.000 for Kidar Nath. It was contended therefore that the claim really was by a surety against his principal and was governed by Article 81 which provides a limitation of three years. It was admitted by Mr. Tek Chand that if this plea of the defendants was correct the suit was barred. He contended, however, that the transaction was really a loan, and that therefore the suit was governed by the six years' rule and was within time owing to the payment of interest by Kidar Nath and Thakar Das, the payment by Thakar Das being binding on Shambu Nath and Baij Nath, and further, that Thakar Das had admitted his liability in two letters Exhibits P-1 and P-2, dated respectively 22nd and 27th February, 1913.

Although Mr. Sheo Narain for the appellants devoted most of his time to an endeavour to show that the transaction was really as alleged by the defendants, at the conclusion of his address he advanced a contention which, if given effect to, would conclude the case in his favour. This contention was that inasmuch as *Mt.* Putli was a minor on the 2nd of November 1917 when the assignment of the debt was executed by Chhabil Das in her favour, the contract evidenced by that assignment was void and could not be made the basis of a suit. In support of his contention he referred to *Mohori Bibee* v. *Dharmodas Ghose* (1). On the other hand, Mr. Tek Chand pointed out that this was an entirely new point, not raised in the written statement, and urged that Mr. Sheo Narain should not be allowed to take it at this late stage. He contended that had this plea been advanced at the outset it could have been proved that the negotiations had been carried out on her behalf by her husband. He drew attention to Sat Narain's statement at page 55, line 30, to the effect that he had acted for *Mt.* Putli in the matter. He further contended that *Mohori Bibee* v. *Dharmodas Ghose* (1) was distinguishable as it dealt with a transfer by a minor, that the suit which was decided by their Lordships of the Judicial Committee was one between the parties to the contract; and that in that suit it was sought to enforce an obli ation entered into by a minor. The question whether a minor could purchase property and could enforce an obligation entered into in his favour was not before the Privy Council. In *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2) it was held by a Full Bench that a mortgage in favour of a minor was enforceable by the minor, and the view was also expressed that in the same way a sale in favour of a minor could be enforced. This view is in consonance with *Mumi Koer* v. *Madan Gopal* (3), *Narain Das* v. *Mt.*

(1) [1902] 30 Cal. 539—30 I.A. 114—7 C.W.N. 441—5 Bom. L. R. 421—8 Sar 374 (P. C.)
(2) [1916] 40 Mad 308—31 M. L. J. 575—20 M. L. T. 407—36 I. C. 921—(1916) 2 M. W. N. 363. (F. B.)
(3) [1916] 38 All. 62—31 I. C. 792—13 A.L.J. 1084

Dhania (4), *Ulfat Rai* v. *Gauri Shankar* (5) and *Bahaludddin* v. *Rafaqat Husain* (6). In my opinion Mr. Tek Chand's contention is correct. The assignment was by Chhabil Das in favour of *Mt.* Putli. The consideration for the assignment had been paid in full to the assignor. The minor was therefore under no further obligation to anyone, and I am unable to see any reason why a minor in such circumstances is precluded from suing on such a contract. I am supported in this view by *Steinberg* v. *Scala* (*Leeds*) *Ld.* (7).

[The Court then discussed the evidence as to the nature of the transaction and came to the conclusion that the transaction was a loan].

It was admitted by Mr. Sheo Narain that in the event of the transaction being found to be a loan, the suit as against Thakar Das and Kidar Nath was within limitation. He, however, contended that any payment of interest or any acknowledgment made by Thakar Das could only be binding on him in order to save limitation, and on his sons, as members of a joint Hindu family, only if the payments of interest made by him had been paid as such, within the meaning of section 20. A reference to the account books shows that at the outset the payments made amounted to the interest due. The last payment was a little short of the actual interest, the shortage being Re. 1 odd. Having regard to the previous nature of the payments I am of opinion that all these payments of interest, whether made by Thakar Das or through him, were intended to be payments of interest as such within the meaning of the section, and that therefore these payments bring the suit within limitation as against all the appellants.

Further I think Mr. Tek Chand's contention is correct that Thakar Das could, as head of the joint Hindu family, acknowledge the debt on behalf of the joint Hindu family and did so acknowledge the debt in his letters dated the 22nd February 1913 and the 27th February 1913, Exhibits P-1 and P-2. It is true that while he could bind himself in an acknowledgment of a time-barred debt, he could not bind his coparceners. When these letters were written however, having regard to the payments of interest already made by him, the claim was within time, and these letters therefore must be regarded as acknowledgments binding not only on Thakar Das but on the other members of the joint Hindu family of which he was the head. In this view of the case the appeal fails and is dismissed with costs.

Turning to the cross-objections, no real reason has been assigned by the Court below for disallowing costs. The defendants certainly are not entitled to any sympathy. The interest claimed is from the date of institution till the date of decree. Such interest is usually allowed, and the omission to do so in this case appears to be due to an oversight. I would therefore accept the cross-objections and modify the decree of the Court below by adding to it interest from date of institution to date of decree and allow the plaintiff her costs in the Court below.

Campbell J.—I agree.

Appeal dismissed.

Cross-objection accepted.

(4) [1916] 38 All. 154—35 I.C. 23—14 A.L.J. 65

(5) [1911] 33 All. 657—11 I. C. 20—8 A.L. J. 670.

(6) [1913] 18 I. C. 451.

) [1923] 92 L. J. R. 944.

1924 LAHORE 613

SHADI LAL, C. J. AND LE ROSSIGNAL, J.

Sewaram and another—Defendants—Appellants.

v.

Azimkhan—Plaintiff—Respondent.

L. P. Appeal Case No. 71 of 1923, Decided on 17th December 1923, from the decree and Judgment of Abdul Raoof, J. in Civil Appeal No. 1559 of 1922, D/-30th January 1923.

Pre-emption– Pre-emptor must possess the qualifications entitling him to pre-empt upto date of suit.

To sustain a claim for pre-emption the plaintiff must prove not only that at the time of the sale he possessed the qualifications which conferred upon him the right to pre-empt the property, but also that those qualifications subsisted at the time when the suit was brought- 91 P R. 1909; 95 P. R. 1901; 32 P. R. 1902; 43 P. R. 1915; 44 Cal. 47 Foll.

[P. 614, C. 2.]

Lala Jagan Nath Vakil—for Appellants.

Judgment.—The facts which are relevant to the question of law arising in this appeal, are simple and do not admit of any dispute. The plaintiff claims to pre-empt a plot of agricultural land situate in Mauza Shahani in the Mianwali District, and there can be no doubt that he was an *ala malik* in the village on the date on which the sale was effected in favour of the defendants. It is however, incontrovertible that after the sale he lost his proprietary rights, and that on the date of the institution of the suit he was no longer a proprietor in the village.

On these facts we have no hesitation in holding that the plaintiff is not entitled to pre-empt the property. It has been repeatedly held that in order to sustain a claim for pre-emption the plaintiff must prove, not only that at the time of the sale he possessed the qualifications which conferred upon him the right to pre-empt the property, but also that those qualifications subsisted at the time when the suit was brought. It must be remembered that we are dealing here with a case in which the plaintiff has lost the qualification which alone gave him the right to bring his action for pre-emption and that we are not called upon to determine the question whether a vendee, who has improved the position after the date of the sale can defeat the claim of a plaintiff who has continued to retain the qualifications which he possessed at the time of the sale.

The Allahabad High Court has consistently adhered to the principle that, in order to succeed in a suit for pre-emption, the plaintiff must show not only that the sale gave him a cause of action, but that the cause of action still subsisted at the date of the institution of the suit *vide inter alia Janki Parshad* v. *Ishar Das* (1). The learned Judge against whose judgment this appeal has been preferred, has however, sought to distinguish that case on the ground that, while in the province of Agra the right of pre-emption is based upon the rule of justice, equity and good conscience, and the principles derived from Muhammadan Law are freely applied to pre-emption cases in that province, the law in the Punjab is contained in a statute of the Legislature, and that those principles are not applicable to cases arising in this province. In support of this distinction the learned Judge has referred to certain observations made by Mr. Justice Shah Din in his judgment in 91 P. R. 1909, but it must be pointed out that that case dealt with the question whether the vendee could defeat the plaintiff's claim by improving his status after the date of the sale, and that the observations were purely *obiter dicta*. Indeed Mr. Justice Shah Din himself in the earlier portion of his judgment fully recognised the validity of the rule that a plaintiff cannot succeed in a suit for preemption, if he loses the property on the strength of which he based his right of pre-emption. This is apparent from the following extract from that judgment:—

"There is, it seems to me, a clear distinction between the position of a pre-emptor seeking to enforce his right of pre-emption by virtue of his possessing certain definite advantages because of his special connection with a particular kind of property, the subject of a sale, and that of a vendee of that property who at the time of the sale possesses no such advantages. The former it is said (on grounds which I shall presently examine) must continue down to the date of the decree in his favour to occupy the privileged position with regard to the property in suit by virtue of which he was at the date of sale entitled to claim pre-emption, and it is considered inequitable to permit him to enforce his rights if, prior to decree he loses the advantage of that position by reason of a material change in his connection with the very property, the ownership of which conferred that advantage upon him. The latter on the other hand, possessed at the date of sale no rights of any kind based upon any ownership of property and obviously started with no valid ground of defence to the pre-emptor's superior

(1) [1899] 21 All. 374—(1899) A. W. N. 126 (F.]

claims and that being so, how can it be said that, though the pre-emptor's position remains absolutely unchanged both as regards his own property and the property in suit, the vendee, by acquiring before decree other property of which he was not an owner at the date of sale, improves his position, *qua* the property in suit, so as to make the pre-emptor lose the right which he undoubtedly possessed at the time of sale and even at the date of the institution of the suit. The pre-emptor's position obviously neither improves nor deteriorates if after the sale he acquires or parts with any property other than the property by virtue of which he had a right of pre-emption at the date of sale, it is only if he loses the latter property, that is to say the property by virtue of which he claims pre-emption, that it has been ruled that this right of pre-emption is lost.

The other learned judges, who dealt with the case reported as 91 P. R. 1909, felt no doubt whatsoever that the plaintiff cannot succeed in a suit for pre-emption if he has ceased to possess at the time of the institution of the suit the qualification which clothed him with the right of pre-emption at the time of the sale. This principle has been affirmed in various other judgments of the Punjab Chief Court, vide 95 P. R. 1901, 32 P. R. 1902 and 43 P. R. 1915. The same rule has been enunciated by the Calcutta High Court in *Nuri Mian* v. *Ambica Singh* (2). Indeed we are not aware of any judgment either of this Court or of any other Court which lays down a contrary principle.

Accordingly we hold that the plaintiff, who on the date of the institution of the suit, had ceased to be the owner of the land on w ich he based his right of pre-emption, was not entitled to pre-empt the property in dispute and accepting the appeal we dismiss the suit with costs throughout

Appeal allowed.

(2) [1917) 44 Cal. 47—30 C. W. N. 1099—34 I. C. 869—24 C. L. J. 140.

1924 LAHORE 615

CAMPBELL, J.

Faqir Muhammad Khan and others — Decree-holders— Appellants.

v.

Pirdad Khan—Judgment-Debtor—Respondent.

Mis. S. A. No. 746 of 1922, Decided on 8th January 1923, from the order of the District Judge, Jullundur, D/- 19th December 1921.

(a) Civil P. C., O. 21, R. 16—Sale of Pre-emption decree-Vendor is not debarred from claiming possession in execution—Pre-emption

The holder of a decree enforcing a right of pre-empt on who subsequently to the date of the decree sells the property to a stranger does not by such conduct debar himself from obtaining possession of the property in execution of the decree. 7 A. 107 Foll; 1933 L. 300 Dist. [P 616, C. 1]

(b) Excution of Decree—Executing Court is bound by its terms.

The Court to which application for execution of a decree is made is bound by its terms as are the parties to it, and has no power to go behind it or to enter into questions beyond its scope. 7 A. 107 Foll. [P. 616, C. 1]

Abdul Ghani—for Appellants.

Faqir Chand—for Respondent

Judgment.—Gul Muhammad Khan and Faqir Muhammad Khan obtained a decree for possession by pre-emption of certain land subject to the condition of their paying into Court within a certain time the price fixed by the decree. They made payment by due date. Thereafter, one Ghulam Muhammad applied for execution of the decree by delivery to him of possession of the land decreed on the allegation that the decree had been sold to him.

Gul Muhammad Khan and Faqir Muhammad Khan appeared in Court and stated that they had sold the decree to Ghulam Muhammad and that they possessed no rights in the land. The Court refused the application holding that the decree was not transferable and this order was upheld on appeal and is now final.

The present second appeal arises out of a subsequent application by Gul Muhammad Khan and Faqir Muhammad Khan for delivery of possession to them. The application was allowed by the First Court, but that order has been reversed on appeal by the District Judge on two grounds. The first was that the previous order in Ghulam Muhammad's application was correct and in accordance with a decision by this Court reported as *Mehr Khan* v. *Ghulam Rasul* (1) which laid it down that a decree for pre-emption is not capable of transfer so as to enable the transferee to obtain possession of the pre-emptional property in execution, and that to allow the original decree-

(1) 1933 Lah. 310—3 Lah. 283—3 L. L. J. 553.

holders now to execute the decree would enable them to hand over the property to Ghulam Muhammad and avoid a second suit for pre-emption against him. The second ground was that, at the time of the present application, Gul Muhammad Khan was an undischarged insolvent and neither he nor Faqir Muhammad Khan had applied for execution for the benefit of all the decree-holders within the meaning of O. 21, r. 15, Civil Procedure Code.

The decision on the first point, in my opinion, was erroneous. It was laid down in *Ram Sahai* v. *Gaya* (2) that the holder of a decree enforcing a right of pre-emption, who subsequently to the date of the decree sells the property to a stranger, does not by such conduct debar himself from obtaining possession of the property in execution of the decree. It is note-worthy that in this case the alleged sale was transacted after the title to the pre-empted property had vested in the original decree-holders by reason of their payment into Court of the purchase-money, and thus the case is distinguishable from that dealt with in *Mehr Khan* v. *Ghulam Rasul* (1). But whatever the subsequent effect of the transaction between the decree-holders and Ghulam Muhammad may be, the Court to which application for execution of a decree is made is bound by its terms, as are the parties to it, and has no power to go behind it or to enter into questions beyond its scope. This was explained in *Ram Sahai* v. *Gaya* (2), where it was pointed out also that the pre-emptor decree-holder, as here, in praying for execution of decree was merely obeying its terms, and that the only rights of the vendee judgment-debtor were to receive the purchase-money before handing over possesion to the decree-holder.

The same principles apply to the second ground on which the learned District Judge has dismissed the application. The judgment-debtors have not raised the objection of Gul Muhammad Khan's insolvency in the capacity of his creditors and O. 22 r. 12 specifically excepts proceedings in execution from the operation of rule 8 of the same Order under which a defendant may apply for the dismissal of a suit on the ground of the plaintiff's insolvency. The Executing Court has to take the decree as it stands and to enforce its provisions. The Receiver of the Insolvency Court is the party to object to the decretal land being handed over to the insolvent defendant, who is bound under penalties by the Insolvency Law to make it available for the liquidation of his debts as soon as he receives it, and there is no reason why the judgment-debtor should be allowed to retain possession of the land to his own advantage and to the prejudice of the insolvent's creditors. It may be noticed in this particular case that Gul Muhammad Khan secured his discharge during the pendency of the present second appeal.

For these reasons, I accept the appeal with costs, set aside the order of the lower Appellate Court and restore that of the First Court.

Appeal accepted.

(1) [1884] 7 All. 107—(1884) A. W. N. 224.

1924 LAHORE 616

BROADWAY, J.

Jalalud-Din — Convict —Petitioner
v.
King Emperor—Opposite Party

Cr. Rev. Petition No. 1305 of 1923, Decided on 21st November 1923 from the order of the Sessions Judge Shahpur at Sargodha, D/- 14th May 1923.

Criminal Trial.—Charge of offence committed at particular time and place does not justify conviction in respect of offence committed at different time and place.

Where the accused is charged with having beaten the complainant at a particular place and at a particular time and the prosecution fails to establish that charge the accused cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion. [P. 617, C. 2.]

Zafar Ullah Khan—for Petitioner

Sagar Chand for Government Advocate —for Opposite Party.

Judgment. — Haji Jalal-ud-Din, Vice President of the Miani Municipal Committee, was convicted by a Magistrate of the First Class of an offence under S. 452, Indian Penal Code and sentenced to six month's simple imprisonment. On appeal by him to the Sessions Court the learned Sessions Judge found that irregularities had been committed by the Magistrate which had prejudiced the accused person but instead of remanding the case the learned Sessions Judge allowed the irregularities to be rectified in his Court by summoning certain witnesses for the prosecution and allowing the said accused person to cross-examine them further before him. As a result the learned Sessions Judge came to the conclusion that "the prosecution witnesses are so hopelessly discrepant and untrustworthy that I am bound to say that a number of them were simply hired and had never seen the attack with their own eyes." He has given excellent reasons for the above view.

The learned Sessions Judge then proceeded to acquit the appellant before him of the charge under S. 452, Indian Penal Code, but finding him guilty of an offence under S. 323, Indian Penal Code reduced the sentence to the term of imprisonment he had then undergone.

Haji Jalal-ud-Din has come up to this Court under section 439, Criminal Procedure Code, and I have heard Mr. Zafar Ullah Khan on his behalf while Mr. Sagar Chand has addressed me on behalf of the Crown. The case for the prosecution briefly was that the petitioner had, on the 26th March 1923 at about 10 P. M. gone to the house of the complainant and had there beaten him and his wife with a stick. It has been urged before me that inasmuch as the learned Sessions Judge has definitely found that the story told by the prosecution was false and that the offence with which the petitioner had been charged had not been proved, there was no evidence on which a conviction under S. 323 could be based. There seems to be very considerable force in this contention. The learned Sessions Judge has written a very elaborate judgment pointing out in detail the various reasons for holding that the story for the prosecution was wholly unworthy of credence. As I understand the judgment it amounts to this that the learned Sessions Judge has definitely found that the complainant's story that he was beaten in his house by the petitioner was not true. He has also found that at least one of the injuries found to exist on the complainant was self-inflicted and that possibly others were. It seems to me that before the learned Sessions Judge could properly find the petitioner guilty of an assault under S. 323, Indian Penal Code it was necessary for him to find where that assault took place and this matter has been entirely ignored. The petitioner was definitely charged with committing an assault in the house of the complainant. This charge he denies and this charge has been found not to be true. It seems unfair to convict the petitioner of an offence with which he was never charged, as it is obvious that had he been charged with having beaten the complainant in some other place he might have had a complete reply to give.

In these circumstances I feel constrained to accept this petition and to set aside the conviction of the petitioner under S. 323, Indian Penal Code.

1924 LAHORE 617

SHADI LAL, C. J.

Santa Singh—Accused—Petitioner.

v

King-Emperor—Opposite-Party.

Cr. Rev. No. 748 of 1922, Decided on 16th June 1923, reported by the S. J., Gurdaspur.

(a) *Criminal Trial—Witness.*

A Magistrate is not empowered to order that a party should produce a certain witness and that in default, the party shall lose his case. [P 618 C 2 P 619 C 1]

(b) *Custom (Punjab)—Property.*

A Court cannot assume that a dependent son is owner of the household property which belongs to the father, the head of the house. The old age of the father cannot deprive him

of his property even though he may have acquired it through the labours of his son who is dependant on him and who owns no separate property. [P 618, C 2]

(c) *Criminal P. C., S. 435 — Order under S. 88 is a proceeding.*

An order under S. 88 is a proceeding within the meaning of S. 435 and is subject to the revisional jurisdiction of the High Court. [P 619, C 1]

Facts.—One Amar Singh is suspected of murder. He is absconding and, in proceedings under Ss. 87 and 88, Criminal Procedure Code, against him, certain property has been attached as his. The application of his father Santa Singh objecting to the attachment of the property on the ground that the property is his and not Amar Singh's has been rejected by Chaudhri Pir Muhammad exercising the powers of a Magistrate of the 1st Class in the Gurdaspur District, by order dated 9th March 1923.

Grounds. — Amar Singh, son of Santa Singh, is suspected of murdering his own nephew Fauja Singh, son of Lal Singh. He is absconding. Chaudhri Pir Muhammad, Magistrate 1st Class, has taken proceedings against Amar Singh absconder, under Ss. 87 and 88, Criminal Procedure Code. Some grain, utensils and cattle have been attached as property of Amar Singh, absconder. Santa Singh, father of Amar Singh, objected against this attachment contending that the property attached belonged to him and not to his absconding son Amar Singh, and that it was attached from his possession. The Magistrate disallowed this objection and made the following remarks in his order disallowing the objection :—"The absconder was the son of the applicant and nearly all his work was done by him (Amar Singh), so there is no reason why he should not be held owner of any property. The applicant was ordered to summon his *Lambardar* because the real facts could have been ascertained from this reliable witness, but he refused to produce him. This act of his clearly shows that he wants to hide the real facts. I reject his application as the evidence produced by him is interested and unreliable."

Santa Singh is an old man Amar Singh, absconder, is his unmarried son and Amar Singh had been residing with his father. He had no land of his own. We may take it that he assisted his father in work. But this does not mean that his father's property became his property. He was a dependant of the father. He worked with the father and got his bread and clothing, etc., from the father. There is absolutely nothing to show that he had any share or interest in the father's property or that he had any separate property of his own. If a father is old, his property does not, for that reason, become the property of his dependent son living with him. The father was not bound to produce the *Lambardar* as his witness as ordered by the Magistrate. A Magistrate is not empowered to order that a party should produce a certain witness and that, in default, the party shall lose his case. The applicant probably had good reasons for not producing the *Lambardar* as his witness. The Court could have summoned the *Lambardar* as a Court witness or the prosecution could have sent up the *Lambardar* as a Crown witness.

The order of the lower Court is not good in law. It cannot fasten upon a party a certain witness who would not obviously support the party and it cannot assume that a dependent son is owner of the house-hold property which belongs to the father the head of the house. The old age of the father cannot deprive him of his property even though he may have acquired it through the labours of his son who is dependent on him and who owns no separate property.

Such proceedings can be referred to the High Court under Ss. 435, 438, and 439, Criminal Procedure Code. *Ilam Din* v. *King Emperor* (1) is an authority in support of this view. This has not so far been overruled; a contrary opinion which may have been expressed in some judgment not printed in any authorised publication cannot

(1) [1908] 29 P. W. R. 1908 Cr. 8—Cr. L. J. 260—9 P. R. 1908 Cr.

be said to have overruled *Ilam Din* v. *King-Emperor* (1). In any case, this is a point which can be decided by the High Court itself.

The orders of the Magistrate are not good in law and should not be allowed to stand. I accordingly refer the case under S. 438, Criminal Procedure Code, for orders of the High Court under S. 439, Criminal Procedure Code.

Order.—For the reasons recorded by the learned Sessions Judge, I am of opinion that the property, which has been attached, belongs, not to the absconding Amar Singh, but to his father Santa Singh. The question, however, is, whether the High Court can interfere with an order passed by a Magistrate refusing to release the property from attachment In *Ilam Din* v. *King-Emperor* (1) a Division Bench of the Punjab Chief Court held that an order under S 88, of the Code of Criminal Procedure, is a proceeding within the meaning of S. 435, and is subject to the revisional jurisdiction of the High Court. I am not aware of any judgment which expressly dissents from this view and accordingly, I accept the application for revision and direct that the property be released from attachment.

Application accepted.

1924 LAHORE 619

BROADWAY, J.

Municipal Committee, Pind-Dadan Khan—Defendant—Petitioner.

v.

Bhagwan Singh and others—Plaintiff and Defendants—Respondents.

Civil Rev. Petition No. 825 of 1922, Decided on 15th November 1922, from the decree of the Senior Subordinate Judge Jhelum, D/-3rd January 1921.

Punjab Municipal Act, (III of 1911) Ss. 84, and 86—Illegal levy of tax—Refund, suit for—Civil Court can try.

The procedure prescribed by Ss. 84 and 86 relates only to appeals against the assessment or levy of a tax *under the law* and do not provide a remedy which might be done in *violation of that law*. The special Act does not oust the jurisdiction of the Civil Court to relieve one subject of the Crown against an illegality imposed upon him by any other subject. A Civil Court can try a suit to recover tax illegally levied by a Municipality though the plaintiff did not first take action under S. 84 of the Municipal Act. [P. 621, C. 1.]

M. L. Puri for Bakhshi Tek Chand—for Petitioner.

Nanak Chand—for Respondents.

Judgment.—One Bhagwan Singh, son of Ganda Singh, is a tenant of three shops situate in Gur Bazar Mandi, within the Municipality of the town of Pind Dadan Khan. The Municipal Committee levied a tax called *teh bazari* from him and recovered Rs. 72, which was paid by Bhagwan Singh under protest. The tax was levied on the ground that Bhagwan Singh had been using a plot of land measuring 10 ft by 40 ft. in front of the shops of which he was the tenant, which land belonged to the Municipal Committee and had been occupied without its permission. Having paid the tax Bhagwan Singh instituted a suit in the Court of the Munsif against the Municipal Committee for recovery of the sum, so paid with Rs. 3 interest, on the ground that he was not liable to pay, the said tax, the Committee not being the owner of the land. The Trial Court dismissed the suit, but on appeal by him the Senior Subordinate Judge, holding that the Committee had failed to prove its ownership of the land occupied by the appellant and that the Municipality had acted arbitrarily and without justification in recovering the amount, decreed the plaintiff's suit Against this decree the Municipal Committee has preferred a second appeal to this Court through Mr. Tek Chand.

On behalf of Bhagwan Singh Mr. Nanak Chand raised a preliminary objection to the effect that no second appeal lay, the suit being of the nature of a small cause. Mr. Mukand Lal Puri, who has appeared on behalf of the appellant, admitted the soundness of this objection, but urged that the appeal should be treated as a revision and I have heard him on that basis, no second appeal being competent.

It has been contended that the Civil Courts have no jurisdiction to try the case, firstly, because S. 84 of the Punjab Municipal Act, 1911, lays down the procedure to be adopted when a person wishes to contest the levy of any tax, and my attention was drawn to *Municipal Committee, Ambala* v. *Mohender Singh* (1), where it was held that when a special Act, such as the Municipal Act, provides a certain remedy by appeal against the acts of the Committee the failure to comply with that special procedure would bar a suit in the Civil Court. Secondly, it was contended that S. 86 of the Act ousted the jurisdiction of the Civil Courts to adjudicate upon any objection regarding the liability of any person to be assessed and provided that "no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of this Act." Mr. Mukand Lal Puri contended that in this respect the language used in the Municipal Act was far more extensive than that used in the Municipal Acts in other Provinces, and my attention was drawn to *Kamayya* v. *Leman* (2) and *Municipal Council, Nellore* v. *Rangayya* (3). In the former case the suit had been brought for recovery of the amount of a professional tax levied by the Municipality on the Plaintiff. On behalf of the Commissioners an objection was taken to the jurisdiction of the Civil Courts to deal with the question of the liability to taxation of the plaintiff and that objection was sustained by the High Court. In *Municipal Council Nellore* v. *Rangayya* (3), the plaintiff sued to recover certain moneys paid by him to the Municipal Council, Nellore, on the ground that he had paid a tax to which he had been improperly assessed. The High Court held that, S. 262 of the Municipal Act being applicable, the suit was not maintainable.

At the same time, in *Municipal Council of Tuticorin* v. *South Indian Ry. Company* (4), the Municipality at Tuticorin called on the South Indian Railway Company to pay a professional tax which the Company had already paid to the Municipality at Negepatam. The Company paid the amount under protest and sued the Municipality for a refund. The High Court held that the suit was maintainable and granted the Company a decree.

Mr. Nanak Chand for the respondent first contended that this Court should not interfere in revision, inasmuch as there had been a decision on the question of jurisdiction, which, even if decided wrongly, should be regarded as final, having regard to the pronouncement of their Lordships of the Judicial Committee in *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (5). He further contended that S. 86 of the Municipal Act, 1911, did not deprive persons of their ordinary remedies under Common Law and referred to a case reported as *Committee of Notified Area, Una* v. *Chatar Behari Narain* (6), in which Scott Smith, J., held that the power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner did not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers. He also held that a Civil Court had jurisdiction to determine the question whether the imposition of a tax was illegal and *ultra vires* and to give relief if a tax had been levied from a person who was not liable to pay the same.

In *G. I. P. Ry. Company* v. *Amraoti Municipality* (7), the G. I. P. Ry. Company instituted a suit against the Municipality of Amraoti seeking to recover a sum of Rs. 500 which they alleged had been illegally levied from them by the Committee and paid by the Company under protest. The Company also asked for an injunction restraining the defendant from recovering, or attempting to recover, any such tax in future. *Inter alia*, the Commitee pleaded that the Civil

(1) [1911] 118 P. L. R. 1911—38 P. R. 1911—9 I. C. 1000—97 P. W. R. 1911.
(2) [1878] 2 Mad. 37.
(3) [1896] 19 Mad. 10.
(4) [1890] 13 Mad, 78.
(5) [1885] 11 Cal. 6—11 I A. 237—4 Sar. 559 (P. C.)
(6) [1918] 74 P. L. R. 1918—44 I. C. 910—74 P. W. R. 1918.
(7) [1912] 8 N. L. R. 107—16 I. C. 449.

Courts had no jurisdiction to entertain the suit, and this particular question came up before the Additional Judicial Commissioner of Nagpur. The Berar Municipal Law contains provisions similar to those to be found in the Punjab Municipal Act. S. 51 provided for an appeal against the assessment or levy of a tax under the Berar Municipal Law, *i. e.*, provided a procedure similar to that laid down in S. 84 of the Punjab Municipal Act. S. 53 of the Berar Municipal Law contained a provision similar to that to be found in S. 86 of the Punjab Municipal Act. It was held that the special procedure laid down by the Berar Municipal Law related only to appeal against the assessment or levy of a tax *under the law* and did not provide a remedy which might be done in *violation of that law*. It was also held that S. 53 of the Berar Municipal Law did not oust the jurisdiction of the Civil Court to relieve one subject of the Crown against an illegality imposed upon him by any other subject. S. 53 of the Berar Municipal Law is almost word for word the same as S. 86 of the Punjab Municipal Act.

On the finding in the present case, that the Municipal Committee is not the owner of the site in front of the shops tenanted by Bhagwan Singh, the said Bhagwan Singh was not liable to be taxed as he has been. The action of the Municipal Committee in levying the tax from him, therefore, gave him a cause of action in a Civil Court.

Following *G. I. P. Ry. Company* v. *Amraoti Municipality* (7) and *Committee of Notified Area, Una* v. *Chatar Behari Narain* (6), I hold that the Civil Court had jurisdiction to try this case and that the failure on the part of Bhagwan Singh to take action under S 84 of the Act is no bar to the suit, inasmuch as the tax was levied illegally.

Mr. Mukand Lal Puri further contended that the decision of the Court below was bad on other grounds. I am, however, unable to see any ground for revision and I accordingly dismiss this petition with costs.

Petition dismissed.

1924 LAHORE 621

ZAFAR ALI, J.

Chanda Singh and others—Judgment-Debtors—Petitioners.

v.

Fateh Chand and another—Respondents.

Civil Rev. No. 885 of 1922, Decided on 14th February 1923, from the order of the Senior Subordinate Judge, Ferozepore, D/- 22nd August 1922.

(a) *Civil P. C., S. 115—Amendment under S. 152.*

Where an amendment under S. 152 C.P.C. was wrongly refused and led to gross injustice.

Held: revision should be allowed. 17 M. 410; 31 B. 138; Foll. [P 622 C 2]

(b) *Civil P. C., S. 152—Decree not in accordance with judgment should be amended.*

Where the decree was a personal decree but the judgment intended it to be in representative capacity (as heirs).

Held: amendment of decree must be allowed. [P 622 C 2]

Badri Das—for Petitioners.

Kashi Ram—for Respondents.

Judgment.—The questions that arise on this application in revision are two-fold, *i.e.*, (1) whether the money-decree whose amendment the defendants-petitioners seek is not in conformity with the judgment, and (2) if not, whether this Court in the exercise of its revisional jurisdiction can interfere with the order of the Court below refusing to amend it.

The facts are briefly as below:—

Upon the basis of a simple bond for Rs. 2,400 executed by Jita Singh in favour of Fateh Chand, the latter after the death of Jita Singh, brought a suit against his two sons and widow to recover Rs. 5,735 made up of Rs. 2,400 principal and Rs. 3,335 interest. It was stated in the plaint that the sons and the widow of the deceased debtor were in possession of all sorts of property left by him and were, therefore, legally responsible for the payment of his debt, and the prayer was for a decree for Rs. 5,735 against the defendants and the estate of Jita Singh. The sons pleaded, *inter alia*, that Jita Singh left no self-acquired property and that the ancestral property to which they had succeeded could in no case be held liable for Jita Singh's debt. Issues

were settled in the presence of the parties and their Pleaders and were as below :—

(1) Was the bond in suit for consideration ?

(2) To what sum, as principal and interest, if any, is plaintiff entitled ?

The learned Senior Subordinate Judge who framed these issues, recorded the following note at the same time:—

"The question of necessity and ancestral nature of the property and its liability in this suit does not arise at present, time enough to raise objections if and when execution is taken out against it."

From the above it is quite clear that, at the time of the settlement of issues, the parties and their Pleaders were made to understand that the only points to be adjudicated upon were the two put in issue and that the question of the liability of ancestral land for the debt would be decided in the execution proceedings. It was further clear that no plea as to the personal liability of the defendants was either raised or pressed at that time, because, on the face of it, they were sued in no capacity other than that of the representatives of the deceased obligor. The judgment of the learned Senior Subordinate Judge (Mr, M. V. Bhide), who decided the case, opened with the remark that the defendants were sued as representatives of the deceased obligor, and concluded with granting a decree to plaintiff for Rs. 4,903-12-0 and proportionate costs without saying anything as to the persons and property liable under the decree, nor was it necessary to do so if regard be had to the remarks recorded at the time of the settlement of issues. But the decree that was drawn up by a Ministerial Officer of the Court was worded as below :—

"……It is ordered that the defendants do pay to plaintiff Rs. 4,903-12-0 and proportionate costs……".

The judgment and decree are dated the 24th October 1921. In July 1922 Chanda Singh applied to the Senior Subordinate Judge for amendment of the decree to make it in accord with the judgment. This application was heard by Lala Achhru Ram, successor-in-office to Mr. Bhide, and was refused on the ground that the plaintiff's prayer was for a decree against the defendants. From his order the defendants preferred an appeal, but a Division Bench of this Court of which I was a member held that the appeal did not lie and that it may be treated as a petition for revision.

Now, it is quite clear that the decree is not in conformity with the judgment and that the plaintiff by his prayer for a decree against the defendants meant nothing else than a decree against them in their representative capacity, *i.e.*, as persons who had succeeded to the estate of the obligor as stated in paragraph 2 of the plaint. Therefore, the lower Court could and must have amended the decree under S. 152 of the Code of Civil Procedure.

As regards the second question there can be no doubt that the decree, if left as it is, will lead to gross miscarriage of justice by fastening a heavy personal liability for the sum of over Rs. 5,000 (including costs) on persons who are not liable for it. In a case like this, this Court has the power to interfere in exercise of its revisional jurisdiction: see *Kristamma Naidu* v. *Chapa Naidu* (1) and *Ismalji Ibrahimji Nagree* v. *Macleod* (2)].

Therefore, I accept the petition and order that the decree be amended so as to make the decretal amount payable out of such property of the deceased obligor as should be liable to attachment in satisfaction of the decree. The respondents will pay the petitioners' costs in this Court.

Application allowed.

(1) [1894] 17 Mad. 410 (F.B.)
(2) [1907] 31 Bom. 138—8 Bom.L.R. 969.

1924 LAHORE 622

MARTINEAU, J.

Mana- Accused—Petitioner.

v

King Emperor—Opposite Party.

Cr. Rev. No. 946 of 1922, Decided on 14th November 1922, from an order of the District Magisrate Jullundur, D/- 31st May 1922.

Criminal P. C., S. 55—Forfeiture—Cr. P. C., S. 91.

Surety's liability to produce accused to answer one charge does not extend to producing the accused to answer charges for other offences. [P. 623 C. 2]

Badri Das——for Petitioner.

Sunder Das for *Government Advocate*—for Opposite Party.

Judgment.—Two men named Jiwan and Santa were arrested in April 1921, under S. 55 of the Criminal Procedure Code. They were released on bail, the petitioner Mana giving bonds in each of which he undertook that the person concerned (*i. e.*, Jiwan in one case and Santa in the other) would appear in Court when required "to answer the charge specified", failing which he would forfeit the sum of Rs. 1,000. In the following July, there occurred a case of burglary and a case of kidnapping in which Jiwan and Santa, respecti ely, were suspected of being concerned, and Mana, on being required to produce the two men to answer charges for the commission of these offences, failed to do so. An order has in consequence been passed for the forfeiture of part of the security, the First Court ordering the forfeiture of Rs. 500 on each bond, and the District Magistrate reducing the amount to Rs. 250. Mana has applied for revision to this Court.

The bonds are defective in some important respects. They were executed by the surety only, and not by the persons for whom he stood surety, they make no mention of any time when, a period within which, the persons named therein are to be produced, and they make no mention of the charge which those persons are to be required to answer. But even if the bonds are not vitiated by these defects, it is clear that the failure of the surety to produce Jiwan and Santa in Court to answer charges in respect of certain offences committed in July 1921 cannot possibly be held to be a breach of the bonds which were executed in the preceding April. Mana's undertaking can at the most be regarded as one to produce Jiwan and Santa when their presence was required in connection with proceedings, then pending against them. He never undertook to be responsible for their attendance to answer charges in respect of offences that might be committed at some future time.

I accordingly accept this application and set aside the orders passed by the Courts below for the forfeiture of the applicant's security.

Application allowed.

✱ 1924 LAHORE 623

MARTINEAU, J.

Buta—Convict—Petitioner.

v.

King Emperor—Opposite Party.

Criminal Revision Petition No. 1598 of 1923, Decided on 30th November 1923, from an order of the Sessions Judge, Sialkot, D/- 9th July 1923.

✱ *Penal Code, S. 442—Walled courtyard.*

A walled courtyard which is not provided with a door is not a building. [P. 633 C 2]

Ghulam Rasul—for Petitioner.

B. P. Khosla for *Government Advocate*—for Opposite Party.

Judgment—It is not disputed that Buta struck Ilm Din on the head, and the evidence appears to justify the finding that the hurt was grievous.

With regard to the conviction under S. 452, Indian Penal Code, it was only the courtyard that Buta entered, and although it appears from the plan that the courtyard is walled there is nothing to show that it is provided with a door. If the entrance is open I do not think that the courtyard can be said to be a building, and in that case the offence committed would amount only to criminal trespass and not to house trespass.

I accordingly alter the conviction of Buta under S. 452 to one under S. 447, Indian Penal Code, and reduce the term of imprisonment to two months, maintaining the fine and the imprisonment to be undergone in default. I maintain the conviction and sentence for the offence under S. 325.

Sentence reduced.

✱ 1924 LAHORE 624

SCOTT-SMITH AND ZAFAR ALI, JJ.

Neki and another—Convicts—Appellants.

v.

King Emperor—Respondent.

Criminal Appeal No. 975 of 1922, Decided on 30th December 1922, from an order of the Sessions Judge, Hissar, D/-24th August 1922.

✱ *Criminal P. C., S. 164—Magistrate must question accused to see if confession is voluntary—Confessions recorded during presence of Court Inspector is inadmissible.*

Section 164 makes it imperative for a Magistrate before recording a confession made to him in the course of a Police investigation to question the person making it as to whether he is making it voluntarily and where this is not done a confession is not admissible in evidence. When considering a confession recorded during the course of a Police investigation and which is subsequently retracted the Court must reach a definite conclusion that it is voluntarily made, before it is admitted in evidence. If the Court has any doubt on the point it should give the benefit of the doubt to the accused person.

Where while in Police custody, the accused made a confession on being questioned by the Court Inspector who immediately produced him before a Magistrate who proceeded to record the confession in the presence of the Court Inspector and after recording it remanded the accused to Police custody.

Held: that it would be most unsafe to hold that the confession was made voluntarily, and that, therefore, it was not admissible against the accused, 1922 Lah. 237 Foll. [P 625, C 2]

Bakshi Tek Chand—for Appellants.

The Public Prosecutor—for Respondent.

Judgment.—This is an appeal by Neki and Nathu who have been convicted by the Sessions Judge of Hissar of the murder of Munshi of their own village Narnand on the 23rd March 19 2, and have been sentenced to transportation for life. There is also an application by *Mt.* Chhoto, widow of the deceased, for enhancement of the sentence and notice was directed to issue to the accused to show cause against enhancement.

The case for the prosecution briefly is, that there was enmity between the appellants and Munshi, and that on the day of the occurrence the deceased was on his way from Narnand to the village of Samanpothi, and that the two appellants lay in wait for him near a pond at about two miles from Narnand, set upon him and killed him, Neki being armed with a stick and Nathu with a gandasa. The evidence for the prosecution is divided by the learned Sessions Judge into five heads:—

(1) The direct evidence of Singha.

(2) The admissions of the two accused before the Revenue Assistant and Magistrate of the First Class.

(3) The discovery of the stick and the gandasa by the accused themselves.

(4) The evidence of motive.

(5) The medical evidence.

The evidence of Singha has been rejected for the reasons given by the learned Sessions Judge and as the Public Prosecutor has not asked us to rely upon it, and we agree with the Court below, it is unnecessary to refer to it. Nanga (P. W. No. 5) a wajiakkar witness says that on the morning of the occurrence he saw Munshi going along the road towards Samanpothi followed at a distance of 50 paces by the two appellants. He has not been referred to by the learned Sessions Judge in his summary of the evidence and it would appear, therefore, that he did not attach much weight to it. In our opinion, it should be rejected for the same reasons as the evidence of Singha.

The main evidence upon which the convictions are based is the retracted confessions of the appellants made before Sheikh Din Muhammad, the Committing Magistrate, on the 27th March. This Magistrate was on that date in camp at Pali, a few miles from Narnand, and it appears, as stated in the judgment of the learned Sessions Judge, that the accused were taken to him to obtain a further remand as the period of the previous remand was to expire on the evening of the 26th March. The Court Inspector, Lala Sardari Lal, who has not been called as a witness, was in camp with the Magistrate in connection with some S. 107, Criminal Procedure Code, cases. He had a talk with the appellants before they were produced before the Magistrate, and an application was then made to the Magistrate which was endorsed by

h m that their confessions should be recorded. The Court Inspector remained present whilst the confessions were being recorded. The Magistrate states that he asked him to leave the Court but he did not do so, representing that he was always in Court and that his presence was not objectionable. In these confessions it was stated that early in the morning of the 23rd March, Nathu went to the deceased's house and asked his son Giani Ram (P. W. No. 6) where Munshi was going to. Giani Ram told him that he was going to Samanpothi. Nathu then went and informed Neki and arming themselves they both followed Munshi along the road to Samanpothi. Munshi was riding a mare whilst the appellants were on foot. They left the main road where the path to Petwar branches off and managed to get in front of Munshi and lay in wait for him. When he came up Neki struck him with his stick and knocked him off his pony, and Nathu then killed him with his gandasa.

After the confessions had been recorded the Magistrate granted a further remand of ten days and the appellants wer taken back into Police custody. The chalan was ready on the 3rd April, and was produced before another Magistrate who ordered that a the Magistrate Ilaqa was on tour the accused persons should be confined in the judicial lock-up and placed before the Magistrate on his return on the 7th April. On the 7th April, the 19th of April was fixed for hearing, but meanwhile on the 10th April an application was made by the accused to the effect that as the Magistrate had recorded their confessions they wanted the case to be tried by some one else. The District Magistrate saw no reason for transfer ing the case and on the 3rd May proceedings started and evidence was recorded on that day and was concluded on the 1st June. On the latter date the appellants retracted their confessions alleging ill-treatment and threats on the part of the Police.

Mr. Tek Chand urges, in the first place, that these confessions are inadmissible in evidence as the formalities laid down in S. 164 of the Code of Criminal Procedure were not complied with, and, in the second place, that the Court should hold that they were not made voluntarily.

Now, as regards the first objection the record of the confessions does not show that before recording them the Magistrate questioned the accused as to whether they were making them voluntarily or not. The Magistrate was, therefore, summoned as a witness at the trial and was questioned on the point. In regard to Nathu he says that he said to him that he should not make any statement under influence of any promise or fear and that the statement would be read in evidence against him. Nathu said that he was saying what he said out of his own will and not owing to fear or promise. He says that he satisfied himself that he made a voluntary statement. In regard to Neki he says. "I satisfied myself that the statement was voluntarily made."

Counsel refers to *Farid* v. *Emperor* (1), in which the facts were somewhat similar. In that case the Magistrate said that the accused made the statement of his own accord but he did not say that he asked the accused whether he was making it voluntarily. It was held that "S. 164 of the Code of Criminal Procedure makes it imperative for the Magistrate, before recording a confession made to him in the course of a Police investigation, to question the person making it as to whether it was made voluntarily, and as this was not done in the present case the confession was not admissible in evidence." The facts of the present case are not exactly similar to those of the reported case for here the Magistrate has deposed that he satisfied himself that the statements were made voluntarily. It is unfortunate that the learned Sessions Judge did not ask the Magistrate how he had satisfied himself, and, whether he questioned the accused persons as to whether they were making their statements voluntarily or not. It is, however, not necessary for us to consider whether the provisions of the law were sufficiently

(1) 1922 Lah. 237—2 Lah. 325—5 P. W. 1922 Cr.—23 Cr. L. J. 149.

complied with or not because, after considering all the circumstances, we are unable to hold that the confessions were made voluntarily.

The learned Sessions Judge in considering this question remarks:—"I find from the Police file that the Investigating Officers had sent the two accused to the Revenue Assistant at Pali not with a view to have their confession recorded, but only to obtain a remand for ten days, and that as the accused admitted their guilt before the Court Inspector it was that officer that put the accused before the Revenue Assistant for having their confessions recorded. The Court Inspector was not investigating the case and hence was not interested in torturing the accused and obtaining their confessions. The Investigating Officer does not seem to have sent them to the Magistrate to have their confessions recorded. Why should he then have beaten them or put pressure on them to confess? *Most probably* the confessions are voluntary and are admissible in evidence"

We consider it unsatisfactory that the learned Sessions Judge was only able to hold that the confessions were *most probably* voluntary and admissible in evidence. It is the duty of the Court when considering such confessions to come to a definite conclusion that they were voluntarily made before he admits them into evidence. If confessions are not voluntarily made, they are not admissible in evidence. The fact that the learned Sessions Judge did admit them in evidence would make it appear that probably his opinion was that they were made voluntarily, but it is quite clear from the way that he expressed himself that there was some doubt left in his mind upon the point. If he had any doubt on the point he should have given the benefit of that doubt to the accused persons.

Now, whether the appellants confessed in the village or not it is clear that they were not sent to the Magistrate in order that their confessions should be recorded by him. When they got to Pali they were interviewed and questioned by the Court Inspector and it was upon his request that their confessions were recorded by the Magistrate. Under these circumstances, it was improper for him to remain in the room, while the Magistrate was examining them, especially when the Magistrate had asked him to retire. The accused persons say that the Police threatened to ill-use them when they returned to Police custody, if they did not make confessions. As a matter of fact, we find that after the confessions were recorded the accused were remanded to Police custody for another ten days instead of being sent to the judicial lock-up. Having regard to the fact that the Court Inspector questioned them and himself took them before the Magistrate and asked the Magistrate to record their confessions and remained present whilst they were being recorded, we think it would be most unsafe to hold that they were made voluntarily. This being so, they cannot be taken into consideration as against the persons making them.

There is no doubt evidence that the appellants were not on good terms with the deceased, but the only other evidence connecting them with the murder is that during the Police Investigation on the 26th March, Neki produced a stick and Nathu a gandasa, which are said to be the weapons of murder. These weapons were kept by the Police for two days, *i. e*, until the 28th March. They were then made up into parcels and sent to the Chemical Examiner. The Chemical Examiner discovered mammalian blood on the gandasa, but was unable to discover the same on the stick. He made scrapings of both the weapons and sent them to the Imperial Seriologist, who discovered human blood on the scrapings. This evidence loses a great deal of its weight owing to the fact, that the stick and the gandasa were kept by the Police for two days before they were made up into parcels. It is quite possible that in the meanwhile, they were tampered with. Even however, if this evidence is taken for what it is worth it is quite insufficient for the conviction of the appellants, the confessions having been rejected.

As already stated, the wife of the deceased has made an application for enhancement of the sentences. In regard to the sentences the learned

Sessions Judge says; "Considering the fact that the accused have themselves supplied the best evidence against themselves, *i. e.*, their confessions and the discovery of the gandasa and the stick and that but for their doing so the prosecution would probably have failed I refrain from passing the extreme sentence on them." In our opinion there was no sufficient reason for not sentencing the accused to the extreme penalty of the law. if they were guilty. The murder was a most cold blooded one and there were absolutely no extenuating circumstances and had we been of opinion, that the guilt of the appellants was proved we should have been constrained to enhance the sentences. As the case stands, we consider that the evidence is insufficient for conviction and, accepting the appeal, we set aside the convictions and sentences and acquit the appellants.

Appeal allowed.

✱ 1924 LAHORE 627

ZAFAR ALI, J.

Nabi Bakhsh—Complainant—Petitioner

v.

King Emperor and another—Opposite Party.

Criminal Revision Petition No. 1091 of 1922, Decided on 17th November 1922 from an order of the Additional Sessions Judge, Gujranwala at Sialkot, D/- 25th May 1922.

(a) Criminal P. C., S. 259—Absence of complainant does not affect trial.

A Magistrate must proceed with the trial of a non-compoundable warrant case after the framing of the charge and conclude it regardless of the fact whether the complainant does or does not attend in a non-compoundable warrant case. [P 627 C 2]

✱ *(b) Criminal P. C., S. 344—Costs can't be ordered from complainant in non-compoundable warrant case after charge—Cr. P. C. S. 259.*

After the framing of a charge in a non-compoundable warrant case the position of the complainant is reduced to that of a witness, and he cannot be ordered to pay the costs of an adjournment occasioned by his failure to attend on any particular date of hearing. [P 627 C 2]

Anant Ram—for Petitioner.

Rahmat Elahi—for Accused.

S. C. Chatterjee for *Government Advocate*—for Opposite Party.

Judgment — The facts are as below:—

In a case started on complaint, a charge under S. 406, Indian Penal Code, having been framed against the accused, he re-called the prosecution witness for further cross-examination on the date fixed for the witnesses to attend for that purpose. The complainant sent a telegram from Bombay stating that he would not appear on that date. The case was adjourned but the complainant was again unable to attend, and this time the Magistrate ordered that he hould pay Rs. 50 to accused as costs of the adjournment. He applies for revision of this order and it is argued on his behalf that after framing a charge in a warrant-case cognizable by the Police, it was incumbent on the Magistrate to continue the proceedings, and that for this purpose if complainant failed to attend, the only proper course for the Magistrate to adopt was to procure his attendance by issuing a warrant of arrest against him if necessary, but that the complainant was not bound to attend after the accused had been put on his defence or after a charge had been framed against him. There seems to be no flaw in this argument as it is based on S. 259, Criminal Procedure Code. It is clear that in a warrant-case of the kind in question, as the Magistrate is bound to proceed with it after framing a charge against the accused and to finish the trial, and as the complainant cannot either compound the offence or withdraw the complaint, he is not bound to attend the Court in his capacity of complainant though he may be bound and can be compelled to attend as a witness. As his position at the said stage of the trial is reduced to that of a witness, he could not be ordered to pay costs of an adjournment. I am, therefore, of opinion that the order of the Magistrate cannot be upheld. Accordingly, I accept this petition and set aside the order. The costs, if already deposited in Court, will be refunded.

Petition allowed.

✱ 1924 LAHORE 628

LE ROSSIGNOL, J.

Chiragh Din—Defendant—Appellant.

v

Ghulam Muhammad and another—Plaintiffs—Respondents.

S. A. No. 1109 of 1922. Decided on 13th December 1922, from the decree of the District Judge, Amritsar, D/- 11th January 1922.

✱ *Limitation Act, S. 26—Mere threat to create easement gives a cause of action—Sp. Rel. Act, S. 42.*

A mere denial of right affords a cause of action. Any person whose property is threatened with a servitude, may bring a suit for a declaration that an easement is enjoyed on sufferance and not as of right. The effect of the Explanation to S. 26 of the Limitation Act is to confer an indefeasible right of easement on any person after an enjoyment of anything over nineteen years, provided he waits less than one year before challenging an interruption and the beginning of his enjoyment arose twenty years before suit, but the Explanation does not come into operation if at the time of suit there is no interruption at all. [P 628 C 2]

K. J. Rustomji—for Appellant.

P. N. Rozdon for *Nur-ud-din*—for Respondents.

Judgment.—Plaintiff and defendant are the owners of a party-wall; defendant on 5th October 1899 obtained sanction to build his house and in the upper storey let into the wall the windows which are the subject of this litigation, but there is no evidence when the windows were actually made.

The plaintiff in his turn wished to build on the party-wall and to close the said windows and was met with opposition from defendant whereupon he instituted this suit for an injunction to restrain defendant from opposition.

The Courts below have decreed for plaintiff, holding that defendant had enjoyed the easement for less than 20 years on 1st August 1919 the date of institution.

This appeal was admitted on the plea that defendant had no cause of action, inasmuch as his building was not actually obstructed but there are other grounds to the effect that an enjoyment of a little over 19 years is sufficient to establish the right of easement.

The finding of both Courts is that the plaintiff wished to build against the windows and defendant objected; in my opinion this gave plaintiff a right of action for his liberty of dealing with his own property was threatened.

A mere denial of right affords a cause of action and I see no reason to doubt that any person whose property is threatened with a servitude, may bring a suit for a declaration that an easement is enjoyed on sufferance and not as of right. In other words, as soon as my neighbour by opening windows, etc., in the common wall affects my property, I am at liberty to sue for a declaration that his enjoyment shall not be deemed an easement as of right but on sufferance. It is true that the effect of the Explanation to S. 26 of the Limitation Act is to confer an indefeasible right of easement on any person after an enjoyment of anything over nineteen years, provided he waits less than one year before challenging an interruption and the beginning of his enjoyment arose twenty years before suit, but in this case the Explanation does not come into operation, for at the time of this suit there had been no interruption.

At that date, the easementhad not been enjoyed for twenty years, and as the date of the construction of the windows is not ascertained, it cannot be said that it had been enjoyed for even nineteen years.

But on the assumption that it had been in existence for nineteen years, the defendant even, had he been the plaintiff, would not have succeeded for he would still have had to prove a twenty years user under the first and cardinal clause of S. 26.

The Explanation does produce anomalous result, but we must apply the law as we find it.

I hold that plaintiff had a cause of action and that the defendant has not established the easement contended for.

The appeal is dismissed with costs.

Appeal dismissed.

✱ 1924 LAHORE 629

BROADWAY, J.

Amarsingh—Plaintiff—Appellant

v

Kanshi and others—Defendants—Respondents.

S. A. No. 1176 of 1922, Decided on 21st December 1922, from a decree of the Additional District Judge Hoshiarpur at Jullundur, D/-1st February 1922.

✱ *Civil P. C., O 41 R. 20—Power is discretionary—Limitation does not apply.*

Where Judge exercised the power given by that rule and Order, the Law of Limitation could not be invoked, the power to take action under O. 41, R. 20 is a discretionary one. Where the plaint did not contain the name, and in the heading of the judgment the name did not appear and the name was also absent from the decree.

Held: in these circumstances there was no real neglect on the part of the plaintiff or his Counsel and the Court ought to exercise its power. [P 630, C 1]

(b) *Discretion — Appellate Court won't interfere with discretion judicially exercised though it differs in conclusion.*

Where a matter is left by law within the discretion of a Court and the Court after proper enquiry and due consideration has exercised its discretion in a sound and reasonable manner the High Court will not interfere with the conclusion arrived at even though it arrived at a different conclusion. [P 630, C 1]

Madan Gopal—for Appellant.

M. L. Puri, Faqir Chand and *Mehr Chand Mahajan*—for Respondents.

Judgment.—One Amar Singh instituted a suit against Kanshi, son of Mayya, and Kanshi, son of Radha, for possession of a share in certain immoveable property and for a declaration *qua* the other half that a certain alienation effected by Kanshi, son of Radha, would not be binding on his reversionary rights on the alienor's demise. Kanshi, son of Mayya, the vendee in the case, pleaded that he had entered into an arrangement relating to this property with his son Daulat Ram and that Daulat Ram was, therefore, a necessary party. Upon this the Court ordered Daulat Ram to be made a party. The plaintiff was never directed to amend the plaint in order to include Daulat Ram as a defendant and the case proceeded. The result was against the plaintiff and a decree was drawn up dismissing the suit with costs. In this decree Daulat Ram's name was not entered as a party, nor did it appear as a party in the heading of the judgment of the Trial Court.

The plaintiff preferred an appeal to the District Court and at the hearing of the said appeal an objection was taken to the appeal on the ground that Daulat Ram was a necessary party and had not been impleaded. Therefore, the learned District Judge, relying on *Mela Ram* v. *Narain Das* (1), dismissed the appeal, holding that Daulat Ram was a necessary party and that an appeal, as far as he was concerned, would at that date be time-barred.

Amar Singh has come up to this Court in second appeal and on his behalf I have heard Mr. Madan Gopal, while Mr. Mukand Lal Puri has addressed me on behalf of the respondents. As pointed out in the order of the Division Bench admitting his appeal, no general rule has been laid down by *Mela Ram* v. *Narain Das* (1), nor by *Khaira* v. *Salem Raj* (2) in which that decision was followed. It is true that the appellant could not as of right have claimed to add Daulat Ram as a party before the learned District Judge as the appeal *qua* Daulat Ram was time-barred. Nevertheless, the learned District Judge had the power to take action under O. 41, R. 20, Civil Procedure Code, and had the learned District Judge exercised the power given by that rule and Order, the Law of Limitation could not have been invoked *vide Shahab Din* v. *Miran Bakhsh* (3). In the same case it was held that the power to take action under O. 41, R. 20, was a discretionary one and Mr. Mukand Lal Puri has drawn my attention to *Ranchodji* v. *Lallu* (4) where a Division Bench of the Bombay High Court held that, where a matter is left by law within the discretion of a Court, and the Court, after proper

(1) [1882] 188 P. R. 1882.
(2) [1920] 51 I. C. 935
(3) [1914] 79 P. R. 1914—368 P. L. R. 1914—25 I.C. 949—169 P.W.R. 1914.
(4) [1883] 6 Bom. 304.

enquiry and due consideration, has exercised its discretion in a sound and reasonable manner the High Court will not interfere with the conclusion arrived at, even though it arrived at a different conclusion. In the present case, however, this authority has no bearing, inasmuch as the learned District Judge does not appear to have had his attention drawn to the provisions of O. 41, R 20, Civil Procedure Code, He has, therefore, not exercised any discretion in the matter.

There remains the question whether there has been any neglect on the part of the appellant or his Counsel. As to this I think there is some force in Mr. Madan Gopal's argument that the documents before the Counsel would not necessarily have led him to the conclusion that Daulat Ram was a party to the case and as such should be made a party to the appeal. The plaint did not contain his name. In the heading of the judgment his name did not appear and his name was also absent from the decree In these circumstances, I am of opinion that there was no real neglect on the part of the plaintiff or his Counsel.

I accordingly accept this appeal and remand the case to the lower Appellate Court making Daulat Ram a party to the proceedings under O. 41, R. 20. The lower Appellate Court will now dispose of the appeal before it on the merits. Costs in this Court will follow the event. Stamp on the memorandum of appeal will be refunded.

Appeal allowed.

☆ 1924 LAHORE 630

ZAFAR ALI, J.

Shamas-ud-Din — Complainant—Petitioner.

v.

Ram Dayal Singh and others—Accused—Respondents.

Cr. Rev. Petition No. 1109 of 1922, Decided on 17th November 1922, from an order of the District Magistrte Rohtak, D/-20th March 1922.

★ (a) *Criminal P, C. Ss. 4 (h) & 107—Application under S. 107 is not complaint.*

An application under S. 107 is not a "complaint" under S, 4 (h) and S. 203 of the Code therefore does not apply to such an application. [P. 630 C. 2]

(b) *Criminal Trial—Application.*

Every Magistrate possesses the inherent power of refusing an application which he finds to be groundless, [P. 630 C. 2]

(c) *Criminal P. C., S. 107—Application can be rejected if Court is satisfied that there is no apprehension.*

If a Magistrate is satisfied after making an enquiry himself or through some other agency that the apprehension of a breach of thes peace complained of does not exist he need not make an order under S. 112 of the Code and must refuse the application. [P. 631 C. 1]

Rozdon for *Kureshi*—for Petitioner.

Gullu Ram—for Respondents.

Judgment.—The petitioner's application under S. 107, Criminal Procedure Code having been dismissed by a Magistrate of the First Class, he applied to the District Magistrate to have the order of the Magistrate revised on the ground that an application under S. 107, Criminal Procedure Code, could not be dismissed under S. 203 of that Code and that the Magistrate erred in dismissing it without taking evidence. The District Magistrate arrived at the conclusion that S. 203 was applicable and that no injustice was done to the complainant on the merits because the application had been referred to the *Tahsildar* for inquiry and was dismissed on his report based on a full enquiry that the application was groundless and that there was no apprehension of a breach of the peace. The applicant now appears in this Court and it is urged on his behalf that the application could not be dismissed without taking the evidence that he wanted to produce in support of it.

There can be no doubt that an application under S. 107, Criminal Procedure Code, does not fall within the definition of "complaint" and, therefore, obviously, S. 203 does not apply to it, but every Magistrate possesses the inherent power of refusing an application which he finds to be groundless, and in the case of an application under S. 107 if he is satisfied after making an en-

quiry himself or through some other agency that the apprehension of a breach of the peace complained of does not exist he need not make an order under S. 112 and must refuse the application.

Further, there is nothing on the record to show that the petitioner was not given an opportunity to produce evidence before the *Tahsildar* or that he asked the Magistrate for an opportunity to produce further evidence but was not allowed to do so.

For all the above reasons I reject this petition.

Petition rejected.

✱ ✱ 1924 LAHORE 631

SCOTT-SMITH, J.

Firm Phallu Mal-Hira Lal — Judgment-Debtor—Appellant.

v.

Banarsi Das— Decree-holder—Respondent.

Mis. F. A. No. 1689 of 1922, Decided on 9th November 1922, from the order of the Senior Subordinate Judge, First Class, Ambala, D/- 13th June 1922.

✱ ✱ (a) *C. P. Code, S. 47—Section covers stay of execution—C.P.Code, O. 41, Rr. 5 and 8.*

The expression "an order relating to execution of a decree" under S. 47 is comprehensive enough to include an order relating to the stay of execution thereof. [P. 631, C. 2]

(b) *C. P. Code, O. 41, R. 6 (2) — Summary dismissal improper—Application for stay of execution cannot be summarily dismissed.*

It is obligatory on the Court to stay the sale on such terms as to giving security or otherwise as it thinks fit. [P. 631, C. 2]

Lala Jagan Nath—for Appellant.

Manohar Lal—for Respondent.

Judgment.—This is an appeal from the order of a Subordinate Judge refusing to stay a sale of immoveable property in execution of decree, during the pendency of an appeal in this Court, under the provisions of O. 41, r. 6 (2) of the Civil Procedure Code. Mr. Manohar Lal on behalf of the respondent raises a preliminary objection that no appeal lies. To this Mr. Jagan Nath replies that the order is really one relating to the execution of the decree and comes within the purview of S. 47, Civil Procedure Code and is, therefore, appealable. He cites *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (1), wherein it was held that the expression "an order relating to execution of a decree" under S.47 is comprehensive enough to include an order relating to the stay of execution thereof. Mr. Manohar Lal has nothing to say against this view and I fully agree with appellant's Counsel and hold that an appeal does lie.

Now. O. 41, r. 6 (2) says that, where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. The lower Court summarily rejected the application of the judgment-debtor for stay of sale and this was clearly erroneous. It was obligatory on the Court to stay the the sale on such terms as to giving security or otherwise as it thought fit.

I, therefore, accept the appeal and setting aside the order of the lower Court, direct it to make an order staying the sale on such terms as to giving security or otherwise as it thinks fit. Mr. Manohar Lal has referred to the case reported as *Ram Nath Singh* v. *Kamleshwar Prasad Singh* (2), and has urged that the Court should demand very ample security in a case of this sort. It will be for the lower Court to decide what security is sufficient. I make no order as to costs in this Court.

Appeal accepted.

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(1) [1911] 14 O.L.J. 489—13 I.C. 745.
(2) [1911] 15 O.W.N. 432—9 I.C. 323.

✱ 1924 LAHORE 632

ZAFAR ALI, J.

Abdul Ghani—Convict—Petitioner.

v.

Emperor—Opposite Party.

Cr. Rev. Petition No. 1182 of 1922, Decided on 10th November 1922, from an order of the Sessions Judge, Ambala, D/-22nd August 1922.

✱ *Penal Code, S. 353—Resistance to public officer acting in good faith though the act be illegal or irregular is offence.*

Where two Bailiffs went together to the house of the petitioner who knew that they were Bailiffs and had come to attach his property in execution of the warrant and where the Civil Nazir stated that his instructions to the Bailiffs were that they both should work together in executing the warrant and the accused whose property was to be attached under the warrant, assaulted one of the bailiffs whose name in the warrant was not endorsed and prevented him from attaching his property.

Held: that the Bailiff was actig in good faith as a public servant and the accused was, therefore, guilty of an offence under S. 353. 21 M. 296; Foll. [P. 632 C. 1]

Abdul Aziz—for Petitioner.

Sheikh Niaz Mahammad for *the Government Advocate* — for Opposite Party.

Judgment.—It is contended that Aziz Ahmad, Bailiff, had not been deputed to execute the warrant of attachment in question, and was, therefore, not acting in the execution of his duty as a Bailiff when he entered the house of the convict petitioner to attach his property. The petitioner, it was stated, gave him a push and did not let him attach his property.

The facts are that four warrants of attachment of property were issued by the Collector, Simla, to realise income-tax due by certain defaulters and each warrant was directed to "Bailiff, Simla." It appears, that there were two Bailiffs serving under the Civil *Nazir* and that it was the duty of that officer to choose a Bailiff for each warrant. Therefore, he endorsed the name of Aziz Ahmad on one of the four warrants and that of Hussain Ali on the rest. Both the Bailiffs went together to the house of the petitioner and it is clear that he knew that they were Bailiffs and had come to attach his property in execution of the warrant in question. Though this warrant had been given to Hussain Ali, Bailiff, by name the Civil *Nazir* stated that his instructions to the Bailiffs were that they both should work to gether in executing the warrants. This evidence has been believed by the Courts below and, therefore cannot be impugned in this Court. This being so, there can be no doubt that Aziz Ahmad believing that he was empowered to act in conjunction with Hussain Ali went with him to the house of the petitioner to attach his property. He was therefore, acting in good faith as a public servant and the petitioner had no authority to deter him from doing so. *Queen Empress* v. *Poomalai Udayan* (1) is a ruling in point from which the following may be cited:—

".....We must admit that the articles seized.....were exempt..... from attachment. The question then is whether this circumstance justified the resistance, and rendered it no offence. We clearly think that it did not as the act, however irregular or illegal it may have been, was the act of a public servant acting in good faith under the colour of his office, and against such an act, the accused had no right of self defence under S. 99 of the Penal Code, inasmuch as there was no apprehension of death or of grievous hurt."

If the principle enunciated above were applied to the present case, it is clear that the petitioner was rightly convicted under S. 353, Indian Penal Code, but the sentence seems excessive and I reduce it to the imprisonment already undergone by him and remit the fine which if already realised, shall be refunded. He is discharged from his bail-bond.

Sentence reduced.

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(1) [1898] 21 Mad. 296.

* 1924 LAHORE 633

MOTI SAGAR, J.

Rameshwar Das—Defendant — Appellant.

v.

Yakin-Ud-Din Khan and another—Plaintiff & Defendant—Respondents.

Mis. F. A. No. 2189 of 1922, Decided on 13th March 1923, from an order of the Senior Subordinate Judge, Hissar, D/- 22nd August 1922.

* *C. P. Code, O. 39, R. 1 — Temporary injunction — Grant of — Plaintiff must strongly prove probable damage — Municipal election— Unsuccessful candidate is not ordinarily entitled to interim injunction against his opponent.*

Plaintiff and the defendant were rival candidates at a Municipal election in which deft. was declared successful. Three months after the result of the election had been published in the Government Gazette, the plaintiff brought a suit for a declaration that the eleotion was void and that the defendant was consequently not entitled to sit as a Commissioner on the Municipal Committee. He also made an application for the grant of a temporary injunction that the defendant be restrained from attending the meetings of the Municipal Committee and from otherwise exercising the powers of a Municipal Commissioner pending the decision of the suit.

Held : that plaintiff's sustaining irreparable injury by the defendant's continuing to act as a Municipal Commissioner pending the determination of the suit, was a mere imaginary apprehension, that there was no substance in the application made by the plaintiff for the issue of a temporary injunction and that he was obviously prompted by a desire to cause injury to the defendant. The Court should, before disturbing any man's legal rights or stripping him of any rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit. [P. 634, C. 1]

Bakhshi Tek Chand — for Appellant.

C. Bevan Petman and *Indar Sain*— for Respondents.

Judgment.—The plaintiff and the defendant were rival candidates at a Municipal election, held at Sirsa on the 14th of November 1921. The defendant secured 150 votes as against 138 votes obtained by the plaintiff, and in which defendant was declared successful. On the 3rd of February 1922 a Notification was published in the Government Gazette declaring the defendant to have been duly elected and on the same date the plaintiff was nominated a Municipal Commissioner by the orders of the Government. On the 2nd of May 1922, three months after the result of the election had been published in the Government Gazette, the plaintiff brought this suit for a declaration that the election was void and that the defendant was consequently not entitled to sit as a Commissioner on the Municipal Committee. He also made an application for the grant of a temporary injunction that the defendant be restrained from attending the meetings of the Municipal Committee and from otherwise exercising the powers of a Municipal Commissioner pending the decision of the suit. The learned Senior Subordinate Judge allowed this application, and it is against this order passed on the 22nd of August 1922 that the present appeal is directed.

The case has been argued at some length by the learned Counsel on both sides, but the point involved for decision is very simple and can shortly be disposed of.

It is contended on behalf of the defendant that the suit for setting aside the election does not lie under S. 42 of the Specific Relief Act and that the learned Senior Subordinate Judge was consequently not justified in granting the temporary injunction prayed for by the plaintiff. I do not propose to enter into a discussion of the question relating to the maintainability or otherwise of the suit as the sole question for determination before me at this stage is whether, in the circumstances narrated above, an *interim* injunction restraining the defendant from acting as a Municipal Commissioner pending the decision of the suit should or should not have been granted.

The principle of law is firmly established that a person asking the Court to exercise its discretionary jurisdiction must make out a strong *prima facie* case in support of the title which he asserts, and must satisfy the Court that its interference is necessary to protect him from irreparable or at least, serious injury before the legal right could be established at the trial. Being an exceptional remedy, an injunction will be refused in the first instance except upon a clear *prima facie* case and "upon positive aver-

ments of the equities on which the application for relief is based." I am unable to see what equities there are in favour of the plaintiff entitling him to the temporary injunction granted by the Court below, nor am I satisfied that the plaintiff is likely to suifer any injury while his alleged rights are being investigated. The rule of law is that the Court should, before disturbing any man's legal right or stripping him of any rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit. This, in my opinion, the plaintiff has not been able to establish, and I do not, therefore, think that a temporary injunction should have been granted in this case.

As to plaintiff's sustaining irreparable injury by the defendant's continuing to act as a Municipal Commissioner pending the determination of the suit, the apprehension appears to be more imaginary than real. If the suit is decided in favour of the plaintiff the result would be that the election would be set aside and a fresh election ordered, but I am wholly at a loss to understand how the plaintiff would be injured by the defendants continuing to discharge the functions of a Municipal Commissioner during this time It appears to me that there is no substance in the application made by the plaintiff for the issue of a temporary injunction and that he is obviously prompted by a desire to cause injury to the defendant.

I accordingly accept the appeal and, setting aside the order of the Court below, dismiss the petition for the temporary injunction with costs throughout.

Appeal accepted.

1924 LAHORE 634

MARTINEAU, J.

Hira Singh — Decree-holder — Appellant.

v.

Madho (Minor *through Hussain Khan*)–Judgment-Debtor–Respondent.

Mis. S. A. No. 2004 of 1922, Decided on 20th February 1923, from an order of the District Judge Amritsar, D/- 19th July 1922.

Execution of decree — Judgment debtor granting lease of his land to decree holder for 20 years in satisfaction of decree—Executing Court cannot afterwards curtail the period.

A money-decree was fully satisfied in 1912 by the grant of a lease for 30 years to the decree-holder of some land belonging to the judgment-debtor. Some years later the Executing Court, on the application of the judgment-debtor, cancelled the remaining period of the lease and directed that possession of the land be restored to the judgment-debtor on payment to the decree-holder a certain sum found on calculation to be due to the decree-holder.

Held: that the Executing Court had become *functus officio* as soon as the lease was executed and the decree was fully satisfied and was not, therefore, competent subsequently to reduce the term of the lease which had been given in full satisfaction of the decree in 1912. [P 634 C 2]

Lala Guran Ditta—for Appellant.

Judgment.—A money-decree was satisfied in 1912 by a temporary alienation to the decree-holder of some land belonging to the judgment-debtor. A rubakar dated the 19th June 1912 from the Court to the Settlement Officer shows that the Court approved of the proposal of the Tahsildar for giving the land on lease to the decree-holder for 20 years. The decree-holder was accordingly put in possession and on the 2nd October 1912 the Court ordered that the case should be sent to the record-room, the decree having been fully satisfied.

The Executing Court has now, on the application of the judgment-debtor, ordered that the lease be cancelled, and the possession of the land restored to the judgment-debtor on his paying Rs. 433-6-0 which is the balance found, on calculation, to be due to the decree-holder. That order has been upheld by the District Judge, and the plaintiff has filed a second appeal, contending that when the decree had been fully satisfied by the leasing of the land for 20 years to the decree-holder the Executing Court became *functus officio* and was not competent to order that the land should be given back to the judgment-debtor before the expiry of the period of the lease. This contention is, in my opinion, correct. Counsel for the appellant has cited *Madho Prasad* v. *Mahtab Chand* (1) in which it was

(1) [1910] 8 I.C. 410.

held that where a portion of the property given on lease in execution of the decree of a Civil Court had passed out of the possession of the lessee, the Executing Court, having become *functus officio* when the lease was given, had no jurisdiction to authorize the grant of a fresh lease or to extend the term of the original lease. Similarly, in the present case it must be held that the Court was not competent to reduce the term of the lease which was given in full satisfaction of the decree, in 1912.

I accordingly accept this appeal, set aside the orders of the Courts below, and dismiss the judgment-debtor's application. The respondent will pay the appellant's costs throughout.

Appeal accepted.

✱ 1924 LAHORE 325

MOTI SAGAR, J.

Mahabir Pershad and others—Judgment-Debtors—Appellants.

v.

Kartat Singh — Decree Holder—Respondent.

Mis. S. A. No. 2564 of 1922, Decided on 15th March 1923, from an order of the District Judge, Ambala at Kasauli, D/- 7th June 1922.

✱ *Civil P. C., O. 34, R. 7—In redemption suit decree directing delivery of possession on payment of certain sum, if passed, can be executed without final decree.*

In a suit for redemption a decree for possession of the land in suit on payment of a certain sum within six months from the date of the decree was passed. Plaintiff paid the decretal sum into Court more than six months after the date of the decree and applied for possession of the land.

Held: that the decree not having been drawn up in the from of a preliminary decree as provided by R. 7. of O. 34 the rule did not apply and that the decree was capable of execution. [P. 635, C. 2]

✱ (b) *Limitation Act, Art 182—Non payment within time being not penalised, ordinary limitation applies—Decree—Construction.*

A decree was silent as to the effect of non-payment of the decretal amount within the time limited.

Held: the decree-holder is entitled to enforce his decree at any time within the period of limitation prescribed for execution of decree in Art. 182 of Schedule 1 to the Limitation Act notwithstanding the fact that the amount was deposited after the fixed time. 19 I. C. 856; 14 A. 350. Foll. [P. 636, C. 1]

Shamair Chand—for Appellants

Jagan Nath—for Respondent.

Judgment.—The plaintiff brought a suit for redemption, and on the 3rd of January 1921 obtained a decree for possession of the land in suit on payment of Rs. 866 within six months from the date of the decree. On the 20th October 1921 the decretal money was paid into Court and on the same date the plaintiff decree-holder applied for execution and prayed that possession of the land in suit be awarded to him. He was met with two objections by the defendant-judgment-debtor (1) that the decree was a preliminary decree and therefore incapable of execution, and (2) that the execution of the decree was barred by reason of the money not having been paid within six months of the date of the decree. Both the Courts below have overruled these objections, and the defendant judgment-debtor has now come up in second appeal to this Court.

Firstly, it is contended by Mr. Shamair Chand on behalf of the appellant that the suit being one for redemption a preliminary decree only could be passed under. O. 34, R. 7, of the Civil Procedure Code and that such a decree was not capable of execution. With this contention I am unable to agree. A reference to the decree clearly shows that it is a decree for possession of the property on payment of a certain amount of money within a certain time. Order 34, R. 7, of the Civil Procedure Code can, therefore, have no application to such a case. Before this rule could apply a decree should be drawn up in the form as provided by this rule, and as the decree has admittedly not been drawn up in that form, I must hold that it is not a preliminary decree and that it is, therefore, capable of execution.

Next, it is contended that as the money was not paid in time, the plaintiff-decree-holder was not enti-

tled to enforce his decree .The learned District Judge, relying upon the case of *Nihal Chand* v. *Ghulam Muhammad* (1), has held that the decree should, in the first instance, have been limited to granting plaintiff the right to redeem the mortgage upon payment of the sum found to be due from him, and that the condition as to the payment of the mortgage-money within six months from the date of the decree was a mere surplusage and did not affect the right of the decree-holder to execute his decree within the period prescribed by Art. 182 of the Indian Limitation Act. It appears to me that the view taken by the learned District Judge is correct and that the plaintiff is entitled to have his decree executed and possession awarded to him. In the case of *Bandhu Bhagat* v. *Shah Muhammad Tagi* (2), the decree stated that the amount due under the mortgage should be paid within four months but omitted to state what the result would be if the mortgage-debt was not so paid. It was held that the decree-holder could execute his decree anywhere within the three years ordinarily allowed for execution. In the present case also the decree is silent as to the effect of non-payment within the due time, and I must, therefore, hold that the plaintiff is entitled to enforce his decree and that the execution is not barred by the decretal amount not having been paid within six months.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1913] 146 P. W. R. 1913—19 I. C. 856—235 P.L.R. 1913.
(2) [1892] 14 All. 350—(1893) A.W.N. 40.

1924 LAHORE 636

ABDUL RAOOF, J.

Parabh Dayal and another—Defendants—Appellants.

v.

Mt. Radho and others—Plaintiffs—Respondents.

S. A. No. 2621 of 1922, Decided on 22nd March 1923, from the decree of the District Judge Hoshiarpur, D/-13th May 1922.

Punjab Tenancy Act,(XVI of 1887), S.77(3) proviso (1)—Ejectment suit—Occupancy rights claimed by defendant—Suit is cognizable by Revenue Court.

Plaintiffs landlords sued to eject defendants alleging that they were trespassers. Defendants pleaded that they were occupancy tenants.

Held, that the suit was cognisable only by a Revenue Court. 73 P. R. 1915; 111 P. R. 1916; Foll. 103 P. R. 1918 Diss. from. [P 638 C 2]

Fakir Chand—for Appellants.

Madan Gopal for Badri Das—Respondents.

Judgment, J.—This second appeal has arisen out of a suit by certain proprietors for the ejectment of certain persons who are recorded in the revenue papers as occupancy tenants. The full history of the dispute between the parties is given in the judgments of the two Courts below. For the purposes of this appeal it is not necessary to state all the facts stated in the judgment under appeal. A few relevant and salient facts must be stated.

The land in dispute is 13 kanals and 10 marlas in area. One Malok was admittedly its occupancy tenant. On his death his widow *Mt.* Radho succeeded to the occupancy tenancy and the land was mutated in her name. On the 11th of July 1890, *Mt.* Radho sold the land to one Gandoo. Sometime in 1890, *Mt.* Radho died. On the 23rd of March the land was mutated in the name of Gandoo. On the 12th of June 1901 the name of Parabh Dayal, the brother of Gandoo, was also entered in the revenue papers along with that of Gandoo as a joint tenant. In the jamabandi the land was shown in the actual cultivation of Mathru and others as non-occupancy tenants under the occupancy tenants Gandoo and Parabh Dayal. The latter served the non-occupancy tenants with a notice of ejectment. Mathru and others, the non-occupancy tenants,contested the notice by a suit and themselves claimed to be the occupancy tenants directly under the proprietors, the plaintiffs in this suit. In support of their contention they relied on a deed executed by the proprietors conferring the rights of occupancy upon them. On the 6th of July 1917, their suit was

dismissed on the ground that they had failed to prove that they were the occupancy tenants of the land. The result was that they were ejected in 1918 and the land came into the actual possession of the brothers Gandoo and Parabh Dayal.The plaintiffs then instituted the present suit for possession of the land on the allegation that the defendants Gandoo and Parabh Dayal were mere trespassers. The suit was resisted on the ground that the defendants were occupancy tenants and the suit was cognizable by a Revenue Court and the Civil Court had no jurisdiction to entertain it. In addition to this plea of want of jurisdiction, the defendants raised various pleas on the merits also. They pleaded that Mathru and others were non-occupancy tenants under them; that they were put up by the landlords to defeat the rights of the defendants, and that the plaintiffs had accepted rent from the defendants and had by various acts admitted th ir right of occupancy in the land. The Trial Court decided in favour of the defendants, both on the merits and on the question of jurisdiction and holding that the plaintiffs were estopped from questioning the occupancy rights of the defendants dismissed the suit.

On appeal the lower Appellate Court reversed the decision of the Trial Court on the merits and held that the defendants were mere trespassers and had not succeeded in establishing their right to the occupancy tenancy. It expressed no opinion on the question of jurisdiction and, setting aside the decree of the Trial Court, decreed the plaintiff's claim.

Parabh Dayal and his nephew Lal Singh, son of Gondoo, (now dead), have preferred this second appeal on various grounds set forth in the Memorandum of Appeal. Only one plea has been urged before me by the appellants' learned Vakil Mr. Faqir Chand, namely, that the suit was not cognizable by the Civil Court. The contention put forward by him is that, in view of the proviso (1) attached to sub-section (3) of S. 77 of the Punjab Tenancy Act, even if the suit as framed was cognizable by Civil Courts, the procedure prescribed by the Punjab Act III of 1912 should have been followed and the plaint ought to have been returned for presentation to the Collector. In support of this contention the learned Vakil has relied upon a Division Bench ruling in *Wadhawa* v. *Musammat Hassi* (1) in that case, as in this case, the landlords had filed a suit to oust from the land the defendants who were alleged by them to be trespassers, and the latter has pleaded that they had acquired occupancy rights in the land by succession to their ancestors. The First Court had decreed the suit and the appeal by some of the defendants had been dismissed by the Divisional Court which had refused to entertain the plea that the defendants were entitled to hold the land as occupancy tenants. A second appeal was presented and the learned Judges held that the suit should have been tried by a Revenue Court under Act III of 1912. They accepted the appeal, set aside the decree of the Divisional Court and, acting under S. 100 of the Tenancy Act, directed the decree of the first Court to be registered as a decree of an Assistant Collector, First Grade, and sent the case back to the lower Appellate Court directing it to return the Memorandum of Appeal to be presented to the Collector. The learned Vakil also relied upon the case of *Mihan Singh* v. *Bhagwan Kaur* (2). in which the late Mr. Justice Shah Din, relying upon the proviso to sub-section (3) of S. 77 of the Punjab Tenancy Act, held that, though the suit was instituted in a Civil Court, the defence raised by the defendants brought the proviso into play and the procedure referred to therein ought to have been adopted by the Munsif. The learned Judge, after setting aside the decision of the Appellate Court, sent the case back to the Munsif with a direction to follow the provisions of the first clause of the aforesaid proviso.

Mr. Madan Gopal, holding the brief of Mr. Badri Das, the learned Vakil for the plaintiffs-respondents, has

(1) [1915] 64 P. W. R. 1915—78 P. R. 1915—29 I. C. 778—111 P. R. 1915.
(2) [1916] 234 P. W. R. 1916—37 I. C. 390—111 P. R. 1916.

contended that the proviso cannot apply to the facts of this case, inasmuch as the defendants are alleged to be trespassers. He relies in support of this contention on clause (d) under the second group of cases mentioned in S. 77, and argues that a suit contemplated by that clause is a suit against a person who is admittedly a tenant and that it does not apply to a case of a person who being a mere trespasser claims a right of occupancy. In support of his contention he relies upon the case of *Ghulam* v. *Jowala Singh* (3). This is a decision by the late Mr. Justice Shah Din in which the learned Judge distinguished his previous decision in *Mihan Singh* v. *Bhagwan Kaur* (2). The following passage in his judgment is relied on by Mr. Madan Gopal:—

"It will be observed that in *Mihan Singh* v. *Bhagwan Kaur* (2) the defendants were admittedly 'tenants' holding under the plaintiffs as their landlords, and the sole dispute between the parties was as to whether or not the defendants were 'occupancy' tenants of the land on which stood the trees which they claimed to have a right to cut in case of need. The matter in dispute was, therefore, one which, under clause (d) of sub-section (3) of S. 77 of the Punjab Tenancy Act, could be heard and determined only by a Revenue Court, and upon that ground the 'proviso' to that sub-section was clearly applicable to the case. In the present case, on the other hand, the defendant, according to the allegations in the plaint, is not a tenant of the plaintiffs but is a mere trespasser;* * * * * * his claim clearly does not fall within clause (d) of sub-section (3) of S. 77 of the Act."

I have examined the judgment in *Mihan Singh* v. *Bhagwan Kaur* (2) carefully and I am unable to find anything in it which may go to show that the defendants in that case were admittedly tenants or that the decision in the case proceeded upon that ground. In any case, the opinion expressed by Mr. Justice Shah Din in *Ghulam* v. *Jowala Singh* (3) is clearly opposed to the decision of the Division Bench in *Wadhawa* v. *Musammat Hassi* (1). Therefore, although somewhat inclined to agree with the view expressed in *Ghulam* v. *Jowala Singh* (3) sitting as a Single Judge, I must follow the decision of the Division Bench. According to that decision this appeal must be accepted.

I accordingly set aside the decree of the lower Appellate Court, direct that the decree passed by the Subordinate Judge, first class, be registered as a Revenue Court decree under S. 100 of the Punjab Tenancy Act and remand the case to the lower Appellate Court with the direction that the Memorandum of Appeal be returned to the plaintiffs-appellants to be presented to the Collector. Costs will abide the result. The Court-fee paid on the Memorandum of Appeal shall be refunded to the appellants.

Appeal accepted.

(3) [1918] 130 P. L. R. 1918—103 P.R. 1918—48 I. C. 363—179 P. W. R. 1918.

1924 LAHORE 638

ABDUL RAOOF AND MOTI SAGAR, JJ.

Ramzan—Defendant—Appellant.

v.

Nabi Bux and others — Plaintiffs—Respondents.

S. A. No. 635 of 1921, Decided on 7th April 1924, from the decree of the District Judge, Sialkot, D/- 14th December 1920.

Civil P. C., O 41, R. 27 — Failure to record reasons vitiates admission—Opportunity to rebut must be given to other side.

Where an Appellate Court admitted additional evidence without recording reasons.

Held : the procedure was vitiated though the Court had ample authority to admit additional evidence if it considered it necessary for the ends of justice. [P 639 C 2]

Nand Lal—for Appellants.

Cooper—for Respondent.

A. Raoof, J.—This was a suit for a declaration to the effect that the mutation entry D/—the 13th of May 1919, giving Ramzan, defendant, one half share instead of 2/5ths of 1044 *kanals* 10 *marlas* of land specified in the plaint, was wrong, and should not

affect the previous entry of ownership of the parties. The relationship between the parties will appear from the pedigree-table given in the judgment of the lower appellate Court at page 13 of the paper book.

It appears that originally Ramzan was shown as owning only 2/5ths. He applied to the revenue authorities for the correction of the entry. His application was allowed, and he was entered as the owner of one-half share. It is in respect of this last entry that the present suit was instituted. The plaintiffs altogether failed to make out the case set out in the plaint and this was probably due to the fact that the revenue records had been destroyed by fire. The trial Court dismissed the suit. The matter came up in appeal before the lower appellate Court. The learned Judge was informed somehow that the records of 1892-1893 were still in existence. He, thereupon, sent for them and found an entry in the pedigree-table denoting that 1/5th share had been sold by Ramzan to Kamun and the sons of Zulfikar. This left only 2/5ths share to be recorded in his name. That is why the original entry in the revenue papers showed him the owner of 2/5ths and the other parties the owner of 3/5ths The records of 1892-1893 were sent for by the learned District Judge without any application being made on behalf of any of the parties for the production of additional evidence. Order 41, rule 27, C. P. C., gives ample power to the appellate Court to admit additional evidence in appeal if it requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The District Judge, after a perusal of the revenue records reversed the decision of the trial Court and granted a decree in favour of the plaintiffs.

The defendant Ramzan has come up in second appeal and the following contentions have been put forward on his behalf :—

(1) That the lower appellate Court had no authority to admit any additional evidence in this case;

(2) That in any case while doing so it ought to have recorded the reason for its admission ;

(3) That an opportunity ought to have been given to the appellant to rebut the additional evidence admitted in appeal.

In our opinion, the procedure adopted by the lower appellate Court is vitiated by the circumstance that no reason was recorded by it for the admission of the additional evidence. The record does not show whether the appellant was ever informed that the learned Judge of the Court below was going to send for additional evidence. Further, it does not appear that any opportunity was given to the appellant to meet the new case made out upon the receipt of the additional evidence. We are of opinion that the lower appellate Court had ample authority to admit additional evidence if it considered it necessary for the ends of justice, but we are also clearly of opinion that an opportunity should be given to the appellant to produce rebutting evidence, if there is any.

We accordingly accept this appeal and setting aside the decree of the lower appellate Court remand this case under Order 41, rule 23, C. P. C. with the direction that it be placed on its original number in the register of pending appeals and be disposed of according to law. Costs will abide the result.

Appeal allowed.

1924 LAHORE 639

MARTINEAU AND MOTI SAGAR, JJ.

Muhammad Khan and others — Plaintiffs—Appellants.

v

Sultan Azam and others — Defendants—Respondents.

S. A. No. 1673 of 1919, Decided on 8th November 1922, from the decree of the District Judge, Jhang at Sargodha, D/- 22nd May 1919.

Evidence Act, S. 74 — History of Multan District attached to Settlement Record, was held to be a Public document.

A history of the Multan District attached to the Settlement Record of the district was held to be a public document, as the history, having been placed with the Settlement

Records, must be presumed to have been compiled by, or by the direction of, the Settlement Officer. [P. 640 C 1.]

Mukund Lal Puri—for Appellants.

Nand Lal—for Respondents.

Judgment.—The plaintiffs in this case sue for pre emption in respect of a sale of land on the ground that they are owners in the village in which the land is situate. The question in dispute is whether the vendee is, as he alleges, a collateral of the vendors and has, therefore, a superior right of pre emption. The Subordinate Judge gave judgment for the plaintiffs, but the District Judge on appeal has held that vendee's relationship to the vendors has been proved and he has dismissed the suit.

His finding is based mainly on certified copies (Exhibit D-A and D-B) of entries in a history of the Multan District which is attached to the Settlement Record and in second appeal it is contended that the copies are inadmissible in evidence, the history in question being neither a part of the Record of Rights nor a public document. We agree in thinking that the history does not form part of the Record of Rights, not being one of the documents specified in S. 31 (2) of the Land Revenue Act. But we see no reason to doubt that the history, having been placed with the Settlement Record, must have been compiled by, or by the direction of the Settlement Officer, and that it is, therefore, a public document within the meaning of S. 74 of the Evidence Act, and is provable by the production of a certified copy. There appears to be no force in the contention that Exhibits D-A and D-B are copies of a copy. We hold that they are relevant and that the decision of the lower Appellate Court, being a finding of fact and based on legal evidence, cannot he contested in second appeal.

The appeal consequently fails and we dismiss it with costs.

Appeal dismissed.

✱ 1924 LAHORE 640

MARTINEAU, J.

Punjab National Bank, Ld., Lahore —Defendants—Appellants.

v.

Cotton Factory known as Bal Krishna Dass - Durga Dutta—Plaintiffs—Respondents.

S. A. No. 2181 of 1922, Decided on 17th April 1924 from the decree of the District Judge, Karnal, D/- 19th July 1923.

✱ *Negotiable Instruments Act (XXVI of 1881) S. 46—Indorsement and delivery for collection does not pass property in the bill.—Nego. Ins. Act S. 50.*

Though the indorsement of a negotiable instrument and delivery transfer to the indorsees the property therein yet if the instrument is delivered conditionally or for a special purpose only and not for the purpose of transferring absolutely the property therein; the property does not pass to the indorsee. [P, 641, C. 1]

Hargopal—for Appellant.

Madan Gopal, Brij Lal. Diwan Mehr Chand and Shamair Chand —for Repondents.

Martineau, J.—This second appeal arises out of a suit brought on a bill of exchange drawn by the Punjab National Bank on the Calcutta branch in favour of K. R. Chop & Co., who indorsed it to Thakur Lachhman Singh & Co.. who, in turn indorsed it to the plaintiffs. The latter have been given a decree against the drawers and this has been affirmed by the District Judge.

The first ground regarding the jurisdiction of the Courts has not been pressed, and it is the second ground on which arguments have been addressed to me, the contention for the appellants being that as the plaintiffs indorsed the bill to Sheo Mukh Rai-Lachhi Ram without any express reservation they cannot maintain the suit. The Courts below have held that the plaintiffs have a *locus standi* because their indorsees have admitted that the bill was sent to them only for collection of the money on the plaintiff's behalf, and that the plaintiffs alone are entitled to the money. Counsel for the appellants, relies on S. 50 of the Negotiable Instruments Act, which provides that the indorsement of a negotiable instru-

ment followed by delivery transfers to the indorsees the property therein, and he argues chat under this section the property in the bill passed to the plaintiff's indorsees. It is, however, to be observed that indorsement alone is not sufficient to transfer the property in a negotiable instrument to the indorsees, but that the indorsement must be followed by delivery, and S. 46 provides that it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein. The Courts below having found that the bill was delivered to Sheo Mukh Rai-Lachhi Ram only as agents of the plaintiffs for the collection of the money it must be held that the property in the bill did not pass to them under S. 50 of the Act, and that the plaintiffs are entitled to maintain the suit. There is no force in the other grounds of appeal and I dismiss the appeal with costs.

Appeal rejected.

1924 LAHORE 641

ABDUL RAOOF, J.

Gurbhaj and another—Defendants—Appellants.

v.

Lachhman—Plaintiff—Respondent.

S. A. No. 2470 of 1922, Decided on 24th March 1923, from the decree of the District Judge, Hoshiarpur, D/-14th August 1922.

Registration Act, S. 17 (1) (b)—Document relinquishing reversionary rights is compulsorily registrable.

Deed relinquishing reversionary rights under the Customary Law of the Punjab in immoveable property for a consideration of Rs. 100 or upwards falls within S. 17 (1) (b) of the Registration Act and is compulsorily registrable.

[P. 812, C. 2]

Mehr Chand Mahajan—for Appellants.

Mukund Lal Puri—for Respondent.

Judgment.—The facts giving rise to the suit out of which the present second appeal has arisen are ew and simple and may be summarised as below :—

The plaintiff Lachhman is the own brother of Khamdi, deceased. The latter by a deed dated the 8th of February 1906 sold 11 *kanals* 18 *marlas* of land for Rs. 400 to Gurbhaj and Bhikham. On the 16th of February 1916 Lachman executed a document in consideration of Rs. 100 in favour of the vendees. In this document, after describing the land, he made the following material statement:—

"Which (*i. e.*, the property) is the *malkiyyat* of Khamdi, nor of Sheo, my real brother. Whatever rights or interests I had in the said property, I give up all these in favour of Bhikham and Gurbhaj, sons of Ruldoo, after taking Rs. 100 from them in the presence of witnesses, and execute this agreement so that it may serve as a reliable evidence"

Khamadi having died his widow, *Mt.* Matti, succeeded to the land for her lifetime. She, however, having re-married three or four years before the suit her rights were forfeited. Thereupon the plaintiff instituted this suit for possession of the land, on the allegation that the same being ancestral the plaintiff as the real brother of the vendor was entitled to its possession. He alleged that the sale was without consideration and necessity. The suit was resisted by the defendants on the following grounds.—

(1) that the plaintiff was not the real brother of Khamadi;

(2) that the suit was barred by limitation;

(3) that the sale was effected for consideration and necessity, and

(4) that the plaintiff had acquiesced in the alienation by executing the document of the 16th of February 1916.

The Trial Court found that the plaintiff was the real brother of Khamadi, and that the suit was within time but, holding that the sale was for consideration, and legal necessity and that the plaintiff had acquiesced in the alienation, dismissed the suit.

The plaintiff appealed and the lower Appellate Court came to a different conclusion on the question of consideration and necessity from that arrived at by the Trial Court. On the question of acquiescence the lower Appellate Court held that the only

piece of evidence on which the decision had been arrived at by the Trial Court, (namely, the document dated the 16th of February 1916) being inadmissible in evidence for want of registration the plea as to acquiescence fell to the ground. On the question of necessity and consideration, the Appellate Court, after considering the evidence on the record, found as a fact that necessity had been established in respect of Rs 127 only. It, thererefore, granted a decree for possession on payment of that sum.

The vendees-defendants have preferred this second appeal and two contentions have been urged on their behalf by their learned Vakil, Mr. Mehr Chand Mahajan, namely, (1) that according to the evidence on the record the entire consideration is proved for necessity, and (2) that the document dated the 16th of February 1916 did not require registration as it did "not purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property," *vide* clause (*b*), sub-S. (1) of S. 17 of the Registration Act.

As regards the first contention it is enough to say that the decision as to consideration and necessity is based upon a finding of fact and it is not open to the appellants to question it in second appeal.

On the second point the learned Vakil contended that the only right which the plaintiff had and which he purported to give up was the right to bring a suit to challenge the alienation and this could not be said to be a right, title or interest in immoveable property. He further argued that, even if the document be taken to have extinguished the reversionary right of the ptaintiff, such a right being a mere possibility did not come within the definition of immoveable property To this contention the decisions in the following cases are a complete reply :—

Hukam Singh v. *Indar* (1) and *Gujar Sham Das* (2).

In the first case an unregistered document like the one in the present suit surrendering the reversionary rights was relied on as a piece of evidence against the plaintiff reversioner and the Hon'ble Mr. Justice Rattigan held it to be inadmissible in evidence for want of registration. The decision is summed up in the following passage to be found at page 32 of the report :—

"The argument founded upon *Abdool Hoosein Mulla* v. *Goolam Hoosein Ally* (3) that the surrender by a reversioner of rights possessed by him under the Customary Rule of the Punjab does not amount to the extinguishment of the right in immoveable property, is opposed to a ruling of this Court to be found reported as *Khairati* v. *Matab* (4), an authority which, if I may venture to say so, appears to be perfectly correct and in accordance with the Customary Law of this Province." Sir Henry Rattigan was a great authority on questions of custom. His decision as to the nature of the reversionary right according to the Punjab custom must be looked at with the respect which it deserves. A similar view was expressed in *Gujar* v. *Sham Das* (2). Following these decisions, I must hold that the reversionary rights which Lachman purported to give up under the document of the 16th of February 1916 were rights in immoveable property of the value of Rs. 100 and the document required registration under S. 17, sub-S. (1), clause (*b*) of the Registration Act and being unregistered was not admissible in evidence under S. 49 of the Act. The view taken by the lower Appellate Court is correct. The appeal fails and is dismissed with costs.

Appeal rejected.

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(1) [1915] 12 P.L.R, 1915—27 I.C. 699—18 P.W.R. 1915.
(2) [1887] 107 P.R. 1887.
(3) [1906] 30 Bom. 304—7 Bom. L.R. 742.
(4) [1911] 135 P.W.R. 1911—11 I.C. 211—214 P.L.R, 1911.

1924 LAHORE 643

CAMPBELL, J.

Rure Khan—Defendant—Appellant.

v

Ghulam Muhammad — Plaintiff — Respondent.

S. A. No. 3071 of 1922, Decided on 20th April 1923 from the decree of the District Judge Amritsar, D/- 2nd October 1922.

Lease — Construction—Tenancy terminable by one week's notice—Notice need not terminate at month's end—Double rent is good compensation for holding over.

Under a lease the defendant was to be a tenant for eleven months paying a monthly rent of Rs. 7-8-0, and if he failed to pay the rent month by month he was liable to ejectment. The plaintiff was empowered at any time to give the defendant a week's notice to vacate the house and the defendant was to comply. The tenancy commenced on the 8th August 1920 and on the 3rd June 1921 the plaintiff sent a notice to the defendant telling him to leave the house within a week or to pay double rent from the expiry of that week. The notice further stated that if the defendant did not vacate the house it would be assumed that he was prepared to pay double rent.

Held: that the notice was not bad though it did not terminate on the last day of a month and that on the authority of 5 P. R. 1904, the Court was right in adopting the double rent standard as the measure of compensation.

(P 643 C 2, P 644 C 1)

B. D. Kureshi—for Appellant.

Sayed Mohsin Shah—for Respondent.

Judgment.—This second appeal is the result of a suit by the landlord of a house against a tenant for damages in the shape of enhanced rent on account of the tenant holding over.

The Trial Court decreed the claim in part, but on appeal by the plaintiff the learned District Judge decreed his whole claim of Rs. 55 6-0.

The question in second appeal turns upon the interpretation of the terms of the lease. Admittedly a written lease was drawn up, but it is not forthcoming. The plaintiff stated that he had lost it. This explanation was accepted by both the Courts below and they admitted secondary evidence in the shape of an abstract given of the document in the register of the petition writer who wrote it. In both Courts the defendant contested the admissibility of secondary evidence and asserted that the original deed had been withheld by the plaintiff purposely, but in second appeal this objection is not repeated and the defendant's learned Counsel has argued from the copy of the petition-writer's entry.

According to that copy the defendant was to be a tenant for eleven months paying a monthly rent of Rs. 7-8-0, and if he failed to pay the rent month by month he was liable to ejectment. The plaintiff was empowered at any time to give the defendant a week's notice to vacate the house and the defendant was to comply.

The tenancy commenced on the 8th August 1920 and on the 3rd June 1921 the plaintiff sent a notice to the defendant telling him to leave the house within a week or to pay double rent from the expiry of that week. The notice further stated that if the defendant did not vacate the house it would be assumed that he was prepared to pay double rent.

The defendant remained in possession up to the 10th or 12th of December 1921, but the present suit was brought on the 2nd of October 1921 for ejectment and double rent at Rs. 15 per mensem for the period of the defendant's occupation after the expiry of the week specified in the notice.

The first point in second appeal is that because the rent was payable monthly, it was a monthly tenancy and the plaintiff could only give such notice of one week as would terminate on the last day of month that is to say, on the 7th of any Calendar month since the first month commenced on the 8th of August 1920. This is not what the abstract of the lease says. The tenancy was for 11 months and one week's notice could be given at any time. The stipulation for the monthly payment of rent has no effect upon the condition by which the plaintiff could serve the defendant with a week's notice at any time.

The second contention is, that there was no contract between the parties for the payment of double rent by the defendant in the event of his holding over after the receipt of notice, and that the finding of the

lower Appellate Court that double rent was a reasonable compensation was not based upon any evidence. It was ruled, however, in *Pirbhu Dial* v. *Ram Chand* (1) that, when a tenant has held over wilfully and contumaciously, the Courts in India would properly award reasonable damages and the penalty laid down in England by Statute of double the rent, may sometimes be taken as a fitting standard. The lower Appellate Court has found distinctly that the defendant held over wilfully and without good reason, and, in view of the above authority, it cannot be said to have acted contrary to law in adopting the double rent standard as the measure of compensation.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1904] 5 P.R. 1904—42 P.L.R. 1904.

✱1924 LAHORE 644

SCOTT-SMITH, J.

Pir Bakhsh and others—Plaintiffs-Appellants.

v.

Jhandu Khan and another—Defendants—Respondents.

S. A. No. 79 of 1921, Decided on 8th November 1922, from a decree of the District Judge, Hoshiarpur, D/-7th October 1920.

✱ *Civil P. C., S. 11—Competency of trial Court is to be looked—Principle applies though appeals lie to different courts.*

It is the competency of the Court of first instance to entertain the two suits which regulates the application of the rule of *res judicata*: the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. 20 P. R 1891. Dist; 32 A. 67; Foll. [P. 644, C. 2]

B. D. Kureshi—for Appellants.

Faqir Chand—for Respondents.

Judgment.—The plaintiffs in the present case sued for possession of 5 *marlas* of land and three mango trees standing on it. Their suit having been dismissed by both the Courts below they have come up to this Court in second appeal.

In 1917 the plaintiffs sued the present defendants for Rs. 51-5-6 on account of the fruits of the same trees which are now in dispute and it was found by the Appellate Court that the plaintiffs had not been in possession of the trees within 12 years of the suit. The learned District Judge says that this decision is final and conclusive. Mr. Kureshi for the appellants urges that that decision does not operate as *res judicata* because the appeal in that case lay to the Subordinate Judge who had no jurisdiction to hear the appeal in the present suit. *Shamas Din* v. *Ghulam Kadir* (1) is an authority in support of this argument; but at that time the former Civil Procedure Code of 1882 was in force. In my opinion that decision has become obsolete by reason of explanation, II. S. 11 of the present Civil Procedure Code which is as follows :—

"For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court."

Having regard to that Explanation, a Division Bench of the Allahabad High Court held in *Beni Madho* v. *Indar Sahai* (2) that it is competent to the Court of first instance to entertain the two suits which regulate the application of the rule of *res judicata* : the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. I therefore, hold that the dicision in the 1917 case is *res judicata*, at all events as regards possession of the trees now in suit. The learned District Judge has given excellent reason for his view that the entries in the Revenue Records are not reliable. It was upon them that the plaintiffs-appellants relied in this Court and his finding that the plaintiffs have failed to prove their possession within 12 years is one of fact which cannot be contested in second appeal.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1891] 20 P. R. 1891 (F. B.)
(3) [1910] 32 All. 67=3 I. C. 707=6 A. L. J. 1.

1924 LAHORE 645

SCOTT-SMITH AND ZAFAR ALI, JJ.

Lakhpat Rai—Defendant—Appellant.

v.

Mayya Mal and others—Plaintiff & Defendants—Respondents.

S. A. No. 2132 of 1919, Decided on 30th December 1922, from the decree of the Additional Dt. J. Jullundur at Ludhiana, D/- 27th May 1919.

Civil P. C., O. 21, R. 57—Execution proceeding struck off at request of decree-holder—Attachment ceases.

The word "default" used in O 21, R. 57—is not restricted to default of appearance, but applies also to a failure to do what the decree holder is bound to do, that is, to go on with his application and have the property sold. Where execution proceedings are struck off at the request of the decree-holder, it amounts to a dismissal or default of the decree-holder within the rule and the attachment no longer subsists. 1928 L. 108—3 L. 71; and 14 A. 157 relied on. [P 645 C 1, 2, P 646 C 1]

Jagan Nath—for Appellant.

B. D. Kureshi for *Malik Muhammad Hussain*—for Respondents.

Judgment—The facts that need be recited to decide this second appeal are but few and simple.

In the execution of a money-decree a house of the judgment-debtor Sukhu was attached on the 19th October 1915, and subsequently orders were made three times for its sale by auction, but it could not be sold as no bidders turned up to buy it. In the meantime, Sukhu applied to be adjudged insolvent, and notice of his application was sent as usual to the Court executing the decree. The next date of hearing in that Court was the 23rd of March 1916, and on that date the decree-holder Mayya Mal appeared and stated as below:—

"*Misl filhal dakhil daftar ho jaue. Phir jari karaonga*".

(The record may for the present be consigned to the record office. (I) will take out execution again.)

In accordance with the above prayer of his, the execution proceedings were struck off and the file was consigned to the record office. Not long after that, that is, on the 3rd May 1916, the insolvency petition was dismissed, and on the 6th May, Mayya Mal put in a fresh application for attachment of the house and obtained an order to attach it. Accordingly, it was again attached on the 13th May. But on the same date Sukhu mortgaged the house by a registered deed to Lakhput Rai for Rs. 1,500 and the latter eventually applied to the Court executing the decree that the house should be sold subject to his lien as mortgage. This was allowed in spite of opposition by Mayya Mal, and the latter, therefore, brought a suit to declare that the mortgage was invalid because (1) it had been effected after attachment and was fictitious, and (2) the house belonged to Rolu, son of Sukhu, and not to the latter. (Rolu, too, was a judgment-debtor along with Sakhu). The Trial Court put these points in issue and decided them against Mayya Mal and dismissed his suit. The plea that the first attachment had not come to an end was not raised at all, nor was it specially stated in the grounds of the appeal preferred from the order of the First Court. But it appears that it was raised in the course of argument before the lower Appellate Court which decided (1) that the first attachment did not cease to exist as the order consigning file to the record-office was not tantamount to dismissal of the application for default within the meaning of O. 21, R. 57, Civil Procedure Code, and could not have the effect of removing the attachment, and (2) that the mortgage was made with the knowledge of the second attachment. Upon these findings the mortgage was declared to be invalid and inoperative as against the attaching creditor.

In this further appeal by the mortgagee it is contended on his behalf, on the authority of *Fateh Din* v. *Quab Din* (1), that the first attachment came to an end under O. 21, R. 57 when the execution proceedings were struck off at the request of the decree-holder himself. In the case cited, a Division Bench of this Court accepted the view of the Allahabad High Court expressed in *Dildar Husain* v. *Sheo Narain* (2) that the word "*default*"

(1) 1923 Lah 108.
(2) [1919] 41 All. 157—49 I.C. 113—17 A.L.J. 52.

used in O. 21. R. 5, is not restricted to default of appearance but applies also to a failure to do what the decree-holder is bound to do, that is, to go on with his application and have the property sold. According to this ruling the first attachment in the present case came to an end when the decree-holder failed to carry on the execution proceedings and had them struck off.

It was not pressed before us that the second attachment had been made before the mortgage, as there is no material on the record to support that contention. On the other hand, it is clear that the terms of the mortgage must have been settled before the 13th May, because on the early morning of that date the parties to it started from their village for Phillaur which is 10 *kos* or 15 miles therefrom, and there executed the deed of mortgage and presented it for registration at 11 A.M. It was not proved that the attachment had been made before 11 A.M. The decree-holder, therefore, could not avoid the mortgage. This being so, we accept the appeal, set aside the order of the lower Appellate Court and restore that of the first Court dismissing Mayya Mal's suit with costs throughout.

Appeal accepted.

✱ 1924 LAHORE 646

ABDUL RAOOF AND MOTI SAGAR, JJ.

Girdhari and others—Defendants—Appellants.

v.

Mam Chand and others—Respondents.

S. A. No. 1203 of 1921, Decided on 17th April 1924 from the decree of the Additional District Judge, Karnal at Hissar, D/- 3rd February 1921.

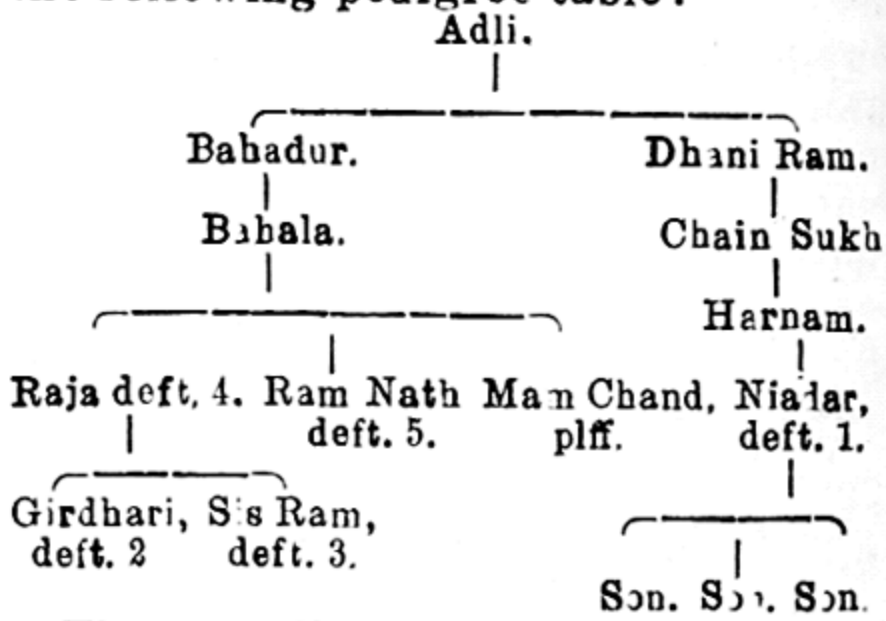
✱ *Custom (Punjab)—Alienation—Suit by very remote reversioner in presence of nearer reversioners is a speculative suit.*

The rule that where a nearer reversioner is precluded from suing to contest an alienation, or colludes with the alienor, a more remote reversioner can sue, has no application to a purely speculative claim for example where the alienor has three sons and the plaintiff has only a bare possibility of succeeding and nothing more. [P. 646, C. 2 P. 647, C. 1]

Sagar Chand—for Appellants.

Shamair Chand—for Respondents.

Moti-Sagar, J.—The relationship of the parties will be illustrated by the following pedigree-table:—



The appellants before us are the defendants Girdhari and his brother Sis Ram. The plaintiff, Mam Chand, is the main respondent in the case. On the 20th February 1919 Niadar son of Harnam sold the land in suit to Girdhari and Sis Ram for a sum of Rs. 3,000. The plaintiff Mam Chand who is a collateral of Niadar thereupon brought this suit for a declaration that the alienation was without consideration and legal neces-sity and that it would not affect his reversionary interests after the death of the alienor. The trial Court found necessity established to the extent of Rs. 886 only and decreed the suit subject to the plaintiff paying that sum to the defendants-vendors when succession opened out. Both sides appealed to the District Judge against this decision with the result that both appeals were dismissed and the decree of the Court of first instance was affirmed. The defendants have now come up in second appeal to this Court and the main contention urged on their behalf is that the suit is of a speculative character and that the plaintiff has no *locus standi* to contest the alienation. This contention is, in our opinion, well founded and must prevail. It is admitted on behalf of the respondent that the alienor, Naidar, has 3 sons living who are nearer in order of succession than the plaintiffs, but it is urged that they are minors and that the plaintiff is entitled to sue as next friend in order of succession to them. A large number of authorities have been cited in support of this proposition and reliance is placed on paragraph 67 of Rattigan's Customary Law which

lays down that where a nearer reversioner is precluded from suing or colludes with the alienor a more remote reversioner is entitled to maintain the action. This is, however, not the case here. This is a purely speculative claim, the respondent only having a bare possibility of succeeding and nothing more, and we have therefore no hesitation in holding that he has no *locus standi*.

The result is that the appeal succeeds and the plaintiff's suit is dismissed with costs throughout.

Appeal accepted.

1924 LAHORE 647

ABDUL RAOOF AND MOTI SAGAR, JJ.

Pritam Singh—Defendant—Appellant.

v.

Sobha Singh—Plaintiff-Respondent.

F. A. No. 2560 of 1919, Decided on 23rd November 1922, from a decree of the Senior Subordinate Judge, Amritsar, D/- 3rd September 1919.

Civil P. C., O. 16, R. 1—Court can't refuse issue of summonses—Further evidence directed to be taken though its value doubtful.

Under O. 16, R. 1 a party has an absolute right to summon witnesses, and so long as he pays the necessary expenses, to insist that their attendance shall be enforced. The only case in which the Court has power to refuse to issue summonses is where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue summons. In this case the Appellate Court directed further evidence to be taken though it was very doubtful if any useful purpose will be served by the Additional evidence coming on the record.

[P 648 C 2; P 649 C 1]

Faqir Chand—for Appellant.

L. Saunders—for Respondent.

Order.—This and the connected Appeal No. 2648 of 1919 arise out of a suit instituted on the 19th November 1917 to enforce a bond dated the 10th January 1914 executed by defendant No. 1. Defendant No. 2 who is a minor and a brother of defendant No. 1 was joined as defendant on the ground that he was a member of a joint Hindu family, and as such liable for the payment of the bond in question. The consideration for the bond was alleged in the plaint to have been previous debts due on certain *hundis* drawn from time to time by defendant No. 1 in favour of the plaintiff, and the suit was for the recovery of Rs. 6,750 principal and interest, after giving credit for Rs. 1,550 alleged to have been received by the plaintiff prior to the institution of the suit. The defendant admitted the execution of the bond and of the *hundis* in lieu of which the bond was admittedly made; but denied the receipt of the consideration on the *hundis*, and contended that they were merely accommodation *hundis* not intended to create any liability on the part of the defendant but drawn for the purpose of enabling plaintiff to raise money thereon for his own personal benefit. Defendant No. 2 denied that he was a member of a joint Hindu family or that he was in any way liable for the *hundis* or the bond in suit. The following issues were framed by the Court below:—

1. Whether the bond in dispute was for consideration and on account of nine *hundis* in favour of plaintiff?
2. If *hundis* were the basis of consideration, were those *hundis* only accommodation *hundis* and without consideration?
3. Is defendant No. 2 also liable?

The learned Senior Subordinate Judge found in favour of the plaintiff on the first two issues, and held that the defendant had failed to establish his plea that the *hundis* were without consideration. As to the third issue the finding was that defendant No. 2 was not a member of a joint Hindu family, and consequently not liable for the plaintiff's claim. A fourth issue relating to the liability of defendant No. 1 to pay interest was also framed when the evidence of the parties had practically been concluded, and found against the plaintiff. The result of these findings was, that a decree for Rs. 5,250 only, being the principal amount due on the bond, was passed in favour of the plaintiff, and his suit against defendant No. 2 was dismissed in its entirety with costs.

Two appeals have been preferred against this decree to this Court, one

by defendant No. 1 in which the finding of the Senior Subordinate Judge that the *hundis* were for consideration and not merely accommodation *hundis* as alleged by the defendant is impugned, and the other by the plaintiff which it is urged that the Court below has erred in not allowing interest and in saddling plaintiff with the costs of defendant No. 2.

Mr. Fakir Chand who has addressed us at considerable length on behalf of the defendant appellant has frankly admitted that, on the record as it stands, he is unable to challenge the correctness of the finding arrived at by the Court below that the *hundis* were for consideration, and that they were not accommodation *hundis*, but he strenuously argues that the learned Senior Subordinate Judge has committed a serious error of law in dispensing with the attendance of certain witnesses whose evidence was very material for the purposes of his case, and who, if they had been allowed to be produced, would have proved to demonstration that the *hundis* in question were without consideration, and that when they were drawn it was never intended that the defendant would be liable thereon.

A further contention as to the frame of the suit is also raised, and it is contended that the suit as laid down is not maintainable, and that it should have been instituted against the firm of Jamiat Singh-Pritam Singh in which the plaintiff himself was also a partner. This is, however, an entirely new contention which was never raised in the Court below, and may necessitate the taking of further evidence. There was no issue on the point, and the attention of the lower Court was never drawn to the fact that an issue in respect thereof was necessary and should be framed. Indeed, the grounds of appeal to this Court do not contain any allegation that the suit against defendant No. 1 alone did not lie, and that the liability, if at all, rested with the firm of Jamiat Singh-Pritam Singh. On the other hand, from the written statement filed in the Court below and the grounds of appeal taken in this Court, it is clear that the sole point on which the parties went to trial was whether the *hundis* were or were not accommodation *hundis* drawn for the sole benefit of the plaintiff. In these circumstances, we cannot allow the defendant to make out a new case at the last stage simply because in the written statement there is a vague reference to the *hundis* being drawn by the firm of Jamiat Singh Pritam Singh.

As to the question that the Senior Subordinate Judge was in error in not giving defendant a full opportunity for the production of his witnesses, it appears that on the 23rd and 24th October 1918 the defendant examined a large number of witnesses on his behalf but was unable to close his case as some of his witnesses, though served for those dates, had not attended on account of their illness. The case was accordingly postponed to 23rd November 1918. On the 23rd November the parties put in a joint application stating that the case was likely to be compromised, and that a further adjournment should be granted in the case. The case was adjourned on this application to 16th December 1918. On the 16th December the Senior Sub-Judge was on leave, and the case had to be adjourned again for the 15th January 1919. On this date the defendant examined seven more witnesses, and prayed for a further adjournment on the ground that two of his witnesses who had been served had not attended, while two others whom he had summoned through Court had not been served. The Court disallowed any further adjournment for the production of these witnesses, and closed the case. It is the propriety of this order which is impugned by Mr. Faqir Chand, and it is contended that, under the circumstances detailed above, the Court was not justified in closing the case and in proceeding to judgment until these witnesses had been re-summoned and examined on behalf of his client.

In our opinion the contention is well founded and must prevail, and the case must go back for this additional evidence to be taken though we are very doubtful if any useful purpose will be served by this additional evidence coming on the record.

Under O. 16, R. 1, a party has, in our opinion, an absolute right to summon witnesses, and, so long as he pays the necessary expenses, to insist that their attendance shall be enforced. It has been held in a large number of cases enumerated at page 503 of Mulla's Civil Procedure Code that, "It does not matter that a party has himself originally undertaken to bring the witnesses and has failed to do so, nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal of the suit. The Court may in either of these cases refuse to adjourn the hearing for the attendance of the witnesses, but it has no power to refuse to issue summonses." The only case in which the Court has power to refuse to issue summonses is where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue summons.

In the case before us diet money and other expenses of the witnesses had probably been paid in time. Summonses had really been allowed to be issued, and two of the witnesses had indeed been served but failed to put in appearance, while the other two were not served apparently through no fault of the defendant. In these circumstances, the Court had no justification whatever to close the defendant's case and the proper course for it to adopt was to proceed under O. 16, R. 10, so far as the two witnesses who had been served and had not attended were concerned, and to issue fresh summonses for the attendance of the other two who had not been served.

The order of the learned Senior Subordinate Judge refusing to enforce the attendance of the four witnesses in question is clearly wrong, and we accordingly remand the case to him under O. 41, R. 28, and direct that he shall record the evidence of these witnesses, and having taken their evidence return it to this Court within three months.

Case remanded.

1924 LAHORE 649

LE ROSSIGNOL AND BROADWAY, JJ.

The Orient Bank of India, Ltd. in Liquidation, Lahore—Appellant.

v.

Habibullah Khan-Share-holder-Respondent.

Mis. F. A. No. 1977 of 1918, Decided on 2nd March 1923, from an order of the District Judge in charge of Liquidation work, Lahore, D/- 29th April 1918.

Company—Liquidation—Share holder can't escape liability as contributory, on the plea of fraud.

A share-holder cannot be relieved of his liability as a contributory in the winding up proceedings on the ground of fraud, once an application has been made for the compulsory winding-up of the concern. [P. 649, C. 2]

Babu S. K. Mukerji—for Appellant.

Mool Chand—for Respondent.

Judgment.—In accordance with the order dated 23rd February 1921 in Civil Appeal No. 546 of 1920, a report has been received to the effect that the forfeiture of the shares held by Mt. Gulam Fatima was illegal. Under Articles 42 to 44 of the Articles of Association, however, the Bank had a lien on the shares in question and was entitled to sell the said shares in exercise of that lien.

The respondent in this and the connected Appeals Nos. 1978 and 1979 of 1918 seek to contest their liability on the ground that they were induced to buy the shares allotted to them by a fraudulent representation that they were to purchase new stock. This they cannot be allowed to do, inasmuch as a shareholder cannot be relieved of his liability as a contributory in the winding up proceedings on the ground of fraud, once an application has been made for the compulsory winding-up of the concern *vide Alister West* v. *Beni Pershad* (1), *Piara Singh* v. *Peshawar Bank, Limited in Liquidation* (2) and *Hakim Rai* v. *Kharak Singh* (3).

This appeal is, therefore, accepted with costs.

Appeal accepted.

(1) [1914] 113 P.W.R. 1914—24 I.C. 836—6 P.R. 1914—165 P.L.R. 1914.
(2) [1915] 54 P.R. 1915—32 P.L.R. 1915—28 I.C. 53—235 P.W.R. 1915.
(3) [1918] 42 P.R. 1918—16 I.C. 21.

1924 LAHORE 650

BROADWAY AND CAMPBELL, JJ.

Wasakhi Ram—Defendant—Appellant.

v.

Hussain Khan and others—Plaintiffs—Respondents.

S. A. No. 2061 of 1917, Decided on 10th November 1922, from a decree of the D. J. Gujranwala, D/- 16th July 1917,

Evidence Act, S. 101—Admission of fact shifts burden of proof—Evidence Act, S. 17.

B sued to W recover a sum of money wrongly paid to him. W's admission in a previous suit between B and a third person that he had received the money from B was proved against him. In the present suit W pleaded that he had not received the money and that the receipt executed by him in favour of B was obtained from him under undue influence;

Held: that W's admission in the previous suit shifted the burden of proving non-receipt of the money and existence of undue influence on W. [P 650, C 2]

Pandit Sheo Narain—for Appellant.

Zafrullah Khan and *Gokal Chand Narang*—for Respondents.

Judgment.—Badar Din was indebted to a joint Hindu family of which three members were Ladha Mal, Ganga Singh and their nephew Wasakhi Ram. In 1906 the family was partitioned and the debt of Badar Din fell to the share of Ladha Mal and Ganga Singh. In 1912 the plaintiff executed two bonds in favour of these two persons. One of the bonds was transferred to another party, Sohna Mal, who brought a suit on it against the plaintiff in January 1914. The plaintiff's plea in the suit was that he had, on the 26th June 1913, paid Rs. 2,170 to Wasakhi Ram in discharge of the debt. Wasakhi Ram as a witness supported Badar Din and admitted that he had received the money and had given Badar Din a receipt which was produced. He further applied to be made a plaintiff in the suit since he was a member of the joint Hindu family, and the question whether he was so or not was put in issue and decided against him. The result of the suit was a decree against Badar Din.

The suit from which the present second appeal has resulted was brought by Badar Din against Wasakhi Ram for the recovery of Rs. 2,170 with interest. It was dismissed by the Trial Court but on appeal the learned District Judge gave the plaintiff a decree for Rs. 2,170 without interest, and against this decision a second appeal has been preferred.

The main question at issue was, whether Badar Din had paid Wasakhi Ram Rs. 2,170 on account of a debt due by him to Ladha Mal and Ganga Singh. The lower Court found that this sum was not proved to have passed. The learned District Judge held that Wasakhi Ram's admission in the previous suit having been proved against him the burden of proving want of consideration and also of proving undue influence in regard to the execution of the receipt (which he pleaded) fell upon him, and that since he had failed to discharge the burden he was liable to pay the plaintiff's claim.

We have heard Mr. Sheo Narain in support of the appeal but we have not considered it necessary to call upon Counsel for the respondent to reply. The main contention by the learned Advocate for the appellant is, that evidence has been overlooked by the lower Appellate Court. He admits that there was a clear admission by the appellant in the previous suit, but he contends that the appellant as a defendant is now entitled to expose the real nature of the transaction between himself and the plaintiff and that evidence that no money passed and that the receipt was given simply in order to injure Ladha Mal and Ganga Singh has been disregarded.

That evidence is stated to be the depositions of Bhag Mal and of the plaintiff himself who was called as a witness by the defendant. Now, Bhag Mal's evidence is specifically referred in paragraph 4 of Badar Din's memorandum of appeal to the lower Appellate Court. He is mentioned by name in the lower Appellate Court's judgment, and the learned District Judge has recorded a definite finding that the defendant has wholly failed to establish undue influence. This is what Bhag Mal was called to establish

and we have no reason for doubting that his evidence was read and considered by the learned District Judge before he came to the above finding.

In regard to the plaintiff, Mr. Sheo Narain claims that an absurd story was elicited from him when he appeared in the witness-box, which showed clearly that no money could have been paid by him to Wasakhi Ram. The plaintiff's deposition is not mentioned at all by the learned District Judge but he states it as having been admitted before him that the non-passing of consideration was not proved, a matter which he made it clear had to be proved by the present appellant. This admission then, by the latter's Counsel rendered specific allusion to the plaintiff's evidence, the object of which was to prove that no consideration passed, unnecessary, and we do not think that any case has been made out for interference on second appeal on the ground of omission by the lower Appellate Court to read evidence.

The next and the only other point argued is that the payment on Rs. 2,170, if made, as alleged by the plaintiff Badar Din, was not legally recoverable since it was not made by mistake or under coercion within the meaning of S. 72 of the Indian Contract Act. This was not a point raised in the appellant's pleadings in the Trial Court. Mr. Sheo Narain contends that the plaint contained no allegation of payment by mistake and concedes that, if we hold that it did, his present objection raised in second appeal must fail. We have perused paras 4 & 5 of the plaint and, although the wording might have been more definite, we consider that there was in effect an assertion that the plaintiff had by mistake paid the money to the wrong member of the family to which he believed himself to be indebted.

The appeal fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 LAHORE 657

LE ROSSIGNOL, J.

Faiz Mahammad—Plaintiff—Appellant.

v.

Muhammad Ismail and another—Defendants—Respondents.

S. A. No. 1136 of 1922, Decided on 14th December 1922, from a decree of the District Judge Amritsar, D/- 1st February 1922.

✱ (a) *Pre-emption can be enforced out of Court.*

Pre-emption can be enforced without the intervention of Courts. [P. 651, C. 2]

✱ (b) *Pre-emption—Conveying property by vendee to pre-emptor—No right of pre-emption arises.*

When a vendee in recognition of a pre-emptor's right, conveys his bargain to the pre-emptor, he is not really effecting a fresh sale, but is merely substituting the pre-emptor for himself as vendee. Such a re-sale or reconveyance does not give rise to pre-emption.

[P. 651, C. 2]

Ghulam Rasul—for Appellant.

P. N. Rozdon—for Respondents.

Judgment.—The facts in this case are without doubt. On 17th July 1918 Rur Singh sold the land in suit to Muhammad Ismail for Rs. 100, Bur Singh, brother of Rur Singh, demanded to pre-empt and on 15th July 1919 Muhammad Ismail re-transferred the land to Bur Singh, recognising his right to pre-empt.

This suit was instituted by the son of Muhammad Ismail with the prayer that he should be allowed to pre-empt on the re-sale by his father.

The question for decision is whether a re-sale under such circumstances gives rise to a right to pre-empt.

Pre-emption can be enforced without the intervention of the Courts, when a vendee in recognition of a pre-emptor's right conveys his bargain to the pre-emptor he is not really effecting a fresh sale, but is merely substituting the pre-emptor for himself as vendee. Bur Singh's right arises out of the prior sale by Rur Singh, whilst plaintiff's right arises out of a re-sale forced upon plaintiff's father by a superior title.

In the circumstances of this case, the re-sale or reconveyance gives rise to no right to pre-empt.

The appeal is dismissed with costs.

Appeal dismissed.

✱ 1924 LAHORE 652

LE ROSSIGNOL AND ZAFAR ALI, JJ.

Din Muhammad and others—Defendants—Appellants.

v

Pir Bakhsh and others—Plaintiffs & Defendants—Respondents.

F. A. No. 3404 of 1917, Decided on 17th November 1922, from the decree of the Subordinate Judge First Class, Lahore, D/-30th August 1917.

✱ *Wakf—Takia—Alienation and partiton of takia property is void.*

A takia is a resting place and usually is in the keeping of a faqir and its common features are a rough mosque which is generally nothing more than a mud or loose masonry prayer platform and attached thereto generally a small hut or shed for the purpose of the ablutions enforced by Islamic tenets before prayers are said. It is also a general meeting place for the exchange of news and gossip and for smoking tobacco. In short it is the primitive substitute of unsophisticated and indigent India for a club. The presence of the prayer platform or mosque and bathroom is due to the frequency of prayer enjoined upon Muthammadans by their religious law and even if the takia be not regarded as a *wakf* property it is obviously a common property set aside for common enjoyment and consequently not a property which may be usurped with impunity by a few of the persons interested and by them diverted to uses which render the original dedication impossible. The takia property is therefore inalienable and impartible except with the consent of all the persons interested. [P 652, C 2 & P 653, C 1 & 2]

Sheikh Niaz Muhammad and *Sheikh Azim Ullah*—for Appellant.

Abdul Aziz and *Shaukat Rai*—for Respondents.

Judgment.—Prior to 1864 outside the Shahalmi Gate of Lahore City was a takia known as the Takia Kashmirian Khisht Faroshan, that is, the resting place of the Kashmiri brick-sellers. In 1854 the land on which takia stood was taken by the Municipal Committee for a public garden and the proprietary body of Killa Gujar Singh was persuaded to make over the site of the takia, now in dispute, in exchange for the old takia. It is not clear whether the proprietors of Killa Gujar Singh made a gift of the land now in dispute or received some payment, but the land in dispute was made over to the Kashmiri brick-sellers, eleven of whom were mentioned by name in the deed of gift or conveyance. The names given in the deed, however, were not intended to be an exhaustive list of the persons interested in the land, for the gift was made not only in favour of those mentioned by name but in favour of others also.

A takia is resting place and usually is in the keeping of a faqir, and its common features are a rough mosque which is generally nothing more than a mud or loose masonry prayer platform and attached thereto generally a small hut or shed for the purpose of the ablutions enforced by Islamic tenets before prayers are said. It is also a general meeting place for the exchange of news and gossip and for smoking tobacco. In short, it is the primitive substitute of unsophisticated and indigent India for a club.

In 1902 a suit was brought on behalf of 43 persons against eight contesting defendants for a declaration, among other reliefs, that the land now in suit containing huts, a mosque, a well, etc., was the joint property of the parties. In that suit, which was finally decided by this Court, it was determined that the present takia had been taken in exchange for the old takia outside the Shahalmi Gate, that it was the joint property of the Kashmiri brick-sellers of Lahore and that the gift in 1864 was in favour of all those interested in the old takia and not merely in favour of the eleven persons whose names were specifically mentioned in the deed of gift. It appears that shortly after the decision in that case the defendants, who were in actual possession of the takia property, proceeded to buy up the shares of the successful plaintiffs and to dispose of part of the land, and the present appeal arises out of a suit brought by 55 persons for a declaration that the takia in dispute is inalienable and impartible property and that it belongs to all the Kashmiri brick-sellers of Lahore, of which brotherhood the plaintiffs alleged that they were members.

The Trial Court has decreed in favour of 24 out of the 55 plaintiffs,

who are connected by blood with the defendant-brick-sellers that they, too, have rights in the takia, but it has refused to decree that the property is impartible and inalienable on the ground that portions of the property have been built upon, some portions have been alienated and the plaintiffs are too late in claiming their relief. Both sides appeal, the plaintiffs contending that a takia, even if it be not regarded as waqf property, is common property set aside for the common enjoyment of the whole brotherhood; secondly, that all Kashmiri brick-sellers of Lahore whether related by blood or not to the defendants are entitled to an interest in the takia; the defendants contending that the Court below had given too wide interpretations to the expression 'families of brick-sellers' and urging that cognates did not fall within that expression.

With regard to the first contention on behalf of the plaintiffs we are unable to agree with the view taken by the Court below. The lower Court has failed to observe that the usurpation of the takia by certain of the defendants and the alienation of certain portions of it were the immediate cause of this litigation. It is not clear that the original owners of this takia were united by any bond of close relationship. There is no indication that the bonds uniting them were other than those of country of origin, occupation and residence in Lahore. The takia was established, and used by them as a place of repose and recreation open to all members of the brick-selling Kashmiri community resident at Lahore. The presence of the prayer platform or mosque and bathroom is due to the frequency of prayer enjoined upon Muhammadans by their religious law, and even if the takia be not regarded as a waqf property it is obviously a common property set aside for common enjoyment and consequently not a property which may be usurped with impunity by a few of the persons interested and by them diverted to uses which render the original dedication impossible. For these reasons we hold that the takia property in dispute is inalienable and impartible except with the consent of all the persons interested.

With regard to the second point, having regard to the history of this takia, we see no reason to doubt that all Kashmiris residing in Lahore and plying the trade of brick sellers have an interest in this takia. It is true that in the course of the judgment of 1910 it was said that that brotherhood had consisted ever since 1861 of a comparatively small number of families and not of a very largely diffused class; but it does not follow that the circumstances will always remain the same and, in the absence of any indication that the use of the takia was originally confined to certain families, we think it right to declare that all Kashmiri brick sellers resident in Lahore have an interest in this takia.

On behalf of the defendants a preliminary point was raised that during the trial in the Court below four defendants, namely, No. 4 Dasandhi, No. 20 Mt. Ghulam Sakina, No. 18 Mt. Jiwan and No. 27 Jamal, had died and that no application to bring their representatives on to the record was made within the statutory period. Consequently, the suit had abated against them and in their absence could not proceed against the remaining defendants alone. In our opinion, this objection does not deserve success. The number of the defendants to the suit was numerous; they lived in a large town like Lahore and their comings and goings could not be readily checked by the plaintiffs. Moreover, these defendants were defended by Counsel and their Counsel did not bring to the notice of the Court and consequently to the notice of the plaintiffs the fact of their demise. Consequently, the failure of the plaintiffs to bring their representatives on to the record in time was excusable. The object of the law is to penalise neglect and no party should be brought on to the record at a period later than that prescribed by Statute if the party responsible could by the exercise of ordinary care have taken the necessary step in time. For the reasons above set forth, neglect cannot be imputed to the plaintiffs. Moreover,

of the four defendants above mentioned three, it is established by evidence, were no longer interested in the case having parted with their rights before their death, while the fourth Jamal had already admitted the claim of the plaintiffs.

The only other point raised on behalf of the defendants was that only the parties to the suit of 1902 and their descendants were interested in this *takia* and that the lower Court had gone wrong in decreeing in favour of the cognates of the plaintiffs; but, for the reasons already given, we reject this contention and hold that all Kashmiri brick-sellers resident in Lahore have an interest in the *takia*. For these reasons we dismiss the defendants' appeal and accepting the appeal of the plaintiffs grant them the relief prayed for with the exception of the prayer for damages which was not pressed before us. The plaintiffs shall have their costs throughout.

Defendants' appeal dismissed and Plaintiffs' appeal accepted.

✱ 1924 LAHORE 654 (1)

SCOTT-SMITH AND ZAFAR ALI, JJ.

Datta Ram—Petitioner.

v.

Daya Ram and others — Respondents.

Cr. Rev. No. 55 of 1924, Decided on 12th May 1924, against the order of the S. J., Karnal, D/- 12th December 1923.

✱ *Penal Code, Ss. 304 and 325 — Grievous hurt causing death owing to a single blow on the head justifies conviction of all the assailants under S. 325 but not under S. 304, where who gave the blow is unknown.*

Where the skull of the deceased was fractured as a result of a blow on the head in an attack upon one man by four persons who beat him with lathis, but there was no other grievous hurt and it was not known which of the accused struck the blow which fractured the skull and resulted in his death.

Held: the accused did not know that death was likely to be caused but they must have known that grievous hurt was likely to be caused, and that they committed therefore the offence of causing grievous hurt. [P. 654, C. 2]

Anant Ram—for Petitioner.

Shamair Chand—for Respondents.

Scott-Smith, J.—This is an application by a private person for enhancement of the sentence of four years' rigorous imprisonment passed upon four persons for an offence under S. 325, Indian Penal Code. The facts as found are that the four respondents set upon Chhelu and beat him with *lathis*. Chhelu's skull was fractured as a result of one blow on the head. He had no other bone fractured and there was no grievous hurt other than the fracture of the skull. There is no evidence to show which of the accused persons struck the blow which fractured Chhelu's skull and resulted in his death. Under these circumstances we think it impossible to hold that the respondents had any common intention to cause death or such bodily injury as was likely to cause death, nor can it be said that each of them knew that death was likely to be caused.

Having regard to the nature of the other injuries caused we think it can only be held that the common intention was to give him a good thrashing and we have no hesitation in holding that they must have known that grievous hurt was likely to be caused. As it is not known which of the respondents struck the fatal blow, *Agra* v, *Crown* (1) is an authority for holding that they can only be convicted of causing grievous hurt as has been done. Substantial sentences have been awarded and in our opinion there is no sufficient ground for enhancement and we reject the petition.

Petition rejected.

(1) [1914) 37 P.R 1914 C.—16 Cr. L.J. 209—27 I.C. 833—319 P.L.R. 1915.

✱ 1924 LAHORE 654 (2)

SCOTT-SMITH AND ZAFAR ALI, JJ.

Pirthi—Appellant.

v.

The Crown— Respondent.

Cr. App. No. 194 of 1924, decided on 14th May 1924, against the order of the S. J., Delhi, D/- 28th January 1924.

✱ *Penal Code, Sec. 302 – Youth and absence of premeditated motive are sufficient for refusing to pass capital sentence.*

Where there was no motive for a premeditated murder and the probability was that there was a violent quarrel

when the accused, a young man of 20 was taking his wife and child from a neighbouring village to his own village and he killed them on the way. [P. 656 C. 1]

Held: that capital sentence in such a case should not be passed.

Shamair Chand—for Appellant.

Public Prosecutor—for Respondent.

Scott-Smith, J.—Pirthi appellant has been convicted by the Sessions Judge of Delhi of the murder of his wife and one year old daughter, and has been sentenced to death. He has appealed to this Court through Mr. Shamair Chand, Advocate, and the case is before us for confirmation of the sentence under Section 374 of the Criminal Procedure Code.

The appellant is said to have killed his wife and child as he was taking them back from Nilothi to his own village of Matola on the evening of the 18th of October 1923. The bodies were found on the way between the two villages on the morning of the 23rd October 1923 at the place pointed out by the appellant. Most of the facts were admitted by the appellant at the trial, and are still admitted in this Court. Pirthi's statement was that 15 days before the *Dusehra*, *Mt.* Saroopi, his wife, left his house with her infant daughter. He searched for her and ultimately found her in Nilothi village. He went there and asked her to return to his home. She abused him filthily and refused to go, but the people of Nilothi persuaded her to accompany him On the way back she kept on abusing him and eventually said "I will live with Ghansham of Matola and will see you implicated in some case. I will then enjoy freely the company of Ghansham." Having said this, she threw her infant daughter with terrible force at him, with the result that the child fell on the ground and its death was instantaneous. This enraged the appellant, who had a stick in his hand and aimed a blow at her shoulder but hit her on the head by mistake. He gave her only one *lathi* blow and she died within 20 minutes. The appellant then took both the dead bodies and buried them in his field and subsequently pointed out the spot to the Sub-Inspector. The medical evidence showed that at least six blows had been struck on the person of *Mt.* Saroopi, two blows at least were struck on the skull. There were multiple fractures of the skull, and there were also three fractures of the arms. The child's ribs were crushed but this could have been caused when it was being buried. The head injuries of the child were inflicted with a stick, and could have been caused by one blow. The Assistant to Civil Surgeon was of opinion that if the child had been thrown and fell on its head, the skull would not have been crushed to the extent of the crushing in this case. The learned Sessions Judge found upon this evidence that the killing of the woman was intentional and that the child did not meet its death as the result of a fall in the way stated by the appellant.

It is quite clear from the evidence that *Mt.* Saroopi had not been living on friendly terms with her husband and had left him in anger, that he found her in Nilothi and that she was persuaded to return with him. The evidence of *Mt.* Hukmi and Sher Singh of Nilothi (P. Ws. 2 and 3) shows that they and other villagers accompanied the husband and the wife for over a mile from the village, because the woman said that she was afraid that her husband would beat her if she went with him alone They do not state that any abuse was given by the wife to the husband. It has, however, been strenuously, urged by the learned Counsel for the appellant that there must have been some further quarrel between the couple after the Nilothi villagers had left them, and that the husband had no reason to deliberately murder his wife and child. There is no evidence on the record to show that the woman was of a bad character, and apparently the husband was anxious to live with her. It has also been contended by Mr. Shamair Chand that it is possible that the appellant's story about his wife throwing the child at him may be true, but the medical evidence negatives this theory and it also appears to me highly improbable that the woman would have thrown her infant child in this way at her husband because she would have been afraid of its suffering some serious injury thereby. It appears to

me much more probable that the child met its death on account of the receipt of a blow from the appellant when it was in the mother's arms which blow he, perhaps, aimed at the mother. His own statement that he struck his wife only one blow is proved by the medical evidence to be false. I do not see how it is possible to come to any other conclusion having regard to the injuries inflicted than that he intended to cause the death of *Mt.* Saroopi. The burden of proving that he acted under the influence of grave and sudden provocation which deprived him of the power of self-control lay upon the appellant, and there is no evidence in support of this. It is, of course, not possible, under the circumstances of the case, that any evidence should have been forthcoming upon this point, but it may be readily remarked that the medical evidence goes against the truth of his story. Moreover, there is no evidence upon the record that *Mt.* Saroopi was on intimate terms with one Ghansham. The *Lambardar* and other prosecution witnesses were not questioned on the subject and the appellant's own father, Ganga Sahai (D. W. 1) did not refer to it. On the contrary, he stated that the appellant and his wife lived on friendly terms. The appellant's brother, Lahri (P. W. 18) said that Ghansham used to visit *Mt.* Saroopi, but that is all he said. He did not allege that there was any improper intimacy between them.

In my opinion the appellant has been rightly convicted of the murder of his wife and child. At the same time I do not think that the case is one in which it is necessary to impose the capital sentence. The appellant is only 20 years of age and having regard to the circumstances already stated, I am of opinion that there must have been some violent quarrel between the parties on their way back to Matola village, for the appellant had no sufficient motive for a premeditated murder. I would, therefore, accept the appeal so far as to set aside the sentence of death and would sentence the appellant instead to transportation for life.

Appeal partly allowed.

1924 LAHORE 656

LE ROSSIGNOL AND HARRISON, JJ.

Singh Ram and others—Plaintiffs—Appellants.

v,

Bhagwana and others—Defendants—Respondents.

S. A. No. 2638 of 1919, Decided on 29th January 1923, from a decree of the District Judge, Gurgaon, at Hissar, D/- 25th November 1919.

Custom (Punjab)—Alienation—Remote reversioners are not bound by acts of nearer reversioner.

Although a nearer reversioner has placed himself in a position which disables him from challenging an unauthorised alienation, because of acquiescence it is still open to more remote reversioners to challenge it on their own account, as the latter do not derive their right to succession through the former [P. 656, C. 2]

N. C. Mehra—for Appellants.

Beni Pershad Khosla—for Respts.

Judgment.—This was a suit by reversioners for a declaration that a gift of ancestral property by Mt. Dakhan to her illegitimate son Bhagwana should not affect the reversionary rights of the plaintiffs. The First Court granted the plaintiffs a decree, but the District Judge dismissed the suit on a ground not raised in the pleadings that the plaintiffs had been adopted into the family of Mt. Dakhan's late husband.

The plaintiffs have appealed to this Court, and on behalf of the respondents it is admitted that the ground on which the District Judge accepted the defendant's appeal was irrelevant. It is, however, contended that, inasmuch as a nearer reversioner Het Ram acquiesced in and accepted the gift made by Mt. Dakhan, that acceptance binds the plaintiffs to whom the reversion will open only on the extinction of Het Ram's land. This contention is opposed to all authority. The plaintiffs do not derive their rights through Het Ram, and when a nearer reversioner has placed himself in a position which disables him from challenging an unauthorised alienation, it is open to more remote reversioners to challenge it on their own account.

For these reasons we accept the appeal and restore the decree of the First Court with costs throughout in favour of the plaintiffs.

Appeal accepted.

1924 LAHORE 657 (1).

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Gopi Mal and another.....Defdts-Appellants.

v.

Muhammad Yasin and another...Plff-Defdts—Respondents.

Letters Patent Appeal No. 7 of 1923 decided on 6th November, 1923 from the decree of Martineau, J., passed in Civil Appeal No. 2428 of 1921 on 15th November, 1922, affirming that of the District Judge, Ambala, dated the 3rd August, 1921.

Punjab Pre-emption Act—Fallow land does not necessarily cease to be agricultural land.

It is not a necessary implication that land is not agricultural land, merely because at the time of sale, it bears no crop; agricultural land often lies fallow in the ordinary course of agriculture and in this country often remains unsown by reason of paucity or excess of moisture, but each case must be decided on its own facts.

Where the land had not been used for agricultural purposes for the 6 years preceding the sale and was subsequently proposed for sale as a building site, *Held* the land is not agricultural land. [P. 657 Cols. 1 & 2.]

Sundar Das for the Appellants.

Obedulla for the Respondents.

Le Rossignol, J.:—In this pre-emption suit the matter for decision is whether the land sold is agricultural land or urban immoveable property.

Now the facts found by the District Judge may not be challenged in second appeal, but the question whether on those facts, so found, the land is to be classed as agricultural land is a question of law.

Agricultural land as the term is used in the Pre-emption Act means land as defined in the Punjab Alienation of Land Act, 1900, as amended by Act I of 1907 and is therefore "land which *is* not occupied as the site of any building in a town.....and *is* occupied or let for agricultural purposes, etc."

It is to be observed, then, that the test is the use to which the land is put at the time of the sale.

From this it is not a necessary implication that land is not agricultural land, merely because at the time of sale, it bears no crop; agricultural land often lies fallow in the ordinary course of agriculture and in this country often remains unsown by reason of paucity or excess of moisture, but each case must be decided on its own facts.

On the findings in this case that the land had not been used for agricultural purposes for the 6 years preceding the sale and in 1913 was proposed for sale as a building site, we hold that the land is not agricultural land and accepting the appeal we dismiss the suit with costs throughout.

Appeal dismissed.

1924 LAHORE 657 (2).

MOTI SAGAR, J.

Nur Samand Khan.....Defendant—Appellant.

v.

Fajja and others.....Plaintiffs—Respondents.

S. A. No. 14 of 1923, dated 11th June, 1923 from the decree of the District Judge, Jullundur, dated 10th October, 1922.

(*a*) *Contract Act, S. 145—Payment means payment in money.*

The word "payment" in S. 145 means a payment in money or by transfer of property and not merely the incurring of a pecuniary obligation in the shape of a bond, promissory note, or acknowledgment of liability. [P. 659, Col. 1.]

(*b*) *Contract Act, S. 145—Principal debtor's liability to pay.*

A creditor obtained a decree jointly against a surety and principal debtor, *ex-parte* against the latter and on contest as against the former, who made payment to the creditor and sued the principal debtor for the decretal amount. In the meantime the *ex-parte* decree was set aside.

Held that the setting aside had not the effect of relieving the surety from the decretal obligation, who had, therefore, a subsisting right to recover from the principal debtor, the amount actually paid to the decree-holder. [P. 659, Col. 1.]

Badri Das for the Appellant.

Fakir Chand for the Respondents.

Judgment:—On the 20th of October, 1911, Abdulla, father of Samand Khan, defendant No. 1, borrowed Rs. 1000 from one Khushal Singh, Resident of the Kapurthala State. Umar Khan, the grandfather of the present plaintiffs, stood surety for the payment of this loan. Abdulla made several payments, and eventually a sum of Rs. 400 only remained due for which on the 23rd of June, 1912, a balance was struck by him in the books of Khushal Singh. Khushal Singh died shortly after and his widows made an assignment of this debt in favour of Kirpa Ram, defendant No. 2. The latter, thereupon, brought a suit on the basis of this balance against Samand Khan, defendant No. 1, son of Abdulla, the principal debtor, and Fajja and Alia plaintiffs, grandsons of Umar Khan, surety, claiming recovery of Rs. 400-0-0

as principal and Rs. 144-0-0 as interest, total Rs. 544-0-0. Samand Khan did not put in appearance, and an *ex-parte* decree was passed against him on the 21st of January, 1919. The other defendants contested the suit but their objections were overruled, and a decree passed in favour of the plaintiffs against them also. Shortly after, in order to pay off this decree, Fajja and Alia executed two documents in favour of Kirpa Ram, one being a bond for Rs. 111-0-0 and the other a mortgage deed of their immoveable property for Rs. 499-0-0. In this manner the total amount of the decree, including costs, namely, Rs. 610-0-0 which was awarded against the present plaintiffs in favour of Kirpa Ram in the Kapurthala courts, was paid off, and the principal debtor completely discharged from liability. Samand Khan, in the meantime, made an application for setting aside the *ex-parte* decree. This application was granted, and on the 13th of *Magh*, 1976 corresponding to the 26th of January, 1920, the *ex-parte* decree was set aside. Fajja and Alia, after they had paid off the decree obtained by Kirpa Ram against them, brought the present suit for Rs. 610 against Samand Khan, the principal debtor on the allegations that they, as sureties, had paid off the decretal amount on behalf of the former, and that under Section 145 of the Indian Contract Act they were entitled to recover this sum from him. The defendant pleaded that the decree obtained by Kirpa Ram in the Kapurthala State was collusive, that the plaintiffs had made no payments in discharge of this decree and that they were consequently not entitled to sue. It was further pleaded that the *ex-parte* decree obtained against the defendant had been set aside, and that the plaintiffs had, therefore, no cause of action to maintain a suit on the basis of that decree. The plaintiffs subsequently made an application that they should be permitted to amend their plaint. This application was granted and they were allowed to make the necessary amendments. The plaintiffs, thereupon, based their suit on the original cause of action, and stated that they as sureties had paid off the debt which was due from the principal debtor, and that even irrespective of the decree they were entitled to be indemnified for the payments made by them on behalf of the principal debtor. Both the courts below found in favour of the plaintiffs and decreed their suit. The defendant has now come up in second appeal to this court through Mr. Badri Das, and I have heard Mr. Faqir Chand on behalf of the plaintiffs.

Two contentions were raised by Mr. Badri Das before me in this appeal. Firstly, it was contended that the payment alleged to have been made by the plaintiffs to the decree-holder on behalf of the defendant was not a legal payment, and did not entitle them to maintain this suit. It was argued that the plaintiffs had made no actual payments, but that they had only executed certain documents in favour of the decree-holder undertaking to pay at a future date ; such an undertaking it was contended was not tantamount to actual payment and did not give the sureties a cause of action to recover from the principal debtor. Next it was urged that the decree having been set aside, the consideration for the documents executed by the plaintiffs in favour of the decree-holder Kirpa Ram had failed, and that as the latter could not recover on the basis of those documents, the plaintiffs had no cause of action. It was also urged that the original debt which was advanced in October 1911 had become barred in January 1919 when the payments are alleged to have been made, that there was no legal obligation on the part of the plaintiffs to pay off a barred debt, and that the defendant, in these circumstances, was not bound to indemnify the plaintiffs even if they had as a matter of fact made any payments to the decree-holder. In my opinion there is force in the first contention in so far as it relates to the bond for Rs. 111 executed by the plaintiffs in favour of the decree-holder, but the other contentions have no force and must be disallowed. In support of the first contention Mr. Badri Das relies on 26 Mad. 322, 14 Mad. L. J. 285 and 50 I. C. 611. Following the rule laid down in these authorities it seems to me that the plaintiffs' suit should be dismissed for Rs. 111, the amount of the liability undertaken by them under the bond, but that the rest of their claim under the mortgage must be decreed. Section 145 of the Indian Contract Act runs as follows :—

"In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully."

It will be noted from the language of this section that the surety has a right to recover

from the principal debtor whatever sum the former paid to the creditor which sum ought to have been paid by the principal debtor.

The sole question for determination, then is whether the sureties have or have not made any payments to the creditor on behalf of the principal debtor. In the present case two documents had been executed by the sureties in favour of the creditor, one of which was a bond for Rs. 111, and the other a mortgage deed under which the property of the sureties had been transferred to the creditor. By the execution of the mortgage deed not only the principal debtor had been exonerated from liability but the sureties had themselves been damnified to the extent of the amount covered by the mortgage deed executed by them in favour of the decree-holder. The execution of the mortgage deed and the transfer of property in favour of the decree-holder were clearly equivalent to payment and must be treated as such, under Section 145 of the Indian Contract Act. The bond, however, stands on a different footing and cannot be treated as payment as between the sureties and the principal debtor. The word payment in Section 145 of the Contract Act means a payment in money or by transfer of property and not merely the incurring of a pecuniary obligation in the shape of a bond, promissory note, or acknowledgment of liability. I am, therefore, of opinion that the suit in respect of Rs. 111 which had not actually been paid by the plaintiffs but in respect of which a pecuniary obligation in the shape of a bond had only been incurred should have been dismissed. As for the rest of the claim it is clear on the authorties cited by the learned Vakil for the appellant that not only the principal debtor was exonerated from liability to the creditor, but that the sureties also were damnifid to a certain extent. The claim was, therefore, rightly decreed to that extent.

As to the second contention it is clear that the deed of mortgage was executed by the plaintiffs before the *ex parte* decree against the defendant was set aside, and that under the decree, which was joint both against the principal debtor and the sureties the latter were bound to make the payment. The decree against the sureties had not been set aside, and I do not think that it would be pleaded on their behalf that when the *exparte* decree against the principal debtor was set aside, the consideration failed even as against them.

As to the question of limitation it is obvious that the payment was made by the plaintiffs under the decree which they were bound to discharge and which was never set aside as against them. No question, therefore, of their paying a barred debt on behalf of the principal debtor arises in this case and I do not think that there is any force in the contention raised.

The result is that I accept the appeal to the extent of Rs 111 and, in modification of the decree of the Lower Appellate Court, decree the plaintiff's suit to the extent of Rs 499 only. Parties shall bear their own costs in this court.

Appeal allowed in part.

1924 LAHORE 659.

MOTI SAGAR, J.

Mt. Bhagwanti.....Plff.-Petitioner.

v.

Bua Ditta and others.....Defdts-Respondents.

Civil Rev. Petition No. 29 of 1923 decided on 21st May, 1923 for revision of an order of the Subordinate Judge First Class, Lahore, dated the 18th December, 1922.

C. P. Code O. 33, R. 5 (d)—Enquiry into merits not permissible.

Where the trial court dismissed the application on the ground that the applicant was not an heir under Hindu Law as alleged, *Held* that the court acted with material irregularity in going into the question of heirship, to determine whether the applicant had a cause of action. [P. 660 Col. 1 & 2.]

D. C. Ralli, Advocate for Petitioner.

Lala Tirath Ram, Vakil for the Respondents.

Judgment, :—This is an application for revision of an order passed by the Subordinate Judge at Lahore on the 18th of December, 1922, rejecting the plaintiff's application for permission to sue as a pauper. One Mahtab Rai was the last male-holder of the property which is the subject-matter of litigation in the present case. He had a brother Gulab Rai and the plaintiff Mt. Bhagwanti is the widow of his son Mathra Das. The suit is for possession of a house on the allegations that the defendants are entire strangers and that the plaintiff who is the only surviving member of Mahtab Rai's family, is entitled to succeed. The suit was instituted in *forma pauperis*. The defendants resisted the application on two

grounds (1)that the plaintiff was not a pauper; and (2) that she was not an heir under the Hindu Law and that, therefore, she had no cause of action. The trial court found in favour of the plaintiff on the first question and held that upon the evidence produced it was proved that the plaintiff was not possessed of any property to enable her to pay the requisite amount of court fees. On the second question, however, it came to the conclusion that the plaintiff was not an heir and had, therefore, no right to maintain the suit. Her application was consequently dismissed on the ground that the allegations made in the plaint did not show a cause of action.

In my opinion this order is illegal and must be set aside. The scope of the enquiry under Order 33 of the Civil Procedure Code is limited primarily to determining the pauperism of the petitioner, and the court is not justified in determining, upon an application to sue in *forma pauperis*, complicated questions of law. There is no doubt that the court has the power to reject the application to sue in *forma pauperis* if the allegations do not show a cause of action, but as repeatedly held "the court ought not to treat the application for permission to sue as a pauper as calling for an adjudication of various questions which ought to be the subject of specific issues after all the pleadings have been filed". In 13 M. L. J 292 it was held by a Full Bench of the Madras High Court that in an enquiry under Section 409 of the old code, which corresponds to Order 33 Rule 7 of the new code, the court ought not to go into evidence as to the merits of the case. A similar view was taken in 4 Mad., 323, 13 M. L. J. 425, 3 I. C. 829, 11 C. W. N. 474, 8 C. W. N. 70; and 41 Mad. 620. Mr. Tirath Ram for the respondents relies on 11 I. C. 55, and argues that it was competent to the court to look into the petition of plaint as regards the merits of the claim obviously with a view to determine whether or not the allegations of the plaintiff disclosed a cause of action. The plea in that case was that the suit was barred by limitation and it was held that in order to satisfy itself as to the existence of a subsisting cause of action the court could refer not only to the petition but also to the statements made by the petitioner during the course of the enquiry. This decision came up for discussion in a recent judgment of the the Madras High Court reported as 53 I. C. 239, and it was held by Mr. Justice Kumaraswami Sastri that it was no authority for the proposition that the court ought to frame an issue as to limitation, which is often a question dependent on facts and requires parties to go into the question which ought properly to be the subject-matter of an issue after the plaint is admitted. I am in entire accord with this view and am of opinion that the Subordinate Judge acted with material irregularity in dismissing the petition on the ground that the claim did not disclose a cause of action.

I accept the petition, set aside the order and direct the learned Subordinate Judge to dispose of the petition in accordance with law. No order as to costs.

Revision allowed.

1924 LAHORE 660.

SHADI LAL, C. J.

Solhu and others.....Accused-Petitioners.

v.

Kishna Ram.....Respondent.

Cr. Rev. No. 45 of 1923 decided on 27th April, 1923 from the Sessions Judge of Hissar, dated the 22nd December, 1922.

Cr. P. Code, S. 367—Appellate judgment must be self-complete.

Where the appellate court's judgment disposed of appeals in two cases, one dealing with five accused and the other with three, but it did not mention the name of any of the accused or the name of any of the witnesses produced by the prosecution or the defence, and thus it was impossible to follow the appellate judgment without reading the judgment of the court of first instance, *Held* that the judgment was not in accordance with S. 367. An appellate judgment must be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial court. 2 Lah. 308 Foll. 35 Cal. 138 Foll. [P. 661 Col. 2.]

Pandit Nanak Chand, Advocate for the Petitioners.

Kunwar Datip Singh, Assistant Legal Remembrancer for the Respondent.

Order of reference:—The accused, on conviction by Sardar Dayal Singh, Tahsildar of Hissar, exercising the powers of a Magistrate of 2nd Class in the Tahsil and District, Hissar, were sentenced by order, dated 22nd December, 1921, under Section 323 of the Indian Penal Code, to pay Rs. 15 fine or in default to suffer three weeks' rigorous imprisonment each. The appeal of

the accused was dismissed by order of the District Magistrate, Hissar, dated 10th February, 1922.

The facts of this case are as follows :—

On 22nd August, 1921, early in the morning, Kishna Ram, complainant, went outside to ease himself in the jungle. As he was coming after washing his hands in the tank, the accused arrived and said :—

"We could not do anything in the night. But the complainant should now be ready". Sohlu, accused, then caught him (complainant) by the neck and knocked him down and Sheo Karan and Molar accused beat him with fists and kicks.

The proceedings are forwarded for revision on the following grounds:—

The judgment in appeal of the learned District Magistrate is not in accordance with law. It does not show tnat he has considered the evidence against each of the appellants. There were three witnesses for the prosecution and four for the defence and three accused in the case. As remarked in 35 Cal. 138 "the name of not one of the accused and the name of not one single witness appear in the judgment of the learned District Magistrate.". The District Magistrate may have fully considered the evidence but "it must appear on the face of the judgment that the case of each accused has been taken into consideration and reasons should be given as far as may be necessary to show that the appellate court has devoted judicial attention to the case of each accused." The evidence in the case is disposed of by the learned Magistrate in the following words :—

"On examination of the evidence I see no reason to interfere with the sentences awarded by the lower court." These are stereotyed words which might be applied to any case. The rulings cited by the applicants' counsel 35 Cal. 138, 15 I. C. 975, 33 I. C. 647 and 2 Lah. 308 are in point. The case is submitted to the High Court with a recommendation that the District Magistrate may be ordered to re-hear the appeal and write up a judgment in accordance with law.

The fine has been paid.

Order of the High Court.—The appellate judgment of the District Magistrate does not comply with the requirements of the law as contained in Section 367 of the Criminal Procedure Code, nor does it contain any indication that he has applied his mind to the case advanced by the prosecution against each of the accused and to the defence set up by him. The judgment disposes of appeals in two cases, one dealing with five accused and the other with three, but it does not mention the name of any of the accused or the name of any of the witnesses produced by the prosecution or the defence. It is impossible to follow the appellate judgment without reading the judgment of the court of first instance, and, as pointed out in *Dalip Singh* v. *Crown* (1) an appellate judgment must be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial court. The same rule has been laid down by the Calcutta High Court in *Jamait Mullick* v. *Emperor* (2).

Now I have perused the judgment of the District Magistrate, and without reference to the judgment of the trial court I am unable to say what the evidence against each of the accused was and whether the conviction was justified. Indeed, the learned counsel for the Crown admits that the judgment does not satisfy the requirements of the law on the subject, and that it cannot be followed without reference to the judgment of the court of first instance. The learned counsel, however, contends that if I read the latter judgment I would come to the conclusion that the conviction was justified, and that there was no adequate ground for interference in revision. He, accordingly, asks me not to remit the case for retrial to the District Magistrate. If I adopt the suggestion made by the learned counsel I, sitting here as a court of revision, would be doing the duty of a court of appeal and I see no reason why the District Magistrate should not be required to do the work which has been assigned to him by the legislature.

Accordingly I set aside the judgment of the District Magistrate and direct him to rehear the appeal and to write a judgment in accordance with law.

Revision allowed.

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(1) (1922) 2 Lah. 308=64 I.C. 377=23 Cr.L.J.9=24 P. L. R. 1922.

(2) (1908) 35 Cal. 138=12 C. W. N. 134=6 C. L. J. 427.

1924 LAHORE 662 (1).

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Diwan Chand.....Plff.—Appellant.

v.

Nizam Din and others.....Vendees-Defdts.—Respodts.

Letters Patent Appeal No. 63 of 1923 and Civil Appeal No. 1390 of 1922 decided on 27th November, 1923 from the decree of Abdul Raoof, J. passed in the Civil Appeal noted above on the 26th January, 1923, affirming that of the District Judge, Jhelum, dated the 10th March, 1922.

Punjab Pre-emption Act—Village—Rural areas become urban owing to commercial pursuits.

The expression "village" connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. When they are occupied by persons who are engaged mainly in commercial pursuits rural areas in the vicinity of a town grow into a suburb of the town. Such areas are governed by rules applying to urban properties. [P. 662 Col. 1.]

Mool Chand for the Appellant.

Barkat Ali for the Respondents.

Shadi Lal, C. J. :—This appeal arises out of an action brought for the pre-emption of a plot of land which is entered in the revenue records as a part of the estate called Pira Ghaib. This estate is situate near the town of Jhelum, and it appears that about ¾ths of its area has been included in the Machine Mohalla which has been held by the courts below to be a suburb of the Jhelum town

The question, upon which we are invited to express our opinion, is whether the property in dispute is to be deemed to be village immoveable property as contemplated by the Punjab Pre-emption Act. There can be no doubt that the land now occupied by the Machine Mohalla including the property in dispute was at one time a part of the village Pira Ghaib, but the facts found by the courts below justify the inference that it has ceased to be a part of the village and must now be regarded as urban property. The expression "village" connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. Now, the Mohalla in question is within the limits of the Municipality of Jhelum and is occupied by persons who are engaged mainly in commercial pursuits. The reported cases contain many instances of rural areas in the vicinity of a town which have ceased to be rural and grown into a suburb of the town. Such areas have been held to be governed by rules applying to urban properties.

We accordingly concur in the conclusion of the Single Judge and dismiss the appeal with costs.

Appeal dismissed.

1924 LAHORE 662 (2).

MOTI SAGAR, J.

The Firm Gokal Chand Jagan Nath of Sialkot.....Petitioner.

v.

The Collector, Income-Tax, Sailkot.....Respondent.

Mis. Civil Petition No. 109 of 1923 decided on 18th May, 1923.

Income Tax Act (XI of 1922), S. 66—Commissioner cannot refuse to pass order on an application to state a case—Revision lies from such refusal.

The petitioners applied to the Commissioner under Clause (2) of Section 66 to refer to the High Court certain questions of law which they alleged arose out of the order passed by the Assistant Commissioner. The Commissioner, instead of accepting or rejecting the application as required by the section, referred it to the Income-tax Officer for disposal who withheld the application and informed the petitioners that it had been withheld. *Held* that the Commissioner has no power under the law to refuse to pass any order on an application or to delegate his authority to any Subordinate Officer, that the procedure adopted by the learned Commissioner in this case was quite illegal and that he himself ought to have passed definite orders accepting or rejecting the application and that the refusal by the Commissioner to state the case, whatever may be the grounds for his refusal, is tantamount to a refusal on the ground that there is no question of law involved and the High Court, if it is not satisfied of the correctness of the Commissioner's decision has power to require the Commissioner to state the case and to make a reference to the High Court. [P. 663 Col. 1 & 2.]

Rai Sahib Lala Mool Chand, Vakil for Petitioner.

Lala Jai Lal, Government Advocate for the Respondent.

Order :—This is an application under Section 66 (3) of the Indian Income-tax Act (XI of 1922), and the prayer made in this application is that the Commissioner be required to draw up a statement of the petitioners' case and to refer it to the High Court for decision. It appears that the petitioners, who are a firm of merchants carrying on business at Sialkot, applied to the Commissioner on the 9th December, 1922 under Clause (2) of Section 66 to refer to the High Court certain questions of law which

they alleged arose out of the order passed by the Assistant Commissioner on the 8th November, 1922. The learned Commissioner, instead of accepting or rejecting the application as required by this section, referred it to the Income-tax Officer for disposal who, by his order dated the 6th of January, 1923, withheld the application and informed the petitioners that it had been withheld.

The petitioners have now come up to this court under Clause (3) of Section 66, and it has been contended on their behalf that the action taken by the Commissioner on their application was not in accordance with law and that he was bound to dispose of the application himself. I think that this contention is well-founded and must prevail. Under Clause (1) of Section 66 if, in the course of any assessment under the Act, a question of law arises, the Commissioner may, either on his own motion or on reference from any Income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court. Under Clause (2) an assessee may demand a reference on any question of law, and the Commissioner has no discretion to refuse to make a reference. Under Clause (3) if the Commissioner refuses to state the case, the assessee may apply to the High Court for a rule directing the Commissioner to state the case, and the High Court can issue a rule if it is satisfied that a question of law arises in the case. But I do not think that Commissioner has any power under the law to refuse to pass any orders on an application or to delegate his authority to any subordinate officer. In fact, it is admitted by the learned Government Advocate that the procedure adopted by the learned Commissioner in this case was quite illegal and that he himself ought to have pased definite orders accepting or rejecting the application. He, however, raises a preliminiary objection that this court has no jurisdiction to deal with this matter, inasmuch as the Commissioner has not passed any orders in this case and has not refused to state the case on the ground that there is no question of law involved therein. His contention is that the jurisdiction of the High Court to take action in such matters comes into existence only where the refusal to state the case proceeds on the ground that no question of law arises and in no other case. I am unable to accede to this contention. In my opinion, the refusal by the Commissioner to state the case, whatever may be the grounds for his refusal, is tantamount to a refusal on the ground that there is no question of law involved, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision has the power to require the Commissioner to state the case and to make a reference to this court. If the contention of the learned Government Advocate were to be accepted, the result would be somewhat startling. Suppose, there is a case in which admittedly there is a very important question of law involved. An application is made to the Commissioner to make a reference to the High Court. The Commissioner on arbitrary grounds refuses to make the reference, but does not say in his order that the application has been refused because there is no question of law involved therein. According to the argument of the learned Government Advocate, it would be impossible under such circumstances for an assessee to make an application in this court that the Commissioner be required to state the case and to refer it to High Court. I do not think that such could have been the intention of the Legislature in framing Clause (3) of Section 66 of the Income-tax Act. In the present case, however, the learned Commissioner has not passed any orders on the petitioner's application. He has neither accepted the application nor rejected it as required by Clause (2) of the section. This procedure on his part is not warranted by any provision of law, and I am, therefore, of opinion that the case must be referred back to the Commissioner with a direction that he should proceed in accordance with law and that he should either draw up a statement of the case for reference to the High Court or reject petitioner's application on the ground that there is no question of law involved therein.

Revision allowed.

1924 LAHORE 663.

SHADI LAL, C. J.

Mahtab Din.....Accused—Petitioner.

v.

The Crown.....Respondent.

Cr. Rev. No. 135 of 1923 decided on 1st May, 1923 from the Sessions Judge, Lyallpur.

(a) *Cr. P. Code, S. 181 (2)—Principal carrying bu mess at L.—Agent working at Karachi—Breach of*

trust committed at Karachi—Court at Lyallpur has no jurisdiction.

The complainant who carried on business at Lyallpur had employed the accused M as agent of his firm to sell goods at Karachi. The contract of agency was entered into at Lyallpur, and it appeared that the agent was to remit the sale proceeds and to send his accounts to the complainant at Lyallpur. The principal preferred a complaint against the agent charging him with the commission of an offence under Section 408. *Held* that property was received or retained by the accused at Karachi and that the offence if any was committed at that place and that the Lyallpur Court had no jurisdiction to entertain the complaint. [P. 665 Col. 1.]

(b) *Cr. P. Code, S. 179—Does not apply to offence under Penal Code,* S. 408*—Loss is not a 'consequence' within S. 179—Penal Code, S.* 408.

Section 179 does not govern the jurisdiction of a court to try the offence of criminal misappropriation or of criminal breach of trust for which a special provision is to be found in Section 181 (2). 22 P. R. 1915 (Cr). foll. [P. 665 Col 2.]

Shuja-ud-Din, Advocate for Petitioner.

Zafar-ulih Khan Advocate for the Complainant; *Sheikh Muhammad Ismail* for the Respdt.

The facts of this case are as follows :—

The complainant *Sheikh* Muhammad Ismail has his business at Lyallpur and he states that he employed Mahtab Din, accused, as an agent of his firm at Karachi. This engagement is alleged to have taken place at Lyallpur. The duty of the accused is said to be that he was to sell goods at Karachi and remit the proceeds thereof as well as accounts to the Head Office at Lyallpur. On the 3rd May, 1922, the complainant instituted a complaint before the District Magistrate at Lyallpur to the effect that the accused had failed to remit the full amount of proceeds of the sale of goods realised by him at Karachi and thereby suspicions were roused and the accused was called to Lyallpur with the accounts; that on going through the accounts it appeared that the accused had committed criminal breach of trust in relation to a large sum of money and that thereupon the accused absconded and has not appeared again. The complainant prayed that the accused be punished in accordance with law.

Mr. S. David, exercising the powers of a Magistrate of the 1st Class in the Lyallpur District has, by order dated the 10th June, 1922, taken cognizance of the case under Section 408 of the Indian Penal Code.

The proceedings are forwarded for revision on the following grounds :—

On behalf of the accused objection is raised to the jurisdiction of the Magistrate in Lyallpur, but the Honorary Magistrate before whom the case has been pending, has held that as the accused did not refuse at Karachi to pay up the entire balance in hand as worked out by him in the account books and did so at Lyallpur, after the accounts were gone into, the Lyallpur Court has jurisdiction, for the offence was completed at Lyallpur on non-payment of the amount alleged to be in hand. This view of the case, however, is in direct conflict with the judgment of the Chief Court reported as 22 P. R. 1915 Cr. The facts of the present case are practically on all fours with those of the case before the Hon'ble Mr. Justice Rattigan and most of the authorities on the subject were reviewed in that case and the court finally held that the Rawalpindi Court which was the Head Office of the complainant's firm, had no jurisdiction to try the case of a criminal breach of trust which had been committed at Rurki. There is absolutely no allegation in the present case that the accused received any money from the complainant at Lyallpur and committed criminal breach of trust in relation to it in this district. All that is alleged is that the sale proceeds of goods, which the accused received at Karachi, were not remitted by him from there and on being recalled and the accounts being gone into he absconded and practically refused to pay up. It is obvious that the offence, if true, was completed at Karachi and the subsequent examination of accounts at Lyallpur does not make any difference. The learned counsel for the complainant relied on I. L. R. 46 Bombay, page 641, which, no doubt, seems to be in conflict with the decision of the Chief Court in the judgment already referred to above. The Bombay judgment, however, was issued under Section 179 of the Criminal Procedure Code, the applicability of which to the cases of the criminal breach of trust and misappropriation, which have been specifically provided for in Section 181, Clause 2 of the Code, seems to be doubtful. The illustrations given in Section 179 show to which class of cases the expression "or any such consequence has ensued" was intended to apply. The learned Judges of the Bombay High Court have differed from the view taken by the Calcutta and Madras High Courts in 44 Cal. 912 and 38 Mad. 639, in regard to the construction of this expression in its applicability to cases

of misappropriation or criminal breach of trust. The reasoning of the learned Judges based on that of the Allahabad High Court in 19 All. 111, however, does not appear to be convincing. The offence of criminal breach of trust or criminal misappropriation is complete, when the accused has dishonestly committed the act, which constitutes the offence, irrespective of any subsequent consequences of it to the complainant. Moreover as indicated above the specific provision for such cases made in Clause 2 of Section 181 must override the general provision in Section 179. At any rate, the courts in this province are bound by the view of law taken by the highest court of the province, to which they are subordinate.

For these reasons, I am of opinion, that the Magistrate, Lyallpur, has no jurisdiction to try this case and submit the case to the High Court with a request that the order of the Magistrate be set aside and he be directed to discharge the accused with a direction that the complainant would be free if so advised to prefer his complaint in the court of the Magistrate at Karachi.

Judgment:—The complainant, Sheikh Muhammad Ismail, who carries on business at Lyallpur, employed the accused Mahtab Din, as an agent of his firm to sell goods at Karachi. The contract of agency was entered into at Lyallpur, and it appears that the agent was to remit the sale proceeds and to send his accounts to the complainant at Lyallpur.

The principal has preferred a complaint against the agent charging him with the commission of an offence under Section 408, Indian Penal Code, and the question which has been referred to this court by the Sessions Judge of Lyallpur is whether the Lyallpur Court has jurisdiction to entertain the complaint and to try the offence.

Now, Section 181 (2) of the Criminal Procedure Code prescribes that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed. Upon the facts as disclosed in the complaint and amplified by the complainant's statement, I concur with the learned Sessions Judge that the property was received or retained by the accused at Karachi and that the offence, if any, was committed at that place. In support of the jurisdiction of the Lyallpur Court the learned Counsel for the complainant invites my attention to Section 179 of the Criminal Procedure Code which provides that when a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued. Now, there is a divergence of judicial opinion on the question whether this section governs the jurisdiction of a court to try the offence of criminal misappropriation or of criminal breach of trust for which a special provision is to be found in Section 181 (2) and the balance of the opinion is in favour of the view that the jurisdiction in such cases is governed by Section 181 (2) and not by Section 179. Further, it must be remembered that loss though a normal result in the case of criminal misappropriation or criminal breach of trust, is not an ingredient of those offences, and cannot, therefore, be described as a consequence within the meaning of Section 179.

The judgment of the Punjab Chief Court in *Crown* v. *Raghbir Singh* (1) appears to me to be on all fours with the present case, and following that authority I hold that the Lyallpur Court has no jurisdiction to entertain the complaint. It is argued that the accusation in the present case relates, not to any specific item, but to the general balance which may be found against the accused; but the facts on the record do not support this contention. There can be no doubt that the misappropriation, if any, was committed at Karachi, and that the offence was completed at that place; and on principle I see no real difference between a case involving one item and that relating to the result arrived at by taking several items into consideration.

I accordingly direct that the record be returned to the Magistrate at Lyallpur with the direction that the accused be discharged and that the complainant be informed that, if so advised, he can bring his complaint in a court of competent jurisdiction at Karachi.

Appeal allowed.

(1) (1915) 22 P.R.Cr. 1915 = 42 P.W.R.Cr. 1915 = 31 I. C. 375 = 16 Cr. L. J. 775.

* 1924 LAHORE 666.

MOTI SAGAR, J.

Surjit Singh.....Appellant.

v.

Lieut. Capt. C. J. Torrie.....Respdt.

Civil Rev. No. 141 of 1923 dated 23rd May, 1923 for setting aside the order of the Lower Appellate Court, Rawalpindi.

(a) *Lim. Act., Art.* 164—*Time not extended if first summons duly served but no notice of adjourned hearing.*

The words in Article 164 "when the summons was not duly served" refer to the summons given for the first hearing of the suit and that where there has been due service of such summons the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed. 57 I. C. 15, Ref. [P. 666 Col. 2 & P. 667 Col. 1.]

(b) *Civil P. Code, S.* 115—*Granting application under O.* 9, *R.* 13 *under mistake of law—No revision.*

A mere error of law is not necessarily an illegality and is not an exercise by a court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for a revision. 11 Cal. 7, 40 Mad. 793, 22 C. L. J. 589 and 20 All. 78, Ref. Where the lower court granted the application to set aside the *ex-parte* decree, which was on the face of it barred by limitation.

Held that the order was erroneous in law, but it is not open to the High Court to interfere in the exercise of its revisional jurisdiction under S. 115. [P. 667, Col. 1.]

Gobind Ram Khanna for the Appellant.

Aziz Ahmad for the Respondent.

Judgment:—The facts of the case which have given rise to this application for revision are given in ample detail in the judgment of the learned Senior Subordinate Judge, and it is not necessary to repeat them here at length. Briefly stated they are as follows:—

On the 27th of February, 1922 the plaintiff obtained an *ex-parte* decree for Rs. 420 against the defendants from the Court of the Munsiff at Rawalpindi. This decree was put into execution and the whole of the decretal amount with costs was deducted from the pay of Colonel Torrie, one of the judgment-debtors, on the 6th of May, 1922. On the 17th of May, 1922, Colonel Torrie made an application to set aside the decree under Order 9 Rule 13 of the Civil Procedure Code, alleging that he had come to know of the existence of this decree on the 9th of May, 1922, only and that he was not to blame for his absence on the 11th of February, 1922, which was the date originally fixed for the hearing of the case in the court passing the decree. This application was rejected by the Munsiff on the 17th June, 1922. On appeal the learned Senior Subordinate Judge reversed the decision of the Munsiff and set aside the *ex-parte* decree, holding that the 11th of February, 1922, the date on which the defendant absented himself, must be considered for all intents and purposes to be a holiday and that as no fresh notice was given to the defendant of the date of the hearing, his application to set aside the *ex-parte* decree must be considered to be within time.

I confess I find it very difficult to understand the process of reasoning by which the learned Senior Subordinate Judge has arrived at this decision. It is not denied that the service of summons had been effected upon the defendant and that he had notice of the date fixed for the hearing of the case. As a matter of fact, it is alleged that he did attend the court on the 11th of February, 1922 at about 10 O'clock, but left the court after an hour or so when he found that the Judge had not turned up. No steps were subsequently taken by him to find out as to what had happened to his case, and the case was finally decreed *ex-parte* on the 27th of February, 1922. The 11th of February, 1922, obviously was not a holiday, and it is impossible to understand how in this particular case the court came to hold otherwise. The period of limitation prescribed by Article 164 of the Indian Limitation Act for an application by a defendant for an order to set aside a decree passed *ex-parte* is thirty days from the date of the decree, or, where the summons was not duly served, when the applicant has knowledge of the decree. In the present case there can be no question that the summons was duly served, and the period of limitation must, therefore, be reckoned from the date of the decree and not from the date when the applicant had knowledge of the decree. There is ample authority for holding that a court has no discretion to enlarge the thirty days provided by this Article, *vide* 12 Bom: L. R. 462, 19 C. W. N. 970 and 22 C. L. J. 589. In 57 I. C. 15 it was held by Mr. Justice Chevis that the words in Article 164 "when the summons was not duly served" refer to the summons given for the first hearing of the suit and that where there has been due service of such summons, the mere fact that the defendant had not received notice of an adjourned hearing will not cause limitation to run from the date on

which the defendant becomes aware of the decree having been passed. In my opinion the defendant was bound to make his application within thirty days from the date of the decree, and it was not competent to the court to extend the time upon any ground except that of fraud which, however, was not alleged in the present case. The application was clearly barred by limitation and ought to have been dismissed.

The question, however, is whether I can interfere on the revision side with the order passed by the court below. There is ample authority for holding that a mere error of law is not necessarily an illegality and is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for a revision, *vide* 11 Cal. 7, 40 Mad. 793, 22 C. L. J. 589, and 20 All. 78. I am, therefore, reluctantly compelled to reject this application and to hold that though the order of the court below upon the application to set aside the *ex-parte* decree, which was on the face of it barred by limitation, in erroneous in law, it is not open to this court to interfere in the exercise of its revisional jurisdiction under Section 115 of the Civil Procedure Code.

I dismiss the application, but having regard to the peculiar circumstances of the case I decline to order any costs to the respondent.

Appeal dismissed.

1924 LAHORE 667 (1).

ABDUL RAOOF, J.

King-Emperor.....Petitioner.

v.

Nazir Singh.....Accused—Respondent.

Cr. Rev. No. 187 of 1923 decided on 27th April, 1923 from the order of Sessions Judge, Ferozepore, dated the 1st December, 1922.

Penal Code, S. 73—Solitary confinement cannot be awarded for convictions under Arms Act.

Solitary confinement cannot be awarded for offences under Special or Local Acts. 17 P. R. 1889, (Cr.), 20 P. R. 1870 (Cr.), 4 P. R. 1875 (Cr.), 24 P. R. 1879 (Cr.), Ref. [P. 667 Col. 2.]

Petitioner was not represented.

Respondent was not represented.

Order of the High Court:—One Nazir Singh was convicted by Sardar Muhammad Ishaq Khan, Magistrate 1st Class, under Section 19 of the Arms Act XI of 1878 and was sentenced to eighteen months' rigorous imprisonment including one month's solitary confinement. On appeal to the Sessions Judge the sentence was reduced to one year's rigorous imprisonment including one month's solitary confinement. The Superintendent of the District Jail at Delhi questioned the legality of the sentence of solitary confinement and drew the attention of the learned Sessions Judge to the provisions of Section 73, Indian Penal Code. The learned Sessions Judge makes a reference to this court and asks for the expression of an opinion whether the sentence of solitary confinement can be awarded on conviction under the Arms Act. He refers to an order of a learned Judge of the Chief Court made on the 3rd of August, 1915, in Criminal Revision No. 883 of 1915 and says that he maintained the sentence of solitary confinement in the present case on account of the abovementioned order of the Chief Court. Section 73, Indian Penal Code, provides that "Whenever any person is convicted of an offence for which under this Code the court has power to sentence him to rigorous imprisonment, the court may, by its sentence, order that the offender shall be kept in solitary confinement etc etc."

It has repeatedly been held in various cases that solitary confinement cannot be awarded for offences under Special or Local Acts for according to clear provision of Section 73 of the Indian Penal Code solitary confinement can be awarded only for offnnces under the Code, see for example:—

(1) 17 P.R., 1889 Cr. (2) 20 P. R. 1870 Cr. (3) 4 P. R. 1875 Cr. (4) 24 P. R. 1879 Cr. I therefore, hold that the sentence of solitary confinement in this case was illegal and must be set aside.

Sentence modified.

1924 LAHORE 667 (2).

ZAFAR ALI, J.

Allah Dad and others...Convicts—Petitioners.

v.

The Crown.....Respondent.

Cr. Rev. No. 256 of 1923 decided on 5th May, 1923 for the revision of the order of Sessions Judge, Gujranwala, dated the 12th January, 1923.

(a) *Penal Code, S. 353—Resistence to illegal warrant—No offence—Warrant to attach supratdar's property is illegal—Cr. P. Code, S. 96.*

Where the *supratdar* of the attached property of a judgment-debtor, failed to deliver it when called upon to do so, and the executing court, therefore issued a warrant of attachment of his moveable property and with this warrant the bailiff along with some seven men went to his residence and

there attached his cattle, and the accused rescued the same, and caused slight injuries while so rescuing, *Held* that a *supratdar* is not a receiver appointed by court and therefore, the provisions of the Code of Civil Procedure relating to a Receiver appointed by court do not apply to a *supratdar*. Therefore, the warrant was illegal and the *sapurdar* and his partisans were competent to resist the removal of his cattle from his house, and were not guilty of any offence if in the exercise of that right they inflicted slight injuries to the companions of the bailiff. 11 C. W. N. 836, Foll. [P. 668 Col. 1 & 2.]

(b) *Penal Code, S. 147—Charge should clearly state the common object—Cr. P. Code, S. 221.*

In the case of rioting it is necessary that the common object of the unlawful assembly should have been clearly stated in the charge.[P.668Col.2]

Hafiz Abdul Latif, Vakil for Petitioners.

Respondent was not represented.

Judgment:—Criminal Revisions Nos. 256 and 672 of 1923 arise out of the same case and both will be disposed of by this judgment. The petitioners, 15 in number, have been convicted under Sections 147 and 353 coupled with Section 149, Indian Penal Code, of rioting and assault on a public servant, *i.e.*, a bailiff. It appears that Allah Dad, *lambardar*-petitioner was the *sapurdar* of the attached property of a judgment-debtor, but failed to deliver it when called upon to do so. The executing court, therefore, issued a warrant of attachment of his moveable property and with this warrant the bailiff along with some seven men went to his residence and there attached his cattle. As he was proceeding to remove the cattle a number of men appeared on the scene and rescued the same. The bailiff was not hurt but his companions received slight injuries.

One of the grounds of appeal was that the warrant of attachment was illegal; but this is not touched by the learned Sessions Judge who throughout his judgment speaks of Allah Dad as judgment-debtor. It is clear that the court executing the decree was not competent to issue a warrant for the attachment of the property of the *Sapurdar*. *Sapurdar* is not a receiver appointed by court and, therefore, the provisions of the Code of Civil Procedure relating to a receiver appointed by court do not apply to a *Sapurdar* to whom attached cattle or other articles are made over by the bailiff. Therefore, the warrant was illegal and the *Sapurdar* and his partisans were competent to resist the removal of his cattle from his house, and were not guilty of any offence if in the exercise of that right they inflicted slight injuries to the companious of the bailiff. "Where a warrant issued under Section 96 of the Criminal Procedure Code was illegal, it was held that the accused, eight in number, who used criminal force upon the Sub-Inspector of Police and his companions to prevent them from executing it, were justified in doing what they did in the exercise of the right of private defence." 11 C. W. N. 836. In the present case it appears that some trouble was apprehended and therefore the bailiff took a number of men with him in order to overcome resistence. But the petitioners do not seem to have exceeded their right of private defence and as they did not cause hurt to the bailiff or use criminal force to him it cannot be said that they were guilty of the offence defined in Section 353, Indian Penal Code.

Another point that may be noticed here is that the particulars of the offence under Section 147, Indian Penal Code, were not stated in the charge framed against the accused. The charge runs as below:—

"That you.....assaulted and snatched the attached cattle of Allah Dad from the bailiff Allah Jawaya and thereby committed an offence punishable under Sections 353 and 147-149, Indian Penal Code."

In 22 Cal. 276 it was held that "before a conviction can properly be maintained for the offence of rioting it is necessary that there should be a clear finding as to the common object of the unlawful assembly and also that the common object so found should have been stated in the charge in order that the accused person might have an opportunity of meeting it."

Having regard to all that is stated above the convictions cannot be upheld. Therefore I accept the petitions and acquit the petitioners and discharge them from their bail bonds.

Revision accepted.

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* 1924 LAHORE 668.

LUMSDEN, J.

Raghbir Singh.....Plaintiff—Petitioner.

v.

Singh Ram.....Defendant—Respondent.

C.R. 286 of 1923 from Small Cause Court Judge, Sonepat.

Provincial Small Cause Courts Act, Sch. II, Art. 35 (ii)—Suit to recover silver given to defendant to prepare ornaments.

Plaintiff sued to recover Rs. 60-9-9 with interest being the value of certain silver made over by him to the defendant for conversion into ornaments and misappropriated by the latter. Plaintiff had brought a criminal case under S. 406 Penal Code, and obtained a conviction in the trial court which was set aside on appeal.

Held: that the Small Cause Court had no jurisdiction to entertain the suit in view of the provisions of Art. 35 Clause ii, though the claim was restricted to the value of the silver and did not include any prayer for damages. 48 Cal. 879, 67 I. C. 305 and 59 I. C. 593, Foll. [P. 669 Col. 1.]

Shamair Chand for the Petitioner.

Nemo for the Respondent.

Judgment:—Plaintiff sued to recover Rs. 60-9-9 with interest being the value of certain silver made over by him to the defendant for conversion into ornaments and misappropriated by the latter. It appears that plaintiff brought a criminal case under Section 406, Indian Penal Code, and obtained a conviction in the trial court which was set aside on appeal. The present suit was tried as a Small Cause Court case and was dismissed with costs.

It is urged on revision that the Small Cause Court has no jurisdiction to entertain the suit in view of the provisions of Article 35 clause ii of the Second Schedule to the Provincial Small Cause Court Act. The defendant is not represented but I have little hesitation in holding that this objection must be sustained. The clause in question was added by the amending Act of 1914 and appears to be fully applicable to the present case even though the claim was restricted to the value of the silver and did not include any prayer for damages. 48 Cal. 879, 67 I.C. 305 and 59 I. C. 593 are analogous cases and all these authorities support the petitioner.

I hold, therefore, that the Small Cause Court had no jurisdiction to hear the case. The order passed is ultra vires and must consequently be set aside and the claim tried in a court of competent jurisdiction. The application is accepted but in the circumstances I make no order as to costs.

Application allowed.

1924 LAHORE 669.

MOTI SAGAR, J.

Mahla Ram.....Convict—Appellant.

v.

The Crown.....Respondent.

Cr. A. No. 329 of 1923 decided on 5th May, 1923, from the order of Magistrate 1st Class dated the 19th February, 1923.

Penal Code, S. 376—Uncorroborated testimony of the woman not sufficient—Evidence of resistence by the woman is a good guide to determine her consent or want of consent.

Where there is no independent evidence in support of the statement of the complainant that she was raped by the accused it would be most dangerous to base a conviction on her uncorroborated testimony alone; the first and foremost circumstance that can be looked for in cases of rape is the evidence of resistance which one would naturally expect from a woman unwilling to yield to a sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts. Where there is absolutely no evidence on the record of any struggle having taken place nor were marks of any injuries found on the person either of the complainant or of the accused, *Held* that the accused cannot be said to have had connection with the woman without her consent. [P. 670 Col. 2.]

Lala Ram Chand Manchanda for the Appellant.

Sardar Kharak Singh for the Government Advocate for the Respondent.

Judgment:—This is an appeal from a conviction under Section 376 Indian Penal Code. The appellant Mahla Ram has been found guilty of raping one Mt. Raj Bibi while travelling in a railway compartment, and has been sentenced to five years rigorous imprisonment including three months solitary confinement.

It is alleged that on the 21st December, 1922, Mt. Raj Bibi was travelling from Lahore to Sillanwali. When the train reached Toha Tek Singh the other women who were travelling in the same compartment got down and the accused got into the same compartment when the train was in motion. When the train had left the station it is alleged that the accused caught hold of Mt. Raj Bibi, who was sitting close to the widow, dragged her down the bench and tucking up her loin cloth forcily raped her. When the train reached the next station at Dahanwala the guard Bhagwan Das (P. W. 4) came out and hearing some cries went to the compartment in which the crime was alleged to have taken place. He found the woman lying on the bench and the accused picking up his loin cloth which was untied. The woman was weeping and abusing the accused. One Abdulla Khan, a *lambardar* (P. W. 5), who was travelling in an adjoining carriage, also came out and stated that he had heard the woman screaming. The accused was at once arrested and handed over to the police when the train arrived at Sharkot station. He was challaned under Section 376 of the Indian Penal

Code and sentenced on conviction as above indicated.

The evidence is support of the prosecution story as set out above consists of the statements of Bhagwan Das (P. W. 4), Abdulla Khan (P. W. 5) and Mt. Raj Bibi herself who is said to have been raped. Bhagwan Das and Abdulla Khan are not eye-witnesses of the crime and their evidence is therefore not of very great importance. Abdulla Khan has testified only to the fact that he heard some cries from an adjoining carriage. Bhagwan Das has stated that when the train stopped at Dahanwala station he went to the compartment in which Mt. Raj Bibi was travelling and found her weeping and abusing the accused.

The accused admits that he had sexual intercourse with the woman but contends that he has not been guilty of any offence inasmuch as the intercourse was with the consent of the complainant herself. He has stated that he got into the compartment in which Mt. Raj Bibi was travelling in a hurry and that he did not notice that it was a female compartment. He has further stated that the woman asked him for some money which he at first refused, and that she then herself suggested to him that he could have sexual intercourse with her to which he consented and paid her two eight annas pieces in return. He has also stated that the woman had a boil on her breasts and that when he pressed them she screamed out in pain.

The accused has produced some witnesses in defence, some of whom have stated that when he was arrested he at once said that he had sexual intercourse with the woman with her consent and that he had paid her some money, while others have stated that the woman did not bear a good character and that she had been living at Lyallpur in a *chakla*. The sole question for determination in the case is whether the accused had connection with the woman with or without her consent, for it is obvious that if it was with her consent no offence was committed, while on the other hand if it was without her consent he would be clearly guilty of rape under Section 376 Indian Penal Code.

In my opinion the evidence on the record is most inconclusive and it is impossible to hold that the woman was not a consenting party. There is no independent evidence in support of the statement of the complainant and it would be most dangerous to base a conviction on her uncorroborated testimony alone. As observed by Dr. Gour in his well-known treatise on the Penal Law of India the first and foremost circumstance that can be looked for in cases of this kind is the evidence of resistance which one would naturally expect from a woman unwilling to yield to a sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts. In the present case there is absolutely no evidence on the record of any struggle having taken place nor were marks of any injuries found on the person either of the complainant or of the accused. In these circumstances I am unable to hold that the accused had connection with the woman without her consent.

I accordingly accept the appeal and acquit the accused.

Appeal allowed.

1924 LAHORE 670.

ZAFAR ALI, J.

Allah Baksh.....Accused—Petitioner.

v.

King-Emperor.....Respondent.

Criminal Rev. No. 380 of 1923 decided on 12th May, 1923 from the Subordinate Judge Gurdaspur, dated 16th February, 1923.

Punjab Municipal Act (1911) S. 155—Long use though prohibited is no offence.

The section contemplates only recent and temporary breach of the rules and the person prosecuted thereunder can successfully plead that he had been using the premises for the purpose objected to for a long period. [P. 671 Col. 2.]

Joti Sarup for the Petitioner.

Shamair Chand for the Respondent.

The facts of this case are as follows:—

(1) The Municipal Committee of Dera Balia Nanak filed a complaint against Allah Bakhsh *Khoja* under Section 219, Municipal Act, alleging that the accused had collected a store of raw hides in his house situate within the local limits of the municipality which storage of raw hides emitted bad odour and was dangerous to public health.

(2) That the accused in spite of several notices having been served upon him failed to comply with the directions of the said Municipal Committee to remove the offensive material from his house.

The accused, on conviction by *Pandit* Siri Kishen exercising the powers of a Magistrate

of the first class in the District, was sentenced, by order dated September 15th 1922, under Section 219, Punjab Municipal Act, to a fine of Rs. 20 or in default to undergo simple imprisonment for a week.

The proceedings are forwarded for revision on the following grounds :—

Various points have been raised in this application but the main ground is that no valid direction was given, disobedience to which would be punishable under Section 219 of the Act. The applicant was given a notice, which purported to be issued under Section 155, calling upon him to remove some raw hides from a certain building within two days. The applicant might have been liable to punishment under Section 155 for keeping the raw hides in the building, and he might also possibly have been liable to punishment under Section 121, but Section 155 does not authorise a Committee to issue a notice for the removal of any offensive material. I have been referred to Section 115 of the Act, but I think it is very doubtful whether any notice of the kind could legally be issued under that section. The section appears to relate to an act which has to be done to the material of the building or to the land.

The case is very similar to 4 P. R. 1894 and it is clear that if the notice was unlawful no conviction can be maintained. I recommend that the conviction and sentence be set aside.

Order of the High Court :—This is a reference by the learned Sessions Judge, Gurdaspur, under Section 438, Criminal Procedure Code.

The accused Allah Bakhsh has been convicted and fined Rs. 20 under Section 219 of the Punjab Municipal Act 1911, on the finding that he kept in a building within the limits of the Dera Baba Nanak municipality raw hides which emitted offensive smells. Though the complaint as well as the conviction was under Section 219, the notice that had been issued to the accused before filing the complaint purported to be under Section 155. It is conceded that the accused could not be convicted under Section 219 as it is not applicable to the facts of the case and the notice issued was not of the description provided by it. It is, however, urged on behalf of the Municipal Committee that the conviction can be altered to one under Section 155. But the Committee had no power, nor was it necessary to issue a notice under that section according to which the act of keeping offensive materials in a building or land renders the owner or occupier thereof liable to the punishment of a fine. Further, Section 155 occurs under the heading "*Scavenging and House Scavenging*" and is intended to impose on all owners or occupiers of buildings or lands within a Municipality the duty of keeping the same in a sanitary condition on pain of fine. No notice is necessary as a condition precedent for prosecuting those who violate ordinary rules of sanitation but the section contemplates only recent and temporary breach of the rules and the person prosecuted thereunder can successfully plead that he had been using the premises for the purpose objected to for a long period. The accused in the present case is a *khoja* by caste and states that he deals in raw hides and had been using the building in question for many years for storing the same therein. If this were true, Section 155 would not be applicable. I am, therefore, of opinion that the view taken by the learned Sessions Judge is correct and the conviction and sentence are, accordingly, set aside.

Reference accepted.

1924 LAHORE 671.

MOTI SAGAR, J.

The firm Phaggu Mal Mata Din.....Judgment-debtors—Appellants.

v.

Benarsi Das.....Decree-holder—Respondent.

Mis. F. A. No. 381 of 1923 decided on 25th May, 1923 from the order of Senior Subordinate Judge, Ambala, dated the 29th January, 1923.

(a) *C. P. Code O. 41 R. 6 (2)—Order refusing stay is appealable—C. P. Code S. 47.*

An order refusing to stay a sale of immoveable property in execution of a decree during the pendency of an appeal in the High Court under Order 41 Rule 6 (2) of the Civil Procedure Code is appealable as a decree under Section 47. Civil appeal No. 687 of 1922 foll. 15 C. W. N. 432 Dist. [P. 673 Col. 1.]

(b) *C. P. Code, O. 41, R. 6 (2)—The rule is mandatory and the court is bound to stay execution.*

Under Order 41 Rule 6 (2) the court in the case of an order for the sale of immoveable property in execution of a decree is bound, where an appeal is pending from such decree, to stay the sale on the application of the judgment-debtor on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of. [P. 672 Col. 2.]

Lala Jagan Nath, Vakil for the Appeallants

Manohar Lal, Advocate for the Respondent

Judgment :—The Senior Subordinate Judge of Ambala has refused to stay a sale of immoveable property in execution of a decree during the pendency of an appeal in this court under Order 41 Rule 6 of the Code of Civil Procedure, and the judgment-debtors have appealed.

It appears that the respondent Rai Bahadur Benarsi Das obtained a decree for Rs. 13, 827-9-6 against the present appellants which was put into execution, and certain immoveable property belonging to the judgment-debtors was attached. The defendant-judgment-debtors preferred an appeal against this decree to this court and along with the memorandum of appeal filed an application under Order 41, Rule 5, Civil Procedure Code, for the stay of execution proceedings. The application came up for hearing before the Chief Justice who rejected it on the 18th November, 1922, and ordered that the judgment-debtors should apply to the executing court for the stay of sale after the property had been advertised for sale under order 41 Rule 6 (2) of the Code of Civil Procedure. The property having been advertised for sale, the judgment-debtors put in an application for stay which was summarily rejected by the Senior Subordinate Judge by an order which was couched in the following terms :—

"The applicant is present. The proceedings as regards auction sale cannot be stayed. The applicant can get an order for stay of the auction sale from the High Court of Judicature at Lahore."

A preliminary objection is raised by Mr. Manohar Lal on behalf of the respondent that the order is not appealable. In my opinion there is no force in this preliminary objection, and it must be overruled. It was held by Scott Smith, J., in *Civil Appeal No 687 of 1922* that an order refusing to stay a sale of immoveable property in execution of a decree during the pendency of an appeal in this court under the provisions of Order 41, Rule 6 (2) of the Civil Procedure Code was appealable as a decree under Section 47 of the Civil Procedure Code. No authority has been cited to the contrary and 15 C. W. N. 432 on which reliance has been placed by the learned counsel is not exactly in point. I see no reason to differ from the opinion of Mr. Justice Scott Smith and I hold that the order is appeable.

On the merits there can be no manner of doubt that the order is erroneous and must be set aside. Under Order 41, Rule 6 (2) the court in the case of an order for the sale of immoveable property in execution of a decree is bound, where an appeal is pending from such decree, to stay the sale on the application of the judgment-debtor on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of.

I accept the appeal and, setting aside the order, remand the case to the Senior Subordinate Judge with a direction that he should pass fresh orders in accordance with law. No order as to costs.

Appeal allowed.

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* 1924 LAHORE 672.

MOTI SAGAR, J.

Kanwal Nabh.....Accused—Petitioner.

v.

The Crown.....Opposite Party.

Criminal Rev. No. 474 of 1923, dated 1st June, 1923, revising the Order of the Dt. Magistrate Lahore, dated 23rd February, 1923.

Criminal P. C., S. 118—Sufficiency of surety to be tried by Magistrate himself.

It is not competent to a magistrate who has passed an order under Section 118 to delegate to another *e. g.* the Superintendent of Police, the duty of the enquiry into the sufficiency of the security tendered, but should make such inquiry himself, 18 P. R. of 1906 Ref. [P. 673 Col. 1.]

Kanhaiya Lal Gauba for the Petitioner.

Lala Jai Lal for the Crown.

Judgment :—On the 27th of September, 1922, one Pandit Kanwal Nabh was ordered under Section 118 of the Criminal Procedure Code by the District Magistrate of Lahore to furnish a bond of Rs. 2,000 with two sureties, who were to be jointly and severally responsible for the same amount, to be of good behaviour for a period of one year. An application for revision against this order was preferred to the Sessions Judge but dismissed on the 22nd of November, 1922. The petitioner thereupon furnished two sureties, namely Mr. Miller and Mr. M. A. Khan, who agreed to stand security for him in the sum of Rs. 2,000 each for a period of one year. On the 10th of February, 1923, Mr. M. A. Khan made an application to the court asking that his security bond may be cancelled. The District Magistrate cancelled the bond on the 23rd of February, 1923, and ordered Kanwal Nabh to produce another surety in place of Mr. M. A. Khan. One Ram

Piara was produced as a surety but was not accepted, and the petitioner was remanded to custody until such time as he was able to produce a better surety. On the same date one Bhagwan Das, son of Manohar Lal, was produced as a surety. The District Magistrate ordered that the Superintendent of Police should hold an inquiry into the surety's suitability as regards his means, and to make a report as early as possible. In the meantime the petitioner was ordered to remain in custody under Section 123 of the Criminal Procedure Code.

Against this order a petition for revision has been filed to this court, and it has been contended that the order of the learned District Magistrate ordering the Superintendent of Police to hold an inquiry into the question of Bhagwan Das's suitability as a surety was illegal and should be set aside. In my opinion this contention is well-founded and must prevail. There is ample authority for holding that it is not competent to a Magistrate who has passed an order under Section 118 of the Code of Criminal Procedure to delegate to another the duty of enquiring into the sufficiency of the security tendered, but should make such inquiry himself, *vide* 18 P. R. of 1906. But it is also clear that till such time as a suitable surety is offered, the accused must remain in jail.

I accordingly accept the application to this extent that the order of the learned District Magistrate dated the 23rd of February, 1923, asking the Superintendent of Police to make inquiries shall be set aside, and the District Magistrate shall be directed to make those inquiries himself. In the meantime the accused shall remain in custody.

On the 1st of March, 1923, the petitioner was released on bail by Mr. Justice Martineau. The case came up for hearing before me on the 25th of May, 1923, and after the arguments had been heard the accused was directed to appear before me on the 1st of June, 1923, to hear orders. The petitioner has failed to put in appearance, and his counsel, Mr. Kanhaiya Lal, tells me that he does not know what has happened to his client. I order that a notice should issue to the petitioner as well as to the surety to show cause why the bail bond should not be forfeited.

Application allowed.

1924 L/85

1924 LAHORE 673.

MOTI SAGAR, J.

Mt. Begum Bibi and others.....Defendants—Appellants.

v.

Rahamat Khan.....Plaintiff—Respondent.

S. A. No. 479 of 1923 decided on 6th June, 1923 from the decree of Additional District Judge, Gujranwala, dated the 15th December, 1922.

Muhammadan Law-Marriage-Law as to, unaffected by Majority Act IX of 1875.

The Muhammadan Law of marriage is left entirely untouched by the provisions of the Majority Act. Minority under the Muhammadan Law terminates on completion of the fifteenth year and every Muhammadan of sound mind who has attained puberty may enter into a contract of marriage even if he or she is a minor according to the provisions of the Indian Majority Act. [P. 674 Col. 1.]

Shuja-ud-Din Advocate for the Appellants.

Abdul Ghani Advocate for the Respondent.

Judgment:—This appeal arises out of a suit for restitution of conjugal rights brought by one Rahmat Khan, a head constable of police, against Mt. Begum Bibi, daughter of one Hayat, who is also a defendant in the case. The other three defendants were the mother and certain other relations and an injunction was prayed for against them and the father Hayat on the allegation that they were restraining the girl from returning to her husband. The suit was resisted on the ground that Mt. Begum Bibi was not the wife of the plaintiff and that she had been forced to affix her thumb impression on the marriage register without any *nikah* being performed between the parties. The trial court found in favour of the defendant and dismissed the plaintiff's suit. On appeal the learned District Judge came to a contrary conclusion and held that a marriage between defendant No. 1 and the plaintiff had been fully established. The suit for restitution of conjugal rights was accordingly decreed, and an injunction was granted in favour of the plaintiff against defendants 2 to 5 restraining them from preventing defendant No. 1 from returning to her husband.

Against this decision a second appeal has been preferred to this court by the defendants and it has been contended on their behalf that the finding of the court below on the question of the factum and validity of marriage is erroneous and should be set aside. In my opinion this contention has no force and must be overruled. The learned District Judge after a full consideration of the evidence has found, and it has not been

disputed before me, in this court, that at the time when the marriage is alleged to have taken place the girl had reached the age of puberty and was *sui juris* under the Muhammadan Law. The learned District Judge has also referred to certain circumstances in his judgment, which in his opinion, unmistakably point to the fact that the girl eloped with Rahmat Khan of her own free-will and that she was a consenting party to the marriage which she subsequently contracted with him. Her allegation that she was forced to put her thumb impression in the *nikah* Register has not been believed and it has further been held that the evidence as to her previous marriage with one Allah Dad was false. These findings are clearly findings of facts and cannot be questioned in second appeal.

It has been contended by Mr. Shuja-ud-Din that the girl at the time of her alleged marriage was a minor, and that therefore, her marriage with the plaintiff Rahmat Khan even if it did take place was not a valid marriage in the eye of the law. This argument entirely loses sight of the fact that the Majority Act IX of 1875, which regulates the age of majority in India does not apply to matters relating to marriage, dower and divorce, and that the Muhammadan Law of marriage is left entirely untouched by the provisions of this Act. Minority under the Muhammadan Law terminates on completion of the fifteenth year and there can be no manner of doubt that every Muhammadan of sound mind who has attained puberty may enter into a contract of marriage even if he or she is a minor under the provisions of the Indian Majority Act. I do not see any force in this contention and must therefore overrule it.

There is, however, no justification for a decree for injunction being passed against appellants 2 to 5. There was no issue on the question as to whether these defendants were restraining defendant No. 1 from returning to her husband, nor was there any evidence produced in support of this allegation. I do not think that in the absence of any evidence the court was justified in passing a decree for injunction against appellants 2 to 5. I accordingly accept the appeal in so far that the decree for injunction granted to the plaintiff against appellants 2 to 5 should be set aside, but the decree for restitution of conjugal rights against defendant No. 1 should stand. Parties shall bear their own costs throughout.

Appeal allowed in part.

1924 LAHORE 674.

HARRISON, J.

Nand Singh.....Defendant—Appellant.

v.

Mahant Pratap Das and another.....Plffs.—Respondents.

S. A. No. 534 of 1923 decided on 19th June, 1923 from the decree of the District Judge, Ludhiana, dated 30th November, 1922.

T. P. Act, S. 10—Applies to the Punjab.

The fact that the agriculturists as a whole are restricted by certain definite rules from disposing of their ancestral land is no reason why an absolute bar against alienation of gifted land should be recognized and enforced.

Section 10 embodies an equitable principle which applies to the Punjab. [P. 675 Col. 1.]

Dev Raj Sawhney for the Appellant.

Nand Lal for the Respondents.

Judgment:—Dasondhi and others were originally shown as tenants-at-will of a large area of land under Mahant Partap Das. A dispute arose between them and on appeal from an order refusing to make a mutation in their favour, the Mahant agreed to relinquish a portion of the land and to allow their names to be entered as full owners subject to a condition which he imposed that they were to be absolutely debarred from making any sort of alienation. The other portion was given up to the Mahant. In spite of the condition the defendants in this case mortgaged the land. The Mahant sued for a declaration that the mortgage-deed was null and void, and was given a decree by the District Judge.

On second appeal it is contended that Section 10 of the Transfer of Property Act renders the condition a dead letter and that the Mahant cannot enforce it. The only question is whether Section 10 embodies a principle which should be applied to the Punjab. It cannot, I think, be seriously contended that the rule there laid down does not embody a principle, nor can it be shown that it is not a sound and equitable principle. The District Judge has taken the view that because alienations are restricted under the Customary Law of the Punjab such or similar restrictions should be recognized in spite of anything contained in the Transfer of Property Act. This, however,

is not quite the point. Alienations are, no doubt, restricted under the Customary Law so far as ancestral land is concerned but they are not absolutely forbidden and under certain circumstances alienations are vaild and good. The condition here imposed was an absolute restriction in perpetuity on every sort of alienation for any purpose by the donees of the land, and the fact that agriculturists as a whole are restricted by certain definite rules from disposing of their ancestral land is no reason why an absolute bar of this sort should be recognized and enforced. I find that Section 10 embodies an equitable principle which applies to the Punjab.

I, therefore, accept the appeal and dismiss the plaintiff's suit. Under the circumstances I leave the parties to bear their own costs.

Appeal allowed.

1924 LAHORE 675 (1).

CAMPBELL, J.

Richpal and others.....Defendants—Appellants.

v.

Mula.....Plaintiff—Respondent.

Civil Appeal No. 619 of 1923 decided on 15th January, 1924 against the decree of the District Judge of Karnal, dated the 20th December, 1922.

Punjab Act (11 of 1920), S. 6—Suit by heirs against appointed heir not barred.

The section deals only with the case of an allegation that the appointment of an heir is contrary to custom. Where plffs. sued for possession as heirs, and were resisted by deft. on the ground that he was an appointed heir, *Held* that the section did not bar the suit. [P. 675 Col. 2.]

Jagan Nath for the Appellants.

Shamair Chand for the Respondent.

Judgment :— Ground of appeal No. 3 in which it was contended that the Lower Appellate Court erred in allowing additional evidence to be produced is not now pressed, and the only point for decision is whether the plaintiffs were debarred from suing by Section 6 of the Punjab Act II of 1920.

The suit concerned the land of one Ballu, deceased. Ballu's great-great-great grandfather was Parlu and the parties to the suit are other descendants of Parlu. After the death of Ballu's widow Mt. Jiwni, the land was mutated in the name of Richpal, defendant No. 1. The plaintiffs came into court asserting themselves to be reversionary heirs and saying that the mutation in favour of Richpal was wrong, that Richpal claimed to have been adopted by Mt. Jiwni, widow of Ballu, that in fact he was not so adopted and that Mt. Jiwni had no power to adopt a son. Richpal pleaded that he was adopted by Ballu before his death and both the courts below concurred in holding that Richpal had not been adopted by Ballu.

The Lower Appellate Court considered the question of whether Section 6 of Act II of 1920 barred the suit and decided that it did not, because the section deals only with the case of an allegation that the appointment of an heir is contrary to custom, whereas the plaintiffs had sued for possession, as heirs, and were resisted by Richpal on the ground that he was an appointed heir. An additional reason might have been given, namely, that under Section 5 of the Act nothing in the Act is to apply to any appointment of an heir by a female, and, if this suit was one by collaterals to contest the appointment of an heir, on the ground that the appointment was contrary to custom, it manifestly was a suit to contest the appointment of an heir by a female.

There is no force in this appeal and it is dismissed with costs.

Appeal dismissed.

1924 LAHORE 675 (2).

CAMPBELL, J.

Ram Chand and others.....Accused—Petitioners.

v.

Jesa Ram.....Complainant—Respondent.

Cr. Rev. No. 665 of 1923 decided on 15th June, 1923 for revision of the order of District Magistrate, Muzaffargarh, dated the 12th January, 1923.

Cr. P. Code, S. 250 (3)—Notice of appeal under, should be given to accused though no expresss provision exists—Cr. P. Code S. 422.

Where an appeal is preferred against an order directing payment of compensation to accused, *Held*, that although there is no express provision nevertheless on the principle *audi alteram partem* the accused should have notice of the appeal in order that they should have an opportunity of supporting the order passed in their favour. 29 Mad. 187 Foll.; 38 Mad. 1091 Foll. [P. 676 Col. 1.]

Lala Har Gopal, Vakil for the Petitioners.

Respondent was not represented.

Judgment :—In discharging certain accused persons under Section 245, Code of Criminal Procedure, a Magistrate of the 3rd class in the Muzaffargarh District ordered under Section 250 that the complainant should pay

Rs. 5 as compensation to each of the accused. An appeal was preferred to the District Magistrate under Section 250 (3) and was disposed of in favour of the appellant without notice to anyone and the order for the payment of compensation was set aside.

If Section 250 (3) be read with Section 422 it will be apparent that the appellate court, unless it was going to dismiss the appeal summarily was bound to issue notice to such officer as the Local Government might appoint. That officer in the present instance was the learned District Magistrate himself and in these circumstances I consider that it would have been proper to give a notice to the accused person. It was ruled in 29 Mad. 187 that, although there is no express provision, directing that notice should in such cases be given to the persons to whom compensation has been awarded, nevertheless on the principle *audi alteram partem*, the accused should have notice of the appeal in order that they should have an opportunity of supporting the order passed in their favour. The same view was taken by the Madras High Court again in 38 Mad. 1091 and expressed more forcibly.

I accept the revision, set aside the order of the learned District Magistrate and direct him to hear the appeal again after giving notice to the accused person, Ram Chand and others.

Revision accepted.

1924 LAHORE 676.

MOTI SAGAR, J.

Fattu..... ..Judgment-debtor—Appellant.

v.

Nanak Chand, ... Decree-holder—Respdt.

Mis. S. A. No. 697 of 1923 decided on 2nd July, 1923 from the order of District Judge, Karnal, dated 9th January, 1923.

Limitation Act, Art, 182—Part payment of decree amount entered in execution application amounts to certification—Limitation saved—Limitation Act, S. 20—C. P. Code, O. 21, R. 2.

If the part payment of a decree amount is entered in an execution petition presented within three years from the date of such alleged payment, it amounts, if the fact of payment is proved, to a certificate of payment under Order 21, Rule 2 and will operate to save limitation under Section 20 of the Limitation Act. 43 Cal. 207, Ref. and Foll. [P. 677 Col. 1.]

Shamair Chand, Advocate for the Appellant.

Lala Ram Nand, Vakil for the Respondent.

Judgment:—This appeal arises out of execution proceedings, and the facts are briefly these:—In 1904 the respondent Nanak Chand obtained a money decree for Rs. 450 and costs against the present appellant Fattu. A compromise was arrived at between the parties in 1909 whereby a sum of Rs. 50 was paid down to the decree-holder and the balance was agreed to be paid by half-yearly instalments of 25 each. It was further stipulated that if there was a default in the payment of two consecutive instalments the whole of the decretal amount would become payable at once. In November, 1917, the decree-holder made an application for the execution of his decree stating therein that he had realized Rs. 275 out of court from the Judgment-debtor. This application was dismissed for default. In July 1920 he made another application for execution in which he stated that Rs. 320 had been realised out of court. This application was again dismissed by the Munsiff on the ground that it was barred by limitation under the twelve years' rule. An appeal against this dismissal was filed in the court of the learned District Judge and the order of the learned Munsiff set aside and the case remanded to him for a decision on the other points arising therein. The application was again dismissed on the ground that as no application for execution had been made within three years from the date of the compromise, it was barred by limitation under the three years' rule. On appeal the learned District Judge, following 43 Cal. 207, held that the certification of payment in the application for execution was sufficient compliance with the requirements of law as contained in Order 21, Rule 2 of the Civil Procedure Code and allowed execution to proceed.

Against this decision a second appeal has been preferred to this court uuder Section 47 of the Code of Civil Procedure, and two grounds have been urged by Mr. Shamair Chand on behalf of the appellant. Firstly, it is contended that as the application of 1917 was made more than three years after the date of the compromise, it did not help to save limitation. His second contention is that the rule of law laid down in 43 Cal. 207 is erroneous and has not been followed in subsequent rulings of the same High Court. He, therefore, argues that as the payments were not properly certified, a mere statement in the application for execution that the decree-holder had realised so much was not sufficent and that his application for execution made in 1920 was clearly barred. Mr. Rama Nand for the

respondent, on the other hand, contests both these propositions and says that his application was within time and that the payments made out of court saved limitation. A large number of authorities have been cited on both sides by the learned counsel in support of their respective contentions, and after carefully going through those authorities I am of opinion that the weight of authority is in favour of Mr. Rama Nand and that the learned District Judge was right in holding that the application for execution certifying the payments already made amounted to a certifying under Order 21, Rule 2 of the Civil Procedure Code, which the court was bound to take notice of. The rule of the law decidable from the authorities cited at the bar appears to be that if the part payment of a decree amount is entered in an execution petition presented within three years from the date of such alleged payment it amounts, if the fact of payment is proved, to a certificate of payment under Order 21, Rule 2 of The Civil Procedure Code, and will operate to save limitation under Section 20 of the Limitation Act. In the present case the payments were set forth in the execution petitions both of 1917 and 1920 which it is alleged were presented within three years from the dates of the alleged payments. There is no particular form under Order 21, Rule 2 of the Civil Procedure Code, in which a decree-holder must certify the payment to a court, nor is there anything prescribed in the rule as to the time within which and the manner in which the decree-holder must certify the payment. I, therefore, see no reason why the statement made in the petitions should not be accepted as a certificate of payment under clause (1) of the rule. The fact of payment, however, is disputed by the judgment-debtor in this case, and in these circumstances it seems necessary that the court should take evidence and come to a conclusion one way or the other whether payments had actually been made or not. If the fact of payment is proved and is found that the payments were made within three years from the date of the present application, no question of limitation would arise and the application would be clearly within time. The order passed by the court below remanding the case appears to be perfectly correct, and there are no grounds to interfere.

The appeal fails and is dismissed with costs

Appeal dismissed.

1924 LAHORE 677.

LUMSDEN, J.

Ram Saran Das. ... ..Defendant—Appellant.

v.

Harphul and others.....Plaintiffs } ...Respon-
Chuni Lal and others..Defendants } dents.

S. A. No. 792 of 1923 decided on 23rd July, 1923 from the decree of District Judge, Delhi dated 17th January, 1923.

(a) *Evidence Act, S. 101—Ancestral land—Burden on him who alleges it to be so—Custom (Punjab.)*

The party asserting the land to be ancestral must prove the fact, it not being possible to accept mere conjectures as substitutes for proof. P. R. 42 of 1910 Foll. [P. 677 Col. 2]

(b) *Custom (Punjab)—Desertion by ancestors and resumption by descendants—Property not ancestral.*

Where a village site was for a period of 25 years *be chiragh* and the fields untilled and thereafter certain of the descendants of the previous proprietors returned to the village and commenced cultivation, *Held* that even assuming that they actually resumed possession of the same land as had been held by their ancestors, their possession was only a re-acquisition and the land was divested of its ancestral character. 2 Lah. 366 Foll. [P. 678 Col. 1.]

Shamair Chand, Advocate for the Appellant.

Lala Jagan Nath Vakil for the Respondents.

Judgment :—The parties to this suit out of which the present appeal arises are Brahmins of Village Chandpur in the Jhajjar Tahsil of the Rohtak District. They are members of an agricultural tribe and it is admitted that they follow custom. There is no dispute as to natural relationship, and the only question for determination in this appeal is whether the land in respect of which the plaintiffs seek a declaration is ancestral *qua* them. Such a question is one of the fact, but the appeal has been admitted on the ground that the finding arrived at by the lower court was not based on any evidence, but was a mere conjecture. In P. R. 42 of 1910 their Lordships of the Privy Council laid down that the party asserting the land to be ancestral must prove the fact, it not being possible to accept mere conjectures as substitutes for proof.

I have no hesitation in coming to the conclusion that in this case the property has not been shown to be ancestral. The history of the village shows that in 1840 all the proprietors, including Nathu Ram, the common ancestor of the parties, left the village and took up their residence elsewhere. For a period of 25 years the village site was

be chiragh and the fields untilled. Thereafter certain of the descendants of the previous proprietors, including the son of Nathu Ram, returned to the village and commenced cultivation. It does not appear to me to be possible to distinguish this case from that reported as 2 Lah. 366, where it was held in similar circumstances that the land must be regarded as the self-acquired property of the persons who returned to the village 25 years after its desertion. There is nothing in this case to show that Kewal Ram actually resumed possession of the same land as had been held by his father Nathu Ram, but even if it could be assumed that he did, the possession was none the less a reacquisition, and the land was divested of its ancestral character. As Kewal Ram is not a common ancestor it follows that the plaintiffs cannot challenge an alienation made in respect of it.

An attempt has been made to distinguish the authority quoted on two grounds, (a) that in this case the proprietors left the village because of famine, and (b) that they retained throughout the period of 25 years, the *animus* of returning. Neither of these distinctions are of substance. It is not stated why in the case quoted the proprietors deserted their village but it may be assumed that it was for some similar reason while it can hardly be believed in the absence of any proof that famine conditions subsisted for a period of 25 years. There is nothing to support the theory in this case any more than in the authority referred to that the proprietors intended to return sooner or later.

It follows that as the plaintiffs have no *locus standi* to challenge the alienation in question the appeal must be accepted, nnd plaintiffs' suit dismissed with costs throughout.

Appeal allowed.

1924 LAHORE 678.

MOTI SAGAR, J.

Bhagwan Das and others..... .....Accused—Petitioners.

v.

Maula Dad Khan.....Complainant—Respondent.

Cr. Rev. No. 821 of 1923 decided on 19th June, 1923, for revision of the order of Magistrate 1st class, Muzaffargarh, dated the 26th February, 1923.

(a) *Cr. P. Code, S. 145—Positive evidence as to likelihood of breach must exist—Religions nature of dispute leads to no inference—Past conduct of parties is good evidence.*

The object of Section 145 is to bring to an end by a summary process disputes relating to land etc., which are in their nature likely, if not suppresed, to end in breaches of the peace. But the mere circumstance that the dispute is one of a religious nature is not enough. There must be positive evidence on the record that the breach of the peace is likely to occur if proceedings under this section are not taken. Where it appears that the land which in 1880 was shown as a part of the Mahomedan graveyard has been gradually brought under cultivation to the prejudice of the Muhammadan community by the owners who were Brahmins and no breach of the peace has occurred during the last 40 years, *Held* that it was hardly likely that any such untoward result should now ensue if the property is not attached under Section 146. [P. 679 Col. 2.]

(b) *Cr. P. Code S. 145—Section is concerned with actual possession whether lawful or unlawful but not with right to possess.*

A right to possess is quite different from actual physical possession, and questions as the rights of parties cannot legitimately be the subject of inquiry in proceedings under Section 145, which is concerned solely with the fact of actual physical possession, whether lawful or unlawful, and questions as to rights are quite irrelevant and entirely outside its scope. [P. 679 Col. 2.]

Lala Har Gopal, Vakil for the Petitioners.

Sheikh Niaz Ali, Vakil for the Respondent.

Judgment:—This is an application for revision of an order passed by a first-class Magistrate at Muzaffargarh under Sections 145 and 146 of the Criminal Procedure Code. The dispute relates to a plot of land measuring 25 *kanals*, 11 *marlas* in area and shown in the Settlement Record of 1880 as *ghair mumkin qabristan* and in possession of the Muhammadan community. The owners of this land as recorded in the revenue papers were originally two Brahmins Ghairan Lal son of Udho Das, and Pokhar Das son of Kanhiya Lal. Since 1880 a major portion of this land has been gradually brought under cultivation so much so that in the year 1921, shortly before proceedings under Section 145 were instituted, only 10 *kanals*, 6 *marlas* remained uncultivated and was shown as *ghair mumkin qabristan*. On the 14th of November, 1922, one Maula Dad filed a complaint against one Bhagwan Das and three others, alleging that they had desecrated certain tombs attached to the Shahidanwala graveyard with the intention of wounding the feelings of the Muhammadan community and that they should be punished under Section 297 of the Indian Penal Code. This complaint was made over to Sheikh Muhammad Murid Akbar, Magistrate, for disposal. On the 15th of November, 1922, the learned

Magistrate without being moved by any member of the Muhammadan community attached the graveyard in question, and issued notices to the parties concerned requiring them to attend his court on the 28th of November, 1922, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. In pursuance of this order written statements were put in by the parties and it was stated by Maula Dad that the area of the Shahidanwala graveyard was about 25 *kanals* during the last three settlements and that the accused had demolished the graves and had brought a large portion of that area under cultivation. The opposite party stated that the Muhammadans used to bury their dead with the permission of the proprietors and that the whole of the land claimed was never used as a graveyard. They further stated that a major portion of the area claimed by the first party was actually under cultivation and in possession of the second party and that there was no apprehension of a breach of the peace. It was consequently contended that Section 145 of the Criminal Procedure Code had no application to this case. The learned Magistrate made over the case instituted under Section 297 of the Indian Penal Code for inquiry to one Lala Gurditta Ram, Honorary Magistrate, and asked him also to submit a report on the question as to who was actually in possession of the land in dispute. Lala Gurditta Ram examined a very large number of witnesses in this case on both sides, and came to the conclusion that the Muhammadan community was not in possession and that no case under Section 297 had been established against the accused. The learned Magistrate, however, came to a different conclusion and held that in view of the Settlement entries of 1880 it could not be definitely stated as to who was in actual possession of the subject of dispute, and he consequently attached the same under Section 146 (1) of the Criminal Procedure Code.

In my opinion the order of the learned Magistrate was wholly without jurisdiction and must be set aside. There was no satisfactory evidence on the record that there was an apprehension of a breach of the peace, and in the absence of any such evidence I do not think that proceedings should have been taken under Sections 145 and 146 of the Criminal Procedure Code. The object of Section 145 is to bring to an end by a summary process disputes relating to land etc., which are in their nature likely, if not suppressed, to end in breaches of the peace. The learned Magistrate observes in his judgment that the affair had a tinge of religion and that, therefore, a breach of the peace was apprehended. I do not think that the mere circumstance that the dispute is one of a religious nature is sufficient to justify a Magistrate to take action under Section 145. There must be positive evidence on the record that the breach of the peace is likely to occur if proceedings under this section are not taken. In the present case it appears that the land which in 1880 was shown as a part of the graveyard has been gradually brought under cultivation to the prejudice of the Muhammadan community, no breach of the peace has occurred during the last 40 years, and it seems to me hardly likely that any such untoward results would now ensue if the property is not attached under Section 146 of the Criminal Procedure Code. In fact, no apprehension of a breach of the peace was alleged by the complainant in his petition, and no application was made by any member of the Muhammadan community for action being taken under this section. There are one or two witnesses to the effect that the Brahmin proprietors used to cut some reeds from this land and that this fact was resented by the Muhammadans, but I do not think that this alone was sufficient for the Magistrate to take action under Section 146 of the Criminal Procedure Code.

The next question for consideration is as to who was in actual possession of the property when proceedings were taken under the section in question. There is a large volume of evidence on the record from which it appears that the Brahmin proprietors have been cultivating the land in question for a large number of years and that the Muhammadan community has not been in possession. They may possibly have a right to possess this land, but a right to possess is quite different from actual physical possession, and I do not think that questions as to the rights of parties can legitimately be the subject of inquiry in proceedings under Section 145 of the Criminal Procedure Code. This section is concerned solely with the fact of actual physical possession, whether lawful or unlawful, and questions

as to rights are quite irrelevant and entirely outside the scope of this section. The learned Magistrate thinks that because the Muhammadan community have a right to possess this land, they must also be considered to be in possession. I am unable to agree with him in this view. The actual physical possession has been clearly proved to be with the petitioners, and they must remain in possession until evicted in due course of law by means of a civil suit.

I accept the revision and setting aside the order of the learned Magistrate, direct that attachment should be removed and that possession should be restored to the proprietors.

Revision accepted.

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* 1924 LAHORE 680 (1).

MOTI SAGAR J.

Bikram Singh.....Accused—Petitioner.

v.

Nihal Chand.....Complainant—Respondent.

Cr. Rev. No. 845 of 1923 decided on 25th June, 1923 for the revision of the order of the District Judge, Gujranwala.

Criminal P. C., S. 476—Sanction should not be granted where object to get exemption from payment of decretal amount.

It is not expedient that sanction to prosecute should be given to a debtor to use against his creditor, where the object is not to further the ends of justice but to put pressure upon the decree-holder to give up his claim under the decree. 26 All. 1; 11 C. W. N. 712; 13 C. W. N. 398; 13 Cr. L. J. 533, Foll. [P. 680 Col. 2.]

Gobind Ram for the Petitioner.

Respondent was not represented.

Judgment:—One Bawa Bikram Singh applied for the execution of his decree which he had obtained against Kesar Mal and his son Nihal Chand. On the 15th of January 1919 Nihal Chand made an application to the Senior Subordinate Judge of Gujrat to the effect that he had paid to the decree-holder Rs. 1,200 in full satisfaction of the decree, and prayed that the decree-holder should be summoned to certify the payment. Along with this application he filed a receipt for Rs. 1,200 whieh purported to bear the signature and thumb mark of the decree holder Bawa Bikram Singh. Bawa Bikram Singh appeared in court and denied the genuineness of the receipt. On the 29th of August 1919 the Senior Subordinate Judge declared the receipt to be genuine and further ordered that notice should be issued to the decree-holder to show cause why he should not be prosecuted for perjury. Sanction was granted against Ram Labhaya and Mahbub Alam, witnesses, who had deposed that the receipt was not genuine, but sanction was refused against Bawa Bikram Singh on the ground that there was no application by the judgment debtor to prosecute the decree-holder. Nihal Chand then made a regular application for sanction to prosecute Bikram Singh, but this was rejected by the Senior Subordinate Judge on the 8th of June, 1922. Against this order of dismissal an appeal was preferred to the District Judge of Gujranwala, who by his order dated the 10th of February, 1923, set aside the order of the Senior Subordinate Judge and granted sanction to prosecute Bawa Bikram Singh under Sections 193/210 of the Indian Penal Code.

Bawa Bikram Singh has come up to this court on the revision side and it has been contended on his behalf that under the peculiar circumstances of this case sanction ought not to have been granted. In my opinion there is force in this contention and it must prevail. There is ample authority for holding that it is not expedient that sanction to prosecute should be given to debtor to use against his creditor *vide* 26 All. 1; 11 C.W.N. 712; 13 C.W.N. 398 and 13 Cr. L. J. 533. In the present case there can be no manner of doubt that the object with which the judgment-debtor has applied for sanction to prosecute the decree-holder is not to further the ends of justice but to put pressure upon the decree-holder to give up his claim under the decree. I do not think that it will be in the interests of public justice to maintain the order of sanction given by the learned Sessions Judge and I accordingly revoke the sanction.

Sanction revoked.

1924 LAHORE 680 (2).

MOTI SAGAR, J.

Munshi and another.....Accused—Petitioners.

v.

The Crown .....Respondent.

Cr. Rev. No. 934 of 1923 decided on 22nd June, 1923 for revision of the order of District Magistrate, Ludhiana, dated 8th January, 1923.

Cr. P. Code, S. 514—Security taken—Accused tried for an offence—Security not forfeited nor that question considered in inflicting punishment—Forfeiture cannot be ordered subsequently.

If a criminal court knowing that the person charged before it is under security to be of good behaviour makes no reference to any confiscation of that security in sentencing that person in the case before it, and takes no steps towards its confiscation, it is not competent for that court or any other court in a subsequent and separate proceedings to take such steps. [P. 681, Col. 2]

R. C. Soni, Advocate for Petitioners.

Respondent was not represented.

Judgment:—On the 1st of October, 1918, the petitioner Munshi was bound down to of good behaviour for one year in the sum of Rs. 500 with one surety under Section 107 of the Criminal Procedure Code. Before the term of the bond had expired, he was convicted of rioting and sentenced to six months' rigorous imprisonment and a fine of Rs. 50 under Section 147 of the Indian Penal Code. On appeal to the learned Sessions Judge the conviction was maintained, but the sentence was reduced to 3 months' rigorous imprisonment and a fine of Rs. 30 only. An application for revision was made to the High Court and the order as to fine was set aside. With regard to the sentence of imprisonment it was observed by the learned Judge that there was no clear ground for interference in revision inasmuch as the sentence of imprisonment had already expired. Subsequently proceedings were taken against the petitioner and the surety for the forfeiture of their bonds under Section 514 of the Criminal Procedure Code. On the 21st of December 1922 the petitioner's bond was forfeited and an order passed to the effect that Ram Kishen, who had stood surety for him, should forfeit his security to the extent of Rs 300. An appeal against this order was preferred to the District Magistrate but dismissed on the 8th of January, 1923.

The petitioners have now come up in revision to this court, and it has been contended on their behalf that the order passed by the courts below with regard to the forfeiture of the bond and the security is illegal and should be set aside. It is pointed out that the District Magistrate, who convicted the accused of rioting under Section 147 of the Indian Penal Code, knew that he was under security and yet did not take any steps towards its confiscation. My attention has been drawn to the statement of Gopal Das, a witness for the defence, who deposed to the fact that he and Munshi had both been bound down together, and reliance is placed on 13 P. R. 1913 in which it has been laid down that "if a criminal court knowing that the person charged before it is under security to be of good behaviour in sentencing that person in the case before it makes no reference to any confiscation of that security and takes no steps towards its confiscation it is not competent for that court or any other court in a subsequent and separate proceedings to take such steps."

This ruling in my opinion is exactly in point and applies fully to the facts of the present case. Ths order passed by the learned Magistrate in taking action for the forfeiture of the bond and the security is clearly illegal and must be set aside. I accept the revision and order accordingly.

Revision allowed.

1924 LAHORE 681.

MOTI SAGAR, J.

The Court of Wards of Nawabzada Muhammod Zulfqar Ali Khan.....Judgment-debtor—Appellant.

v.

Abrar Ali.... ....Decree-holder—Respondent.

S. A. No. 1556 of 1923 decided on 31st January, 1924 against the order of the District Judge, Karnal, dated 4th April, 1923.

C. P. Code, O. 32, R. 6—Elder brother cannot give discharge of a decree debt on behalf of his minor brothers—Limitation Act, S. 7.

Where two of three joint execution creditors are minors, the other execution creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minors. [P. 682, Col. 1.]

Mukund Lal Puri, Advocate for the Appellant.

Shamair Chand, Advocate for the Respondent.

Judgment:—The sole question for determination in this appeal is whether an application for execution of a decree is or is not barred by limitation. The decree was made on the 20th of December, 1916, in favour of three persons of whom 2, Sajid Ali and Zahid Ali, were minors represented by their next friend Mt. Kazimi Begam and the 3rd Sayyid Abrar Ali was *sui juris*. The present application for execution was presented on the 9th of May 1922 when more then three years from the date the decree was passed, had expired. It was contended on behalf of the judgment-debtor,

who is now the appellant before me, that a valid discharge could be given by the adult decree-holder without the concurrence of the other decree-holders, and that the application was, therefore time barred. The learned Judges of the courts below have held that as two of the decree-holders were minors, the application of the 9th of May 1922, was in time by reason of Section 7 of the Indian Limitation Act of 1908. That section lays down that where one of several persons jointly entitled to make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all ; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. The only question, therefore, that arises for consideration is whether in the present case the adult decree-holder could or could not have given a discharge without the concurrence of the minor decree-holders.

It is argued by Mr. M. L. Puri, who appears on behalf of the appellant, that Sayyid Abrar Ali, the adult decree-holder, was competent to give a valid discharge and relies in support of this contention upon the cases reported as 60 P. R. 1893 and 41 Mad. 659 at page 682 Now the first case was considered in a recent Full Bench judgment of this court reported as 68 P. R. 1917, but not approved of. The second case is a Madras case and it is well-known that the Madras High Court has always taken a view in relation to this question which has not been accepted by any of the other High Courts in India, see 43 Bom. 487, 22 All. 199, 28 Cal. 465 and 68 P. R. 1917. In 15 I. C. 664 it was held that "where one of two joint execution creditors is a minor, the other execution creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minor." This view was based mainly on the provisions of Section 461 of the Code of 1882 which corresponds to Order 32, Rule 6 of the present Code of Civil Procedure. This rule lays down that "where there is a decree for money or other moveable property for the benefit of a minor, the next friend for the suit, who is other than a statutory guardian, cannot receive the money unless the court grants him leave to receive the property". It is also clear that under the Muhammadan Law the uncle is neither the legal nor the natural guardian of the property of a minor, and it is difficult to understand how, in these circumstances, the adult decree-holder could have given a valid discharge so as to bind the interest of the other decree-holders. In my opinion the first contention of the appellant cannot, therefore, be supported.

Next it was argued that at any rate Abrar Ali's application should be regarded as time barred, especially as in the plaint individual shares were specified. The contention, in my opinion, is equally untenable. The decree was a joint decree in favour of the plaintiffs for possession of 153 bighas of land on payment of Rs. 974 to the defendant and no shares were specified in the decree to which, according to the judgment-debtor, the decree-holders were entitled under Muhammadan Law. Moreover, the limitation was clearly saved by the operation of Section 7 of the Indian Limitation Act and the contention cannot possibly, therefore, have any force. In my opinion the case is completely covered by the above section and the order of District Judge must be affirmed.

The result is that the appeal fails and is dismissed with costs.

Appeals dismissed.

1924 LAHORE 682.

MOTI SAGAR, J.

Udi.....Defendant—Appellant.

v.

Maru Mal.....Plaintiff—Respondent.

S. A. No. 1589 of 1923 decided on 1st February, 1924 against the decree of the Senior Subordinate Judge, Karna, dated 12th May, 1923.

Limitation Act, Art. 144—*Suit by transferee from a co-sharer for possession against other co-sharers—Article applies—Limitation runs from date of transfer.*

In the case of co-sharers the possession of one co-sharer is the possession of all and if one of them sets up a prescriptive title against the others he must prove that this possession was openly hostile and it could not be lawfully referred to a legal title as co-sharer; but a transferee or an assignee cannot by the mere fact of transfer or assignment, became a co-sharer if his rights as such are denied by the other co-sharers and a suit by him therefore for possession against his assignor's co-sharers must be brought within 12 years from the date of transfer. [P. 683, Col. 2.]

Shamair Chand for the Appellant.

Lala Mehar Chand Mahajan for the Respondent.

Judgment:—After hearing arguments on both sides I am of opinion that this appeal must succeed. The suit was one for possession of a 1-10th share in a certain house at Panipat which the plaintiff claimed to have purchased from one Taiji by a sale deed executed by the latter in his favour on the 23rd February, 1897. The defendants who are the other co-sharers, denied that Taiji had any share in the house or that he had sold it to the plaintiff. It was further contended that the suit was barred by limitation, inasmuch as the plaintiff had never been in possession of the share in dispute from the date of its purchase. The trial court did not give any findings on the merits but dismissed the suit on the preliminary ground that it was barred by limitation. On appeal the learned Senior Sub-Judge came to a contrary finding and held that it had been proved that the plaintiff had been in joint possession of another 1/5th share in this house with the defendants and that consequently no question of limitation arose in this case. He further held that if Taiji was a co-sharer, the plaintiff, as his assignee, would also be a co-sharer and the fact that he had not been in possession from the date of the sale would not be of much consequence. He accordingly accepted the appeal and remanded the case to the court of first instance for decision on the merits. Against this decision the defendants have come up in second appeal to this court through Mr. Shamair Chand and I have heard Mr. Mehr Chand Mahajan on behalf of the respondent.

It is argued by Mr. Shamair Chand that the finding of the learned Senior Sub-Judge that the plaintiff was in joint possession of a 1/5th share in this house with the other co-sharers is not based on any evidence and must, therefore, be set aside. Mr. Nehr Chand Mahajan, on the other hand, contends that there is evidence on record in support of this finding and that the finding being one of fact cannot be impugned in second appeal. I have carefully read the evidence on which reliance has been placed by Mr. Mehr Chand and I am unable to agree with him that it supports his contention. It is true that some witnesses have stated that the plaintiff sold a 1/5th share in the house to one Sultan Singh and that the latter sold it in turn to Ramji Lal and Moti, defendants; but it is not at all clear how the plaintiff acquired this share. It is stated that this share originally belonged to one Khairati, and that he transferred it to the plaintiff. There is neither any sale deed on the record, nor any other oral evidence from which the fact of this alleged sale could be deduced. In any case the evidence relied on in no way proves the plaintiff's contention that he or his successors-in-interest have ever been in possession of this 1/5th share. I must, therefore, hold that the finding of the learned Senior Sub-Judge is not based on any evidence and that it has not been established that the plaintiff has been in possession of any portion of the house in dispute since the date of his purchase.

No authority has been cited by the learned Vakil for the respondents in support of his next contention that the plaintiff, as an assignee, has the same rights and privileges which his assignor had in the property. It is true that in the case of co-sharers the possession of one co-sharer is the possession of all and that if one of them sets up a prescriptive title against the others he must prove that his possession was openly hostile and that it could not be lawfully referred to a legal title as co-sharer; but I fail to understand how a transferee or an assignee can, by the mere fact of transfer or assignment, became a co-sharer if his rights as such are denied by the other co-sharers. It is beyond doubt that if the assignor has not transferred possession of the property assigned to his assignee the latter, in order to succeed in a suit for possession must sue within 12 years from the date of his assignment, and that a suit against his assignor would be barred if he comes into court after that period. It would be absurd to hold that the claim which would obviously be barred against the assignor would be within limitation if brought against the other co-sharers, who do not even recognize the right of the assignor to assign in favour of a third party. In my opinion there is no force in this contention, and I must overrule it.

Finally it was contended by Mr. Mehr Chand that the site in dispute was a vacant piece of land and that the case was, therefore, governed by the principle that possession went with title. This contention, however, is negatived by the plaintiffs' own allegation in the plaint where he stated that the property in suit was not a vacant site, but a residential house. In my opinion the plaintiff has entirely failed to prove his possession within

12 years prior to the institution of the suit, and the claim is clearly barred by limitation.

I accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal allowed.

1924 LAHORE 684.

MOTI SAGAR, J.

Firm Nanak Chand, Kishori Lal...Plaintiff—Appellant.

v.

Firm Ram Sarup, Gujar Mal...Defendants—Respondents.

S. A. No. 1950 of 1923 decided on 14th January, 1924 from the decree of the District Judge of Hissar dated 18th September, 1923.

(a) *Negotiable Instruments Act, S.4—Mere m ntion of interest—No undertaking to pay—Instrument is not a pro-note.*

A document was in the following terms:—*Age rupai nau snu tumhare hamare pas jama hainge. Biyaj dar das anne sainkra denge, Held* that the document does not contain any unconditional undertaking to pay the principal sum of money and the only undertaking given is to pay interest at the rate of ten annas per cent per mensem. The document clearly is an acknowledgment of a debt and not a promissory note within the meaning of Section 4. [P. 684, Col. 2.]

(b) *T. P. Act, S. 130—Clear words mentioning sale of bond used—Assignment complete.*

Where an endorsement on a bond was worded as follows:—*Is ruppa ko wasul karne ka malik Nanak Chand Haige. Main ne ruppa ko Nanak Chand hath baich dia baiga. Dastkhat Bishambar Dyal. Miti Bhadona Sudi 9, Samat* 1979. and immediately after there was another endorsement to the following effect. *Is ruppa ke rupai Biyaj Nanah Chand Kishore Lal settle lie. Destkhat Biahambar Dyal. Rupai sab aur biyaj le lie. Dastkhat Bishambar Dyal. Bhadon Sudi, 9 Sambat* 1979 and the endorsement was also thumb marked by Bishambar Dyal, *Held* that the words *Ruppa ko Nanak Chand hath baich diya haiga* clearly indicate that a complete assignment was effected. 30 M. 75 Foll. [P. 685 Col. 1.]

Shamair Chand, Advocate, for the Appellant.

L. Nawal Kishore, Vakil for the Respondent.

Judgment.:—One Prabhu Dyal borrowed a sum of Rs. 900 from one Bishambar Dyal and executed a pronote in his favour on the 23rd of December, 1913. On the 3rd of October, 1916, he paid a sum of Rs. 275 to Bishambar Dyal and the latter on the 31st of August, 1922, is alleged to have assigned the document to the present plaintiff who brought a suit on the basis thereof on the 3rd of October, 1922, impleading both Prabhu Dyal and Bishambar Dyal as defendants. The suit was resisted by Prahbu Dyal on the ground that he had paid off the money due on this document to Bishambar Dyal and that nothing now remained due. He further contended that the document was not a pronote and therefore not negotiable. The validity of the assignment was also challenged and it was contended that the plaintiff had no *locus standi* to sue, Bishambar Dyal at first admitted the claim but subsequently after the issues had been framed resiled from his previous statement and contended that the alleged assignment was not for valid consideration. The trial court decreed the suit, holding that the alleged repayment of the loan by Prabhu Dyal to Bishambar Dyal had not been established, that the document was a pronote and that the assignment was valid.

On appeal the learned District Judge agreed with the Sub-Judge's finding that the evidence as to repayment was not at all convincing and that the defence subsequently put forward by Bishambar Dyal was false. On the other two questions, however, the finding of the learned District Judge was in favour of the defendants and it was held that the document was not a pronote and that it had not been validly assigned to the plaintiff. As a result of this finding the suit was dismissed.

Plaintiff has now come up in second appeal to this court. I agree with the finding of the learned District Judge that the document is not a pronote. A promissory note is defined in Section 4 of the Negotiable Instruments Act as an instrument in writing containing an unconditional undertaking signed by the maker to pay a certain sum of money to or to the order of the said person. The document in question in the present case is in the following terms:—*Age rupai nau sau tumhare hamare pas juma hainge. Biyaj dar das anne sainkra denge.* There can be no doubt that the document does not contain any unconditional undertaking to pay the principal sum of money and the only undertaking given is to pay interest at the rate of ten annas per cent per mensem. The document clearly seems to be an acknowledgment of a debt and not a promissory note within the meaning of Section 4 of the Negotiable Instruments Act.

The next question for consideration is whether the assignment was valid or not. On this point I am unable to agree with the finding of the learned Judge of the court below that the words on the back of the document

amount merely to an endorsement and that they do not constitute a valid assignment in favour of the plaintiff. The endorsement in question is worded as follows :—*Is ruqqa ko wasul karne ka malik Nanak Chand haiga. Main ne ruqqa ko Nanak Chand hath baich dia haiga. Dastkhat Bishumbar Dyal. Miti Bhadon Sudi* 9, *Samat* 1979. Immediately after follows another endorsement to the following effect:—*Is ruqqa ke rupai biyaj Nanak Chand Kishori Lal seti le lie. Dastkhat Bishambar Dyal. Rupai Sab aur biyaj le lie. Dastkhat Bishambar Dyal Bhadon Sudi*, 9 *Sambat* 1979. The endorsement is also thumb marked by Bishambar Dayal. In Wharton's Law Lexicon an assignment is defined as a transfer of an estate or interest in property and it is stated that the usual operative verb is "assign", but any other word indicating an intention to make a complete transfer, for example, convey will also amount to an assignment. In 30 Mad. 75 the learned Judges observe that no particular words are necessary to effect a transfer if the intention to transfer is clear from the language used. In Section 130 of the Transfer of Property Act a transfer of an actionable claim can be affected by the execution of an instrument in writing signed by the transferror and shall be considered to be complete and effectual upon the execution of such instrument. In the present case the words *ruqqa ko Nanak Chand hath baich diya haiga* clearly indicate that a complete assignment has been effected. In my opinion the assignment in writing was valid and it did give the plaintiff a right of suit upon the document in question.

I accept the appeal and setting aside the order of the court below decree the plaintiff's suit with costs throughout.

Appeal allowed.

1924 LAHORE 685.

MARTINEAU, J.

Ram Kishen and others...Plntffs.—Appellants.

v.

Khiali and athers.....Defts.—Respondents.

S. A. No. 2026 of 1923 decided on 11th February, 1924 from the decree of the District Judge of Rawalpindi, dated 4th July, 1912.

(a) *C. P. Code, S.* 100—*Finding as to necessity for sale is one of fact.*

The finding of the Lower Appellate Court that one of the vendors was a cripple and incapable of working, and that his share of the price was required for his personal necessities, is a finding of fact and cannot be contested in second appeal. [P. 685, Col. 2.]

(b) *Custom (Punjab)—Custom prevailing among Jats cannot apply to Brahmins.*

The rule prevailing among Jats, who have been agriculturists from time immemorial, that an alienation of ancestral land for the purpose of raising money to be invested in trade is not permissible, cannot properly be applied to the community of Brahmans. [P. 686, Col. 1.]

Sagar Chand for *Anant Ram* for the Appellants.

Shamair Chand for the Respondents,

Judgment :—The plaintiffs contest a sale of land situate at Bamlot in the Kahuta Tahsil of the Rawalpindi District, which was effected by their cousins in 1909. Their suit has been dismissed, the courts below having concurred in finding that the sale was effected for necessity. The plaintiffs have filed a second appeal.

The sale was for Rs. 500 and the payment of the full price is found to have been proved.

The learned District Judge is wrong in saying in his judgment that the sale was effected by 3 persons, namely Khiali, his brother Maulu and their cousin Hari Chand, for the sale deed shows that the sellers were only Khiali and Hari Chand and not Maulu. Consequently the argument advanced on behalf of the appellants that there was no necessity for the sale so far as Maulu was concerned has no force.

With regard to Hari Chand, the finding of the Lower Appellate Court is that he was a cripple and incapable of working, and that his share of the price was required for his personal necessities.

This is a finding of fact and cannot be contested in second appeal As to Khiali it is found that he took the money in order to put into the plaintiff, Ram Kishen's shop at Muktsar in which he had joined or was going to join. It is contended for the appellants that this was not a necessary purpose, and reliance is placed on 19 P. R. 1915, but I think the learned District Judge is right in holding that ruling is not applicable to the present case. The case relied upon related to an alienation by a Jat, and the learned Judge who decided it remarked that they had no doubt that village custom would not look with favour upon the conversion of a Jat agriculturist into a shopkeeping trader and would not countenance an alienation of ancestral land in order to

enable such agriculturist to carry on business of the shop. The parties in the present case are Brahmans and although it has been found that the members of their community cultivate land and follow custom it appears that they have been settled in the village in which the land in suit is situate only since about 1805. The rule prevailing among Jats, who have been agriculturists from time immemorial, that an alienation of ancestral land for the purpose of raising money to be invested in trade is not permissible, cannot, I think, properly be applied to the community of Brahmans to which the parties belong. Moreover, neither of the vendors, in this case, cultivated land, Hari Chand, as already stated, did no work and Khiali is employed in the police. It is also in evidence that land in the Kahuta Tahsil is inferior and that crops are very uncertain.

I agree with the learned District Judge that the sale by Khiali was for necessity.

The appeal, therefore, fails and I dismiss it with costs.

Appeal dismissed.

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* 1924 LAHORE 686.

MOTI SAGAR, J.

Daulat Ram and another.....Appellants.

v.

Deoki Nandan and others.....Respondents.

Mis. F. A. No. 1396 of 1922, decided on 28th May, 1923 from the order of District Judge, Karnal, dated 12th May, 1922.

Prov. Insol. Act (1920), *P.* 54—*Real object to gain advantage to debtor and not to prefer creditor—No preference.*

To constitute a fraudulent preference within the meaning of S. 54, the court must be satisfied that the dominant or substantial motive was to prefer the creditor and was not to obtain some advantage to the debtor. Where it was found that the debtor was in need of money, that he went to mortgagee and asked him to advance a sum of Rs. 1,800 who told him that he would not make the advance until his previous debt was secured and unless sufficient security was given for the new advance which he desired him to make and that the debtor agreed to the suggestion and probably in an endeavour to keep his business afloat as long as possible he granted the mortgage, *Held*, that these circumstances clearly show that the real intention of the debtor was not to prefer one creditor to other creditors but to gain a substantial advantage for himself and that the transfer was not fraudulent. [P. 687, Cols. 1 & 2.]

Manohar Lal for the Appellants.

Shamair Chand and Gobind Ram Khanna for the Respondents.

Judgment:—This is an appeal from an order of the District Judge of Karnal in the exercise of his insolvency jurisdiction, annulling a certain mortgage made by one Saundha insolvent in favour of one Daulat Ram, a creditor, and holding that the mortgage was void and inoperative as against the other creditors under Section 54 of the Provincial Insolvency Act (V of 1920). It appears that Saundha was in very embarrassed circumstances in the beginning of 1921 and was unable to meet his liabilities as they fell due. On the 10th of February, 1921, he executed a deed of mortgage in respect of the property in dispute in favour of Daulat Ram creditor for a sum of Rs. 5,000. The deed purported to secure an antecedent debt of Rs. 3,200 and a new advance of the balance Rs. 1,800. It also provided for interest at the rate of twelve annas per cent. per mensem. The details of the consideration as recited in the mortgage deed were as follows:—

1.	Paid before the Sub-Registrar	Rs. 1,700
2.	Registration expenses	„ 100
3.	Due on a *hundi* dated 18-3-1919	„ 400
4,	Due on a *hundi* dated 38-9-1919.,.	Rs 200
5.	„ „ „ „ „ 15-10-1919...	„ 300
6.	„ „ „ „ „ 15-1-1920...	„ 500
7.	„ „ „ „ „ 15-2-1920...	„ 400
8.	„ „ „ „ „ 7-3-1926...	„ 1,000
9.	Due oc account of interest on hundis	„ 400
	Total.	Rs. 5,000.

On the 18th of April, 1921, Saundha filed an application asking to be adjudicated an insolvent, and he was adjudicated as such by the orders of the learned District Judge of Karnal on the 6th of December, 1921. A receiver was appointed and he took charge of all the properties of the insolvent. The creditors filed certain objections to the effect that the debt alleged to be due to Daulat Ram was fictitious and that the mortgage executed by Saundha in his favour was void under Section 54 of the Provincial Insolvency Act. The Receiver was asked to make a report who held an inquiry into the genuineness of these debts and found that the debts were proved and that the mortgage in favour of Daulat Ram was not fictitious. He accordingly entered the name of Daulat Ram in the list of the secured creditors for Rs. 5,375, Rs. 5,000 principal plus Rs. 375 interest. No appeal was preferred against this decision by the creditors as required by Section 68 of the

Provincial Insolvency Act, but an application was made by them to the court in which the very same objections were repeated, and it was prayed that the court itself should hold an inquiry. The learned District Judge framed the following two issues :—

1. Whether the debt was fictitious ?

2. Whether the mortgage was fraudulent and void under Section 54 of the Provincial Insolvency Act ?

Evidence was recorded on both these issues, and tne finding of the learned District Judge was that the debts were genuine. but that the transfer was void for fraudulent preference.

Mr. Manohar Lal for the appellants has attacked this finding as being based on an erroneous view of the law and it has been contended by him that upon the true view of the facts it cannot be upheld. His contention is that before a transfer can be avoided under Section 54, it must be definitely proved that in making the transfer in favour of a creditor the debtor acted with the view of giving that creditor a preference over his other creditors and that the onus of proving that such fraud was intended is upon the creditor who alleges it or who impugns the transfer. This contention in my opinion is well-founded and must be given effect to, There is ample authority for holding that to constitue a fraudulent preference within the meaning of Section 54 the court must be satisfied that the dominant or substantial motive was to prefer the creditor and was not to obtain some advantage to the debtor. In Halsbury's Laws of England, Volume II, page 282, the law on the subject is thus laid down :—

"In order that a transaction may be set aside as a fraudulent preference, it is necessary to prove that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors. This need not be the primary result aimed at, it is sufficient that it should be the object aimed at in bringing about the primary results. If the transaction can properly be referred to some other motive than that of giving the creditor paid a preference over the other creditors, the payment is not fraudulent and void, for it is from the intention on the part of the debtor to act in fraud of the law, that is, to prevent the distribution of the bankrupt's property rateably among all his creditors that the invalidity of the transaction arises.

Again at page 285 it is stated that "in every case the state of mind of the debtor is the paramount consideration. The intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns; if that intention be shown not to have existed, it is of no importance that the creditor had knowledge of the debtor's insolvency or that the debt was not due, nor for this purpose is it true that the debtor must be taken to have intended the natural consequences of his act." This is in accordance with what was laid down in the case of *Sharp* v. *Jackson* (1) where it was observed by Lord Esher that "the question depends not on the mere fact that there has been a preference but also on the state of mind of the person who made it, and that it is not sufficient to say that, the natural consequence of the act being to prefer, the intention to prefer follows." In 53 I. C. 175 it was held by Mr. Justice Rankin that "if the debtor's real object was to procure a further advance for himself, or to satisfy the demands, or escape the pressure of the creditor, or if he had both these objects as the mainspring of his action, then the transaction is not fraudulent preference."

The law on the object being as stated above, the question for consideration is whether in the present case the mortgage was made with the dominant view of preferring the respondent and was thus void under Section 54 of the Provincial Insolvency Act. There is not a particle of evidence on the record to show that the mortgage was made with any such view or that the suggestion of making the mortgage emanated from the debtor. On the contrary the evidence shows that the debtor was in need of money, that he went to Daulat Ram mortgagee and asked him to advance a sum of Rs. 1,800 who told him that he would not make the advance until his previous debt was secured and unless sufficient security was given for the new advance which he desired him to make. The debtor agreed to the suggestion and probably in an endeavour to keep his business afloat as long as possible he granted the mortgage. These circumstances clearly show that the real intention of the debtor was not to prefer one creditor to other creditors, but to gain a substantial advantage for himself. I am satisfied that the transfer was not fraudulent

(1) (1899) A. C. 419=68 L. J. Q. B. 866=80 L. T. 841=6 Manson 264=15 T. L. R. 418.

within the meaning of Section 54 of the Provincial Insolvency Act, and that it must be upheld. It has, however, been argued on behalf of the respondent that the existence of the debts has not been fully established and that the finding of the learned Judge of the court below on this point is erroneous. With this contention I am unable to agree. The previous *hundis* have been produced and the last balance proved by the scribe Suraj Mal. The advance of Rs. 1,800 at the time of the mortgage and the *hundi* of the 7th of March, 1920 for Rs. 1,000 were not contested in the court below, and it is not competent to the respondent to question these two items in this court. The debts in question have in my opinion been fully proved, and I do not see any force in the contention that they were not due.

Mr. Manohar Lal's next contention is that under Section 54 of the Provincial Insolvency Act it was only the receiver who could avoid the mortgage and no other person. In view of my finding, however, on the first question that the mortgage was valid, it is unnecessary to give a finding on this question.

I accept the appeal, set aside the order of the court below and uphold the mortgage.

Appeal allowed.

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* 1924 LAHORE 688.

MOTI SAGAR, J.

Muhammad Abdulla.....Judgment-debtor—Appellant.

v.

Jiwan Mal.....Decree-holder—Respondent.

S. A. No. 1961 of 1922, decided on 8th May, 1923 from the order of the District Judge, Lahore, dated 27th April, 1922.

Civil P. C., S. 60 (g)—Gratuity payable by University not exempt.

Gratuity payable by a University to its servants is not in the nature of a government pension and consequently not exempt from attachment under S. 60 (g). 6 All. 634 Dist. Where the gratuity recommended by the Syndicate of the Punjab University, was in consideration of past services which the J. D. had rendered to the University, *Held* it constituted a debt due to judgment-debtor which could be attached under S. 60. [P. 688, Col. 2; P. 689, Col. 1.]

L. C. Mehra for the Appellant.

Durga Das for the Respondent.

Judgment:—On the 14th of December 1920, the respondent Jiwan Mal obtained a money-decree against the appellant for Rs. 4,177 from the Court of the Senior Sub-ordinate Judge at Lahore. In execution of this decree he attached a certain gratuity which the appellant was entitled to receive from the Senate of the Punjab University on the 6th of May, 1921; a cheque was received by the executing court from the office of the University and made over to the decree-holder on the same day. On the 9th of May, 1921, the judgment-debtor filed an objection that the gratuity was not liable to attachment under Section 60 (*g*) of the Civil Procedure Code and that the money should not be paid to the decree-holder. The cheque, however, had already been paid and the money realised by the decree-holder. Both the courts below have concurrently found that Section 60 (*g*) had no application, and that the exemption contained therein related to gratuities payable to Government servants only. The objection filed by the judgment-debtor has accordingly been disallowed, and he has now come up in second appeal to this court.

Two points have been urged before me by Mr. L. C. Mehra who has appeared on behalf of the appellant. Firstly, it is contended that the gratuity payable by a University to its servants is in the nature of a Government pension and consequently exempt from attachment under Section 90 (g) of the Civil Procedure Code. With this contention I am unable to agree. Section 60 (*g*) provides that stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the *Gazette of India* by the Governor-General-in-Council in this behalf, and political pensions shall not be liable to attachment or sale in execution of a decree. This does not exempt private pensions or pensions payable by a body other than Government from attachment, and no authority has been citec before me in support of the contention that a pension or a gratuity payable by a University is a pension or gratuity falling within the purview of Section 60 (g) of the Civil Procedure Code. 6 All. 634 cited by the appellant's counsel does not in any way help him. In that case a certain amount of bonus had been recommended by the Traffic Manager for a servant in the employment of the East India Railway Company in consideration of long and good services. The recommendation was sanctioned and the amount of the bonus was received by the District Pay-master. Before payment could be made the money was attached in execution of a decree. It was held that the

money was not liable to attachment in execution of the decree, inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the date of the passing of the Transfer of Property Act, and that as it was not evidenced by a registered instrument, it could only be effected by actual delivery which had not been made in that case. It is clear that this judgment can have no bearing whatever on the present case. There was no decision in that case on the question whether a bonus payable to a servant of the Railway Company was or was not exempt from attachment under Section 266 of the Civil Procedure Code of 1882. The next case cited was 6 Cal. L. R. 19. That case, instead of supporting the appellant, clearly supports the respondent in his contention that a private pension is attachable in execution of a decree.

Next, it is contended that the gratuity in question had not become due and payable when the attachment was effected and was consequently not a debt-or property belonging to the judgment-debtor. This objection was not taken by the judgment-debtor in the written objections filed by him in the court of first instance, and he was not, therefore, entitled to take it in his grounds of appeal to the Lower Appellate Court. Further, in the Lower Appellate Court also he appears to have dropped this contention as there is no adjudication of the point in tbe Judgment passed by that court. Mr. L. C. Mehra however, urged that the point was distinctly raised and argued by him before the Lower Appellate Court and that he is not reponsible if that court has failed to give a decision thereon. He has filed no affidavit in support of this allegation, and I am unable to hold in the absence of any such affidavit that the point was argued and left undecided by the learned Judge of tbe court below. In any case I am of opinion that there is no substance in this contention. The gratuity, which had been recommended by the Syndicate of the Punjab University to be paid to the appellant, was in consideration of past services which the latter had rendered to the University, and constituted a debt wbich could be attached under Section 60 of the Civil Procedure Code. I do not see any force in this appeal and dismiss it with costs throughtout.

Appeal dismissed.

1924 LAHORE 689.

MOTI SAGAR, J.

Tara Chand and another.....Defendants—Appellants.

v.

Rahman Shah and others..... .....Plaintiffs—Respondents.

S.A. No. 2077 of 1922 decided on 16th May, 1923 from the decree of District Judge, Rawalpindi, dated the 28th April, 1922.

(a) *C. P. Code, S. 100—Finding of law.*

Finding as to passing of consideration and existence of legal necessity is not one of fact.

(b) *Custom (Punjab)—Alienation—Proof of necessity—Recitals consistent with probabilities should not lightly be set aside.*

Where a sale deed effected in 1899 was sought to be set aside in 1920 for absence of necessity and consideration. *Held* that though recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain yet when a long period has elapsed between the alienation and the suit to set it aside, and when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. 44 C. 186 P. C. foll. [P. 690, Col 1.]

D. C. Ralli, Advocate for the Appellants.

Malak Muhammad Tofail, Advocate, for the Respondents.

Judgment :—On the 27th of April, 1898, Mt. Khanam Ji, widow of one Fateh Shah, sold 62 *kanals*, 5 *marlas* of land in mauza Dheri Shahan in Fateh Jaung Tahsil of the Campbellpore District to one Shankar Das for Rs. 800. On the 28th of April, 1899, she sold another plot of 8 *kanals* of land in the same village to Bhagwan Das and others for Rs. 96. In June, 1920, the plaintiffs brought this suit for possession alleging that they were the reversioners of Fateh Shah, the husband of Mt. Khanam Ji, that the land was ancestral and that the alienation was without consideration and legal necessity. The defendants repudiated these allegations and contended that the land was the self-acquired property of the deceased, that the alienation was for consideration and necessity and that in the presence of daughters the plaintiffs had no right to maintain the suit. The trial court found in favour of the defendant-vendees on all points and dismissed the plaintiff's suit. On appeal the learned District Judge upheld the finding of the trial court in so far as the first deed of 1898 was concerned but came to a contrary finding on the question of the plaintiff's *locus standi* to

maintain the suit and also with regard to the nature of the property which he found to be ancestral. He further held that no necessity and consideration had been established for the second sale deed of 1899, and he accordingly passed a decree in favour of the plaintiffs for possession of the land covered by that sale-deed.

Against this decision a second appeal has been preferred to this court by the defendant-vendee, and it has been contended on his behalf that the finding of the learned District Judge as to the second sale deed not being for necessity and consideration is not very clear and definite and that it should be set aside. A preliminary objection is raised on behalf of the respondent that the finding is one of fact and cannot be impuged in second appeal. In my opinion there is no force in the respondents' objection, and it must be overruled. The consideration as recited in the sale deed was made up of the following three items :—

(1) Due on account of a decree for arrears of rent	Rs.	71–13–0
(2) Paid cash for registration ...	„	8– 0–0
(3) Due on account of the price of corn by the vendor ...		16– 3–0
Total		96– 0–0

The learned District Judge does not definitely find that there was no decree in existence on account of which Rs. 71–13–0 were paid by the vendor. His finding only amounts to this that the recital in the sale deed has not been sufficiently corroborated by other evidence on the record. But it should be remembered that the sale deed was effected in 1899 and that the original vendee is now dead. It has been held by the Judicial Committee in 44 Cal. 186 that recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain but that when a long period has elapsed between the alienation and the suit to set it aside, and when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. This authority is exactly in point and I do not think that in this case the recitals in the sale deed, which are clear evidence of the representations that must have been made to the vendee, can be disregarded after such a length of time. The learned District Judge admits in his judgment that the mortgage deeds (D. 15 and D. 17), dated the 9th of January, 1880, executed by Nigah Ali Shah, the father of Fateh Shah, in favour of Prabh Dial, the father of Tara Chand, and of Bhagwan Das vendee show that there must have been dealings between Nigah Ali Shah's family and the family of the vendor. This circumstance coupled with the recitals in the sale deed is quite sufficient to support necessity for the deed, and I do not see any sufficient reason why the alienation in question shoud be set aside.

I accept the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

1924 LAHORE 690.

MOTI SAGAR, J.

Ram Chand.....Defendant—Appellant.

v.

Kaura and another....Plaintiffs—Respondents.

S. A. No. 2822 of 1922 decided on 16th June, 1923 from the decree of the District Judge, Mianwali, dated the 8th August, 1922.

Punjab Redemption of Mortgages Act (II of 1913), S. 12—Order under, suit to impeach—Limitation Act, Art. 14 applies.

Section 12 of Redemption of Mortgages Act II of 1913 merely points out the results which would ensue if the procedure laid down in that section is not followed. In order to ascertain the period of limitation for such a suit it is necessary that reference should be made to the provisions of the Indian Limitation Act, and the only Article in that Act under which the suit could fall is Article 14, which provides a period of one year's limitation from the date the order complained against is passed. [P. 692, Col. 1.]

Jagan Nath for the Appellant.

Har Gopal for the Respondents.

Judgment :—This appeal arises out of a suit for redemption of certain lands attached to Mehugamala well in Mauza Bhakkar in the Mianwali District. The property in suit consists of two plots of land, one mortgaged in 1827 by means of a written document but alleged to have been subsequently redeemed and remortgaged orally in 1878, and the other said to have been mortgaged in the year 1903. There is no dispute now in respect of the mortgage of 12 *kanals*, 6 *marlas* of land made in 1903, and it is admitted before me that the suit for redemption so far as this later mortgage is concerned is within time. The dispute only relates to

the first mortgage of 1827, and the contention of the defendants is that the suit with regard to the redemption of this mortgage is barred by limitation. It is contended that the mortgage is more than 60 years old and that the plaintiff has no subsisting rights of redemption in respect of the land covered by this mortgage. The entries in the Settlement Records of 1878 on which reliance is placed by the plaintiff, it is urged, do not mean that the original mortgage of 1827 came to an end and that a new contract creating a fresh mortgage was substituted in its place in 1870. It is stated that the original mortgage remained intact, but that at about the time of the settlement only certain modifications were introduced in its terms which did not, however, in any way affect the existence of the previous contract itself. It is further contended that, in 1916, the predecessor-in-title of the present plaintiff made an application to the Collector for the redemption of this mortgage under the Redemption of Mortgages Act (II of 1913), but that this application was dismissed on the ground that the mortgage was more than 60 years old and that the claim as to its redemption was barred by limitation. It is urged that as no suit was brought by the predecessor-in-title of the plaintiff within one year from the date of that order to establish his rights in respect of the mortgage, the present suit is barred under Article 14 of the Indian Limitation Act. Both the courts below have found in favour of the plaintiff and have decreed the suit in its entirety with costs in both courts against the defendants. The latter has now come up in second appeal to this court through Mr. Jagannath and I have heard Mr. Hargopal on behalf of the respondents.

Mr. Jagan Nath's first contention is that the finding of the learned Judge of the court below on the question of limitation is erroneous, and that the Settlement entries of 1870 have been entirely misinterpreted by him. In my opinion this contention has no force and must be overruled. It has not been shown in what way the entries have been misinterpreted, and a reference to those entries clearly shows that the mortgage of 1870 was an entirely new transaction and not a mere continuation of the previous mortgage of 1877 with certain terms here and there modified. I see no reason to differ from the opinion of the learned District Judge on this point and hold that the suit in respect of this mortgage is within time. I am also of opinion that the finding of the learned District Judge that the previous mortgage of 1827 did not remain subsisting and that a fresh mortgage was created some time between 1861 and 1878 is clearly a finding of fact which cannot be disturbed in second appeal.

The next question to be considered is what is the effect of the proceedings taken under the Redemption of Mortgages Act in 1913 on this suit. It appears that on the 11th of May, 1913, Allah Bakhsh, the predecessor-in-title of the present plaintiffs made an application under Act II of 1913 to the Collector claiming redemption of the land in suit on payment of Rs. 45. Notice was issued to the mortgagees to show cause why redemption should not be effected, and on their objecting that the mortgage was made more than 80 years ago and that the applicant did not possess any subsisting rights of redemption therein, an inquiry was ordered into the age of the mortgage in dispute. The Collector eventually came to the conclusion that the mortgage was made in Sambat 1884 and that, therefore, the claim as to its redemption was barred by limitation. He accordingly dismissed the petition and directed the applicant to seek his remedy in a Civil Court, if so advised. This application was presumably rejected under Section 9 of Act II of 1913. Now, Section 12 of that Act says down that "any party aggrieved by an order made under Sections 6, 7, 8, 9, 10 and 11 of this Act, may institute a suit to establish his rights in respect of the mortgage but, subject to the result of such suit, if any, the order shall be conclusive." This section embodies a rule of law similar to that which is contained in rule 63 of Order 21 of the Civil Procedure Code. Under Rule 63 of Order 21 of the Civil Procedure Code the person who is aggrieved by an order passed against him is entitled to bring a declaratory suit to establish the rights which he claims to the property in dispute within one year from the date of such order, and if no such suit is brought within the period prescribed by law, the order of the court allowing or disallowing the objection becomes conclusive. In the present case no suit was brought by the mortgagor or his representative-in-interest whithin one year from the date of the adverse order passed against him, and it is consequently contended that this suit, which is practically one for setting aside that order, is barred under

Article 14 of the Indian Limitation Act. Articles 11, 11-A, 12 and 13 of the Indian Limitation Act provide a period of limitation for suits of a specific nature brought under the Code of Civil Procedure, and Article 14 is a general residuary Article intended to provide a period of limitation for all suits which do not fall within the purview of any of those Articles. The present suit is clearly one for setting aside an order of the Collector passed in his official capacity for which no express provision is made in the Indian Limitation Act, and I do not see how it can be argued that the suit is outside the scope of Article 14. The learned District Judge is of opinion that as no period of limitation for a suit of this nature is fixed in Section 12 of the Redemption of Mortgages Act, Article 14 does not apply. I am unable to agree with this view. Section 12 of the Redemption of Mortgages Act merely points out the results which would ensue if the procedure laid down in that section is not followed. In order to ascertain the period of limitation for such a suit it is necessary that reference should be made to the provisions of the Indian Limitation Act, and the only Article in that Act under which the suit could fall is Article 14 which provides a period of one year's limitation from the date the order complained against is passed.

Next it is argued that it is not a suit for setting the order passed by the Collector but a suit for redemption, pure and simple, and that therefore Article 14 has no application to such a suit. I do not think that there is any force in this contention. Before redemption of the mortgage in suit can be effected it is necessary that the order passed by the Collector in 1913 should be set aside, and the plaintiff cannot evade the provisions of Article 14 by merely saying that he does not expressly ask for the setting aside of the order. The Collector after due inquiry decided against the claim of the plaintiff's predecessor-in-title, and the plaintiff is, by reason of the latter being a party to the proceedings before the Collector, bound by the order, and it is necessary for him under Section 12 of Act II of 1913 to get rid of that order before he can establish his right to redeem the property.

Lastly, it is argued that proceedings under Act II of 1913 are summary in their nature and that the Act is not intended to curtail the period of limitation for a suit for redemption which a litigant ordinarily possesses under the Indian Limitation Act. No doubt this is so, but this argument entirely loses sight of Section 12 of the Act under which the order is likely to become conclusive, if not duly contested by means of a suit. In my opinion the order of the learned District Judge is wrong, and the suit is clearly barred by Article 14 of the Indian Limitation Act so far as the earlier mortgage of 1827 is concerned.

The result is that I accept the appeal and, in modification of the order of the lower appellate court, grant the plaintiff a decree for possession by redemption of 12 *kanals* 6 *marlas* of land incorporated in mutation No. 1509. dated the 31st of August, 1903, on payment of Rs. 48 only. The rest of the plaintiff's claim shall stand dismissed. Parties shall hear their own costs throughout.

Appeal allowed in part.

1924 LAHORE 692.

ABDUL RAOOF, J.

Kidar Nath and others.....Plffs.—Appellants,

v.

Wazir Chand aad others...Defdts.—Respdts.

S. A. No. 1173 of 1921. decided on 29th June, 1923, from the decree of the District Judge, Karnal, dated 21st January, 1922.

(a) *Limitation Act, S. 5—Mistake of fact—Fact of death of a party not known to parties for more than three months—Mistake excused.*

The judgment under appeal was given on the 21st of January, 1922. The appeal was filed on the 19th of April, 1922. On the 6th of July, 1922, an application was made to remove from the memorandum of appeal the name of one R. and substitute the names of P. and H. as R. had died before the presentation of appeal and name had wrongly been continued on the record. R. had in fact died before the decision of the Lower Appellate Court, but his name, by an over-sight, was retained in the decree of the Lower Appellate Court.

Held: that the retention of the name of the deceased was not intentional, that having regard to this circumstance the mistake should be overlooked and the time for appeal sgainst the heirs of R. should be extended. [P. 693, Col. 1.]

(b) *Hindu Law—Religious endowment—Trusi without a trustee possible.*

A trust, according to the Hindu Law, cannot fail for want of the appointment of trustees and the court will appoint a manager on the failure of those entitled to appoint him. (Page 923, paragraph 2111 of Gour's Hindu Code.)

Where a trust was created for three purposes, namely (a) for a *sada barat*, (b) for the construction of a shiwalaya and (c) for expenses in connection with the sati of the family. [P. 694, Col. 2.]

Held: that the intention of the creators of the trust was to create a trust of a public and religious character. 23 Bom. 659 Ref.

Shamair Chand for the Appellants.

Jagan Nath for the Respondents.

Judgment:—This second appeal has arisen out of a suit for rendition of accounts, removal of the defendants from the office of trustees and appointment of new trustees. The trial court dismissed the suit and the appellate court upheld the decree of the trial court. Hence this second appeal was filed by the plaintiffs.

On the appeal being taken up for decision a preliminary objection was raised on behalf of the respondents on the ground that in must be taken to have abated on the following facts:—The judgment under appeal was given on the 21st of January, 1912, The appeal was filed on the 19th. of April 1922. On the 6th. of July 1922 an application was made to remove from the memorandum of appeal the name of one Ram Richhpal and substitute the names of Prem Nath and Hukam Chand as Ram Richhpal had died before the presentation of appeal and his name had wrongly been continued on the record. The application was admittedly made after the period of limitation provided by the law for the presentation of appeals had expired. It, however, appears that in spite of the fact that Ram Richhpal had died before the decision of the LowerAppellate Court, his name, by an oversight, was retained in the decree of the Lower Appellate Court. Mr. Shamair Chand has contended that he and his clerk were misled by the entry in the decree of the Lower Appellate Court, that the retention of the name of the deceased was not intentional, that having regard to this circumstance the mistake should be overlooked and the time for appeal against the heirs of Ram Richhpal should be extended under Section 5 of the Indian Limitation Act. In my opinion the mistake appears to be a *bona fide* one. I. therefore, extend the period of limitation under Section 5 of the Limitation Act and overrule the preliminary objection. As regards the merits of the case the following facts must be taken into consideration in order to decide the question raised in this second appeal:One Mt.Dhako died in 1875 leaving considerable property, both moveable and immoveable—a dispute arose between the reversioners as to succession. On the 21st of August, 1875, a deed of partition was executed by which the ancestors of the plaintiffs Nos. 1 and 2 and those of the defendants divided the property. By that deed a *shiwala* with certain shops and Rs. 10,000 were set apart for charitable purposes. The clause relating to the charity is set out in the judgment of the Lower Appellate Court as follows:—

"Rs. 10,000 (ten thousand rupees) cash and a house (*shiwala*) with shops as a joint property, detailed below, have been set apart for charitable purposes with our consent. We, co-sharers, have no claim to the said cash and house and shops. A *sada barat* (perpetual giving of alms) will continue to exist. Hence we have written these few words in the form of a deed of partition so that it may serve as an authority:—

One house (*shiwala*) with shops under it and Rs. 10,000 (ten thousand rupees), not of the whole heritage of the deceased, have been set apart for charitable purposes as *wakf* property. The said Rs. 10,000 is to be spent as follows:—

(*a*) for a *sada barat*	...	Rs. 8,000
(*b*) for the construction of a *shiwala* ...	...	„ 1,000
(*c*) for the expenses in connection with the *sati* of the family. ...	...	„ 1,000
Total		Rs. 10,000

The suit was instituted by six persons, namely, (1) Shiba Mal, son of Ajudhia Parshad (2) Kidar Nath, son of Ram Parshad, (these two plaintiffs are members of the family), (3) Naubat Rai, son of Harnam Das, (4) Rahtu Mal Gupta, son of Ram Saran Das, (5) Gopi Nath, son of Richha Mal and (6) Mangat Ram, *lambardar*, son of Data Ram. These are outsiders and are said to be *Arya Samajists*. The defendants against whom the suit is brought are the children or grand-children of the members of the family who were parties to the partition-deed. It is alleged in the plaint that Sant Lal, Gowardhan Das and Bishan Das were appointed as trustees of the *wakf* property. The suit was instituted so far back as the 14th of January, 1914 after obtaining the necessary sanction under Section 92 of the Code of Civil Procedure. The material issue which arose for decision on the pleadings of the parties was whether the ancestors of plaintiffs Nos. 1 and 2 had endowed the property in suit for a public charitable purpose and thus had created a public trust by means of the

partition deed of 1875. Mr. Ali Hussain, the learned Senior Subordinate Judge, after considering the evidence and circumstances of the case, came to the conclusion that the trust was not for a public and charitable purpose and that the plaintiffs were not entitled to maintain the suit and dismissed it by his judgment dated the 17th of October, 1914.

An appeal was preferred against his decision which was accepted and an order was mede by Mr. Bishambar Dayal on the 19th of July, 1915, remanding the case under Order 41, Rule 23 of the Code of Civil Procedure for trial *de novo*. This order of remand was set aside by a Division Bench of this court on the 17th of May, 1921, and the case was sent back to the Appellate Court for disposal. The learned Judge of the court below has upheld the decree passed by Mr. Ali Hussain.

Ostensibly the only ground upon which the learned Judge has upheld the decree of the trial court is that as no trustees were appointed under the deed there was no trust at all. The following passage in the judgment speaks for itself :—

"He also urged that there was no trust at all. With this I agree. The essential idea of a trust is that certain persons hold property to or for the use of others (including charitable and religious purposes); and the creation of a trust involves the appointment of trustees. The deed in question appoints no trustees and creates no trust. It incidentally declares the charitable intentions of the owners of joint property who were dividing it among themselves. If they had not carried out these intentions nobody—no outsider at any rate—could have compelled them to do so; and the fact that their intentions were carried out for some years wholly or in part is irrelevant."

Evidently the learned Judge has imported the notions of the English Law into his judgment. The rule of the Hindu Law is thus stated by Mr. Gour in Section 225 of of his Hindu Code :—

"225 (1): The founder is entitled to provide for the management of any endowment created by him.

(2) He may nominate a shebait and provide for his successor and effect will be given to his wishes if not inconsistent with the general law.

(3) Where the founder makes an endowment without providing for its management, the right of management vests in the founder and his heirs.

(4) The right of the founder to provide for the management devolves upon his heirs on his death.

(5) The court may appoint a manager in the last resort."

A trust, according to the Hindu Law, cannot fail for want of the appointment of trustees and the court will appoint a manager on the failure of those entitled to appoint him, see page 923, paragraph 2111 of the same Code.

In the case of *Vidya Varuthi Thirtha* v. *Balusami Aiyar and others* (1) their Lordships observed :—"It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Muhammadan Laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia*." The learned Judge of the court below was, therefore, wrong in holding that there was no endowment in this case because no trustees had been appointed. The question whether an endowment for a public and charitable purpose was made depends upon the true construction of the clause in the deed referred to in the beginning of this judgment. The *shiwala* is situated outside the family house and is open to the public who resort to it for worship. Thus there can be no doubt that the intention of the dedicators was to endow it to the public. The trust is created for three purposes, namely :—

(*a*) for a *sada barat*,

(*b*) for the construction of a *shiwala*; and

(*c*) for the expenses in connection with the *sati* of the family.

Out of these the last purpose only may be stated to be of a private character. In the case of *Jugal Kishore* v. *Lakshmandas Raghunathdas* (2) the facts were as follows :—

"A Hindu built a temple in honour of the deity Shiv Pandurang, to which were attached a *dharmsala* and a *sadavart* for feeding travellers and giving alms to the poor. In the maintenance of the temple and the

(1) 1922 P. C. 123=44 Mad. 831.
(2) I. L .R. 23 Bom. 659.

charities connected with it, he dedicated certain property by a deed of gift, under which he constituted himself a trustee for life and appointed a *panch* to act as his successors in the trust. During his life-time he managed the temple as provided in the deed. On his death in 1867, the *panch* did not take charge, but his son (the defendant) assumed the management. The temple was open to the Hindu community."

And the learned Judges held that "Having regard to the fact that a certain number of the public had always used the temple, that there was attached to it a *dharmsala*, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart*, the intention of the founder was to devote the property to public, religious and charitable purposes." In the deed in the present case it is provided that a *sadavart* (perpetual giving of alms) will continue to exist (*sadavart jari rahega*). The intention to create a perpetual charity is clear from this expression. In the detail of the property endowed it is stated that one house with shops under it and Rs. 10,000 out of the whole heritage of the deceased have been set apart for charitable purpose as *wakf* propety, (*ek makan shiwala mai dukanat zerin aur mubligh das hazar rupae wakf dharmada*).

Now, the expression '*wakf* is a well known technical expression conveying the idea of tying up the property in perpetuity and the word *dharmada*' denotes charity. Thus there can be no doubt as to the intention of the creators of the endowment that they intended that the Rs. 10,000 were to be so employed as to feed the poor in connection with the *shiwala* for ever. Therefore there is an irresistible conclusion that the Rs. 10,000 were not to be consumed but their income or interest only was to be spent in maintaining the *wakf*. It is not contended for the respondents that the maintenance of a temple and of a *sadavart* are not charities of a public nature. All that is contended for is that the intention of the creators of the trust was not to create a trust of a public and religious character. This contention cannot be sustained on the true construction of the deed.

I must, therefore, accept this appeal and set aside the decision of the Lower Appellate Court. As the decision of the learned Judge of the court below upon a preliminary point is set aside, the case must be remanded for trial on the merits under Order 41, Rule 23, Civil Procedure Code. Costs will abide the result.

Appeal allowed.

1924 LAHORE 695.

MARTINEAU, J.

Dhanna.....Appellant.

v.

Lekh Ram and others.....Respondents.

S. A. No. 2336 of 1921 decided on 10th November, 1922 from the decree of the District Judge, Hissar, dated the 12th July, 1921.

Punjab Preemption Act, S. 30—Time runs from mutation when vendee is in possession prior to sale.

Where the vendee was already in possession of the land in suit before the sale as a lessee, he should not be deemed in law to have taken possession of the land under the sale when the sale was effected. It is impossible for a person to take physical possession of property of which he has already got the physical possession and consequently time must run from the date of mutation under Section 30 of the Pre-emption Act. 1922 Lah. 210, Foll. [P. 695 Col. 2.]

N. G. Pandit for the Appellant.

Shamair Chand for the Respondents.

Judgment:—The plaintiff in this case sued for pre-emption in respect of an oral sale of land which took place on the 15th August, 1918. Mutation was sanctioned on the 14th March, 1919. The suit was instituted on the 11th March 1920, and the main question in the case is that of limitation. The First Court gave the plaintiff a decree but the District Judge on appeal has dismissed the suit as barred by limitation, on the grounds that the property was capable of being physically possessed and that the vendee took possession under the sale on the 15th August, 1918. The plaintiff has presented a second appeal to this court.

The learned District Judge has overlooked the fact that the evidence of the Patwari and the Revenue Records shows that the vendor Lekh Ram was already in possession of the land in suit before the sale as a lessee. I cannot agree with the argument that he should be deemed in law to have "taken" psssession of the land under the sale when the sale was effected. It is impossible for a person to take physical possession of property of which he has already got the physical possession and consequently, it appears to me that time must run from the date of mutation under Section 30 of the Pre-emption Act.

The matter is in fact concluded by *Tola Ram* v. *Lorinda Ram* (1). In that case there had been an agreement to sell land to a certain person on the fulfilment of certain conditions. He got possession and subsequently he fullfilled the conditions and become the owner of the land. A suit for pre-emption was filed and it was held that as under the circumstances of the case physical possession under the sale was impossible the vendee having been in physical possession from the date of the execution of the original contract, time began to run under the provisions of the Pre-emption Act from the date of mutation.

The suit in the present case is therefore within time having been instituted within one year of the date of the mutation.

The courts below have concurred in holding that the plaintiff has a superior right of pre-emption but the Lower Appellate Court has given no finding as to the price payable by him about which the parties are at issue so that a remand is necessary.

I accept the appeal, set aside the decree of the Lower Appellate Court and remand the case to that court under Order 41 Rule 23 Civil Procedure Code for disposal of the appeal before it after it has decided the question of price. Court fee on the appeal in this court to be refunded. Other costs to be costs in the case.

Appeal accepted.

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(1) 1922 Lah. 210.

1924 LAHORE 696.

MARTINEAU AND MOTI SAGAR, JJ.

Kokan and others ....Defendants—Appellants.

v.

Sohan..... ...Plaintiff—Respondent.

S. A. No. 1580 of 1920 decided on 7th May, 1923 from the Additional Judge, Rohtak, date, 25th May, 1920.

Decree—Construction—Allowing redemption does not make a decree a mortgage decree.

Where the court decreed possession to the then plaintiffs with the proviso that the defendant could redeem within four years on payment of Rs. 1125 and it was nowhere stated in the decree that the decree-holders would enter into possession of the property in the capacity of mortgagees. *Held* the mere fact that it was provided in the decree that the judgment-debtor would be entitled to redeem within four years does not necessarily lead to the inference that the mortgage had not determined and was slill subsisting. [P. 697 Col. 2.]

Tek Chand and R. C. Sohni for the Appellants.

Shamair Chand and Sagar Chand for the Respondent.

Moti Sagar, J :—The facts of the case which has given rise to this second appeal are very simple and may shortly be stated as follows:—

On the 22nd of June 1891, the, plaintiff Sohan mortgaged the land in suit without possession to Kokan and Harphul for Rs. 500. The mortgage was for five years, and the deed contained a conditional sale clause to the effect that if redemption was not effected within the period fixed the land would be deemed to be sold to the mortgagee. On the 10th of August, 1892, an additional charge for Rs. 99 was created on this land and it was stipulated that redemption would be effected along with the previous mortgage. The other terms of the mortgage were practically the same as those provided for in the deed of 1891. The five years expired in June 1896 and on the 3rd of August, 1897, foreclosure proceedings were instituted by the mortgagee and apparently duly carried out.

On the 18th of August, 1897, notice of foreclosure was served upon the mortgagor and on the 1st of December, 1898, the mortgagee sued for possession as owner, alleging that the year of grace had expired and that the mortgage money had not been paid by the mortgagor. No objection was taken in that suit to the regularity of the foreclosure proceedings and the only points urged in defence were :—

that full consideration had not been paid ;

tnat the defendant mortgagor had made repayments to the extent of Rs. 448 ; and

that until the accounts had been settled it could not be definitely said how much was due to the plaintiffs.

The defendant, however, admitted his liability to pay what was found due to the plaintiffs if instalments were allowed. It was denied that the plaintiffs were entitled to a foreclosure decree. Upon these pleadings the Court framed certain issues and adjourned the case to the 23rd of December, 1898, for the evidence of the parties. On the 23rd December, 1898, however, the parties entered into a compromise and made an application to the Court that a decree for possession by

way of foreclosure be passed in favour of the plaintiffs on condition that if the defendant repaid Rs. 1,125 within four years he would be entitled to redeem and get back possession of the land in suit from the plaintiffs. The statement of the defendant mortgagor was recorded who verified the compromise, bnt added that for four years the plaintiffs would remain in possession as mortgagees The court thereupon decreed possession to plaintiffs with the proviso that the defendant could redeem the land under mortgage within four years on payment of Rs. 1,125 to the plaintiff-decree-holders. In the decree which followed upon the judgment there was nothing to indicate that the plaintiffs would remain in possession for four years as mortgagees only and not as full proprietors. On the 28th of June, 1899, possession was delivered to the plaintiff-decree-holders. On the 19th of February, 1903, an application was made by the plaintiffs to the effect that four years had expired, that the judgment-debtor had not paid any money, and that the plaintiff-decree-holders were consequently entitled to remain in possession as full owners. A notice was sent to the judgement-debtor to appear and show cause why the plaintiff-decree-holders should not be recorded as full owners of the property in suit. The judgment-debtor appeared and stated that by the decree of the 23rd of December, 1898, a new mortgage was created between the parties and that since the conditional sale clause as contained in the decree was in law null and void he was entitled to redeem and that the mortgage was still subsisting. The Executing Court, however, overruled this objection and ordered that the plaintiff-decree-holders should be recorded as full owners. Mutation as full owners was also effected in the revenue papers in 1903 in favour of the plaintiffs, and since then they have remained recorded as such up to the date of the institution of the present suit.

On the 9th of April, 1919, the present suit was instituted by the mortgagor Sohan for possession by redemption on the ground that the decree of 1898 created a fresh mortgage and that the plaintiff was entitled to redeem on payment of Rs. 1,125. The trial court dismissed the suit on the ground that the mortgage did not subsist, and that the suit was barred by the rule of *res judicata* and by limitation.

On appeal the learned District Judge came to a contrary finding and held that a judicial hypothec had been created by the decree of 1898 and that the plaintiff-mortgagor was entitled te redeem. Against this decision a second appeal has been preferred to this court by the defendants Kokan and Harphul through Bakhshi Tek Chand while Mr. Shamair Chand has appeared on behalf of the plaintiff. The case has been argued at considerable length by the learned counsel on both sides and a mass of authorities have been cited for and against the various contentions raised on behalf their respective clients. We do not think it necessary to examine all the authorities in detail as in our opinion this appeal must succeed on the short ground that no fresh mortgage was created by the decree of 1898 and that the defendants Kohan and Harphul entered into possession of the property in suit as full proprietors and not merely as mortgagees.

If should be observed that the suit instituted in 1898 by the present defendants was one for possession as full owners. The Court decreed possession to the then plaintiffs with the promise that the defendant Sohan could redeem within four years on payment of Rs. 1,125. It was nowhere stated in the decree that the decree-holders would enter into possession of the property in the capacity of mortgagees, and the mere fact that it was provided in the decree that the judgment-debtor would be entitled to redeem within four years does not necessarily lead to the inference that the mortgage had not determined and was still subsisting.

In our opinion upon a true construction of the decree the plaintiff-decree-holders were given full proprietary rights in the land in suit, but by mutual consent a concession was allowed to the defendant judgment-debtor that if he paid a certain sum within a certain period he would be allowed to get back possession from the plaintiffs. As held in the case of *Karori Mal* v. *Ramjee Lal* (1) it was clearly not the intention of the parties that a fresh mortgage should be created and that the defendant-judgmentdebtor should get a further period of sixty years to redeem the land. It was held in that case that where after the expiry of the year of grace in foreclosure proceedings the mortgagee sues for possession as owner

(1) (1921) 2 Lah. 53=3 Lah. L. J. 68= 59 I. C. 812=41 P. W. R. 1921.

of the mortgaged property, and under a compromise between the parties the court passes a decree for such possession with the proviso that the mortgagor can redeem the mortgaged property within a certain period and avoid either wholly or in part the execution of the decree, such a decree does not create a fresh mortgage. We do not think there is any essential difference between the wordings of the decrees passed in that case and in the present case and are of opinion that a fresh mortgage was not created by the decree of 1898 and that no mortgage was subsisting which could now be redeemed.

It has been argued that in order to arrive at a proper interpretation of the decree reference should be made to the statement made by the judgment-debtor in court before the decree of 1898 was passed and to the execution proceedings subsequent to the decree, which clearly show that the possession of the decree-holder was that of a mortgagee and not that of a full proprietor. There is abundant authority for holding that when the wordings of a decree are unambiguous and explicit it is not competent to a court to go behind the decree and to refer to the judgment or to any surrounding circumstances. In the present case we are of opinion that there is no ambiguity in the words of the decree. It is, therefore, not competent to us to refer to any other documents for the purpose of interpreting the decree.

The result is that we accept the appeal and setting aside the order of the Lower Appellate Court restore the decree of the first instance with costs throughout.

Appeal allowed.

1924 LAHORE 698.

ABDUL RAOOP AND CAMPBELL, JJ.

Mt. Tabi.....Plff.—Appellant.

v.

Saudagar Singh.....Defdt.—Respondent

S. A. No. 2526 of 1920 decided on 19th November, 1923 from the decree of the Additional District Judge, Lahore dated the 5th August, 1920.

Rewaj-i-am—Is important piece of evidence.

Among parties generally following Customary Law it is permissible to fall back as a last resort on their personal law for the decision of a point on which no definite rule of custom applicable can be found. The *riwaj-i-am* even when unsupported by instances is an important piece of evidence to which serious regard is to be paid. [P. 699, Col. 1.]

(b) *Words—Mother.*

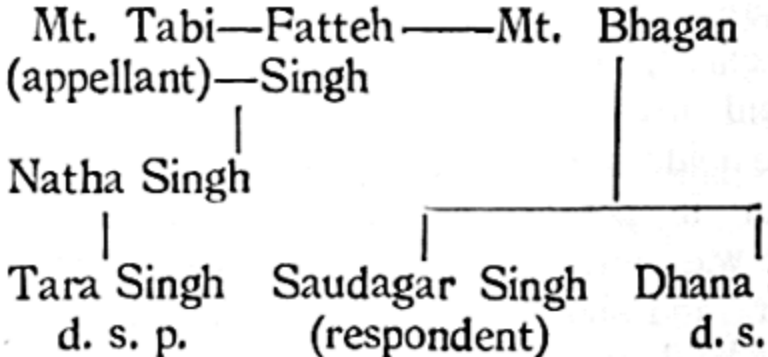
The word 'mother' does not include grandmother. [P. 699, Col. 2.]

Aziz Ahmad for the Appellant.

Nanak Chand, Advocate for *Bakhshi Tek Chand*, Advocate, and *Lala Shaukat Rai* for the Respondent.

Campbell, J.:—This judgment will dispose of second appeals Nos. 2526 and 2631 of 1920, the question for decision in each being the same. That question is, as stated in the Certificate given by the Lower Appellate Court under Section 41 (3) of the Punjab Courts' Act, that of the respective rights of a Sikh grandmother and a paternal uncle *inter se* and of the interpretation and scope of the word 'mother' as given under answer No. 66 of Bolster's Customary Law of Lahore District.

The following pedigree table elucidates the facts:—



Dhana Singh died first of the sons of Fatteh Singh and his estate was inherited in equal shares by Saudagar Singh and Natha Singh. Natha Singh died and was succeeded by Tara Singh. When Tara Singh died his land was mutated half in favour of Saudagar Singh and half in favour of his grandmother *Mt.* Tabi by an amicable arrangement. Subsequently each of these persons brought a suit for a declaration that he and she were sole heirs of Tara Singh. Saudagar Singh succeeded in both suits in one of which he was plaintiff and in the other defendant. *Mt.* Tabi appealed unsuccessfully to the District Judge and she has now come on second appeal to this court in each case with a certificate in the terms noted above.

In the trial court 12 witnesses were produced by *Mt.* Tabi in whose opinion the grand-mother is a preferential heir to an uncle, while 17 witnesses for Saudagar Singh deposed that a grandmother is no heir at all in the presence of an uncle. No concrete instance was quoted by either set of witnesses and this evidence is valueless.

The only other evidence is the *riwaj-i-am* the terms of which are embodied in paragraph 66 of Bolster's Customary Law of the

Lahore District. It is there declared that when a man dies without lineal descendants, widow or daughters his property devolves on the following in order :—

1. Father ;
2. Mother ;
3. Brothers or their male descendants through males ;
4. Paternal uncles or their descendants ;
5. Other collaterals ;
6. The village community.

This is stated to be the answer of all tribes but no instances of succession are quoted in the record.

Two contentions are advanced on behalf of *Mt.* Tabi before us and they are mutually contradictory. The first is that in the *riwaj-i-am* the word 'mother' must be held to include grand-mother so that the grand-mother stands as regards succession on an equal footing with the mother. The second is that since no definite rule of custom applicable to the question before the court can be found recourse must be had to Hindu Law for a rule and under Hindu Law the grand-mother is preferred to the uncle.

This second argument is based on 110 P. R. 1906 but it has no force. What the Full Bench ruled in that case was that among parties generally following Customary Law it is permissible to fall back *as a last resort* on their personal law for decision of a point on which no definite rule of custom applicable can be found. In the present instance there is no gap which cannot be filled otherwise than by a resort to Hindu Law. The *riwaj-i-am* even when unsupported by instances has been ruled by the Privy Council to be an important piece of evidence to which serious regard is to be paid and here we have the *riwaj-i-am* which describes the uncle as an heir and does not mention the grand-mother at all. There is thus a piece of evidence that under custom the uncle is an heir and the grand-mother is not. If the contest were between two such persons as the sister's husband and the mother's brother and if there were no evidence on the record except the present *riwaj-i-am*, then it might be said that there was a gap which could not be filled except by a reference to personal law, and this is manifestly what the learned Judges meant who delivered 110 P. R. 1906.

On the first point the argument addressed to us amounts to a claim that the word 'mother' should include grand-mother because it ought to do so and because a grand-mother is an heir under Hindu Law and thus there would be nothing strange in her being an heir under Punjab Agricultural Custom. Under Hindu Law, however, a grand-mother does not stand on the same footing as a mother and although she comes before a father's brother she comes after a brother and his descendants to whom the mother is preferred under the rule of custom enunciated in the *riwaj-i-am*. It is easy to theorize and to speculate as to what the rules of custom should be but the function of a court, in matters of disputed custom, is to discover the actual practice and to give effect to it. Here not a single instance is discoverable of inheritance by a grand-mother in preference to an uncle, and the *riwaj-i-am* declares the uncle to be an heir and omits all mention of the grandmother. The word 'mother' in the *riwaj-i-am* must be presumed to carry its plain literal meaning in default of any evidence that it was intended to mean something else. Bricks cannot be made without straw and there is no material except the words themselves of paragraph 66 of Bolster's Customary Law which enable us to interpret it or explain its scope.

Both appeals therefore fail and are dismissed with costs.

Appeals dismissed.

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* 1924 LAHORE 699.

HARRISON AND MOTI SAGAR, JJ.

Municipal Committee of Jhang.....Defdt.—Appellant.

v.

Devi Dayal.....Plaintiff—Respondent.

S. A. No. 2688 of 1920 decided on 14th November, 1923 from the decree of the District Judge, Jhang at Sargodha dated the 27th August, 1920.

Jurisdiction—Civil Court—Can't interfere with honest and fair exercise of discretion of a Municipal Committee.

Where the action of the Committee is shown to be *intra vires* and it is in no way dishonest or malicious the question of whether it was necessary in the public interest to take action to remove the structures does not arise in Civil Court. [P. 700, Col. 2.]

Gokal Chand Narang for the Appellant.

Mehta Amin Chand for the Respondent.

Harrison J.:—The MunicipalCommittee of Jhang acting under the provisions of Section 175 of the Municipal Act (III of 1911) ordered the plaintiffs-respondents to remove certain structures which encroached upon a street, and on their failure to comply, the Committee removed them. The plaintiff instituted two separate suits praying for declaration that the sites under these erections were their exclusive property and that the resolution directing their removal should be cancelled. The suits have been decreed by both the Lower Courts and the declarations have been given; but, as the Committee has never denied the title of the plaintiffs and as the erections have actually been removed, it is impossible to see what satisfaction the plaintifffs can get from the declarations or what possible result they can have. The plaintiffs did not ask for damages and none have been awarded. The Committee has appealed presumably with the idea that the decisions may form a dangerous precedent.

The finding of the District Judge was that the structures were on the street and that the action of the Committee was *intra vires*. He was not satisfied that it was *bona fide* as it appeared to him to be capricious and arbitrary. He thought that the structures were not obstructions because in his opinion they caused practically no inconvenience to anybody. The question before us is whether in these circumstances, the action being admittedly *intra vires*, any suit lies and whether the decision of the Committee can be questioned. Various authorities have been quoted, the Committee relying upon 107 P. L. R. 1915, 75 P. R. 1916 and 6 P. R, 1919 while the respondents rely on I. L. R. 12 Bom. 490 and I. L. R. 12 Bom. 474. The findings in these Bombay rulings in no way assist the respondents, and moreover the point in its extreme form as urged by the respondents does not really arise in this case. The District Judge has used the words *bona-fide* and has found that the action was not *bona fide*. The body of the judgment, however, shows that he has not used these words in their true sense and what he means is "unnecessary". It was alleged that improper influence had been brought to bear on the Committee, but he has not found that this was so. He has merely substituted his opinion as to the advisability and necessity of removing the structures for that of the Committee. In doing so he has acted wholly *ultra vires* and has arrogated to himself powers which he had not got. We, therefore, hold accepting the finding of fact of the learned District Judge, that the action of the Committee being shown to be *intra vires* and there being no finding that it was in any way dishonest or malicious, the question of whether it was necessary in the public interest to remove the structures did not arise any more than did the question of title.

We accept the appeals and dismiss the suits of both the plaintiffs.

The costs of the defendant Committee will be borne throughout by the plaintiffs in both cases.

Appeals allowed.

1924 LAHORE 700.

HARRISON AND ZAFAR ALI, JJ.

Ahmad Shah and another...Plffs.—Appellants.

v.

The Church Missionary Trust Association London, through S. D. Hinde and others.....

Defendants,—Respondents.

F, A. No. 304 of 1919, decided 5th June, 1923 from the decree of Subordinate Judge, Multan, dated 16th December, 1918.

(a) *Abadi—Outgrowth of a sub-division not a separate sub-division.*

There is a no authority for the proposition that the accretion to or an over-growth of an old sub-division of a town within the limits of that town is to be regarded as a sub-division of it, though there are rulings to the effect that the new suburbs beyond the limits of the town constitute new sub-divisions. [P. 702, Col. 1.]

(b) *Pre-emption—Custom—Multan City.*

The custom of pre-emption does obtain in the sub-division Husain Agabi of the City of Multan, 24 & 57 P. R. 1906 Ref. [P. 702, Col. 2.]

Abdul Rashid for the Appellants.

Tek Chand and *Har Gopal* for the Respondents.

Zafar Ali, J.:—The plot of land which is subject of this pre-emption suit is situated in that low lying northern outskirt of the city of Multan which extends between two of its gates the Lohari and Daulat Gates, and is hemmed in on the north by the circular road. The city proper to the south of this tract and the fort to the north beyond the road are on much higher levels. The whole of this low expanse was originally vacant and was known as Mazul property belonging to Government. Portions of it were from time to time leased, sold or gifted by Government

for building purposes and it was in about 1873 that two large plots from it were gifted to the Church Missionary Society and that body founded therein a school. Later on in about 1915 the school was removed therefrom and the society divided the land into small plots and offered the same for sale by public auction. Four of these plots were purchased by defendants Nos. 2 to 4, and it is only one of these four that the plaintiffs claim to pre-empt on the ground that it adjoins their land. The defence was that the custom of pre-emption did not obtain in this new suburb of the city which constituted a sub-division by itself and was known by the name *hithar* (low land). The plaintiffs contended on the other hand that the so-called *hithar* formed part of the sub-division Husain Agahi and was included in it. It was common ground in the court below that the custom of pre-emption was in force in Husain Agahi and that being the position taken up by the parties, the decision of the case depended upon the answer to the question whether the land in dispute was within Husain Agahi or beyond it. The Lower Court arrived at the conclusion that it was situated in *hithar* which was a separate sub-division and not part of Husain Agahi and that no right of pre-emption was proved to exist in *hithar*. The suit was accordingly dismissed and the plaintiffs have come to this court in first appeal.

Counsel for the defendants-respondents wanted to argue before us that the custom of pre-emption was not proved to obtain even in Hussain Agahi, but we did not allow him to do so because, as stated in the judgment of the court below, the existence of the custom in Husain Agahi was not denied by the defendants in that court. Therefore the only question before us is whether the part called *hithar* is an outgrowth of and is included in the sub-division Husain Agahi or is a separate sub-division by itself. There is ample documentary evidence on the record showing that the lands and houses in *hithar* are generally described as situated in Husain Agahi.

In the first place, in the notice of sale of plots issued by the local agent of the Church Missionary Society the land was stated to be "situated at Husain Agahi."

Secondly, in the very deed by which the defendants purchased the four plots the land was stated to be situated in Husain Agahi. Similarly in all other deeds of sale executed by the agent of the Missionary Society the plots sold were stated to be situated in Husain Agahi.

Thirdly, the defendant Budhu Ram himself in the agreement dated the 15th September, 1915, executed by him relating to a plot of *nazul* land, which is to the north-east of the land in dispute, described it as situated in Husain Agahi.

Fourthly, there is the statement of the defendants' own witness Mr. M. N. Bannerji, Pleader, Multan, where house is built on *nazu* land between Daulat and Lohari Gates, that he describes his house as situated in Husain Agahi.

Fifthly, there is the evidence of defendants' own witness Behari Lal, Sub Overseer, Municipal Committee, Multan. who produced the survey map of Multan city, prepared in 1901, and the field book relating thereto, and stated by a reference to these documents, that as against the survey stations 99, 5 R, 29, and 2 M, marked in the map, the entry in the field book is in "Husain Agahi." A glance at the map shows that the line connecting these four stations is just on the northern boundary of the entire land containing the Mission School building. This makes it clear that in 1901 this land was considered to be a part of *Muhalla* Hasssin Agahi. (See copy of this map Ex. 6-13, filed by the defendants).

Sixthly, there is the evidence afforded by the record of a pre-emption suit brought in 1910 by Jhandu (P. W. G.) for possession a house situated in this *hithar* land. It was stated in the plaint that the house was in Husain Agahi and that the custom of pre-emption obtained in Husain Agahi in respect of houses. This house is marked as No. 1 in the plan Ex. P. 16 and the plaint is printed at page 51 of the copy book. The case ended in a compromise which is printed at page 49. In this compromise the house stated to be "situate at *hithar* near Duselvia Husain Agahi, Multan." The Duselvia ground is to the north of this house and it appears that this ground is known as Duselvia Husain Agahi as stated in the deed of compromise.

As against this mass of documentry evidence which it is important to note comprises:

(1) defendants' own title deed P-3;
(2) the agreement executed by one of the defendants in September 1915, P-11; and

(3) the survey map D-13 produced by their own witness Bihari Lal,

all that defendant's counsel could urge was that in certain deeds of sale of *nazul* plots executed by the Deputy Commissioner of Multan, the plots sold were stated to be situated inside Lohari Gate and not in Husain Agahi and that in the registers of *nazul* lands prepared in 1864, 1871 and 1901 the land in dispute was shown to be inside Lohari Gate lying between Husain Agahi Bazar and the Circular Road was not within *Muhalla* Husain Agahi. The Lower Court discarded all this evidence, and referring to the old history of the city as given in the Multan Gazetteer according to which this low lying land was once the site of a ditch or the bed of the river Ravi, arrived at the conclusion that the high level border of the city was its old boundary, that the new *abadi* in the hollow below it could not be a part of the old *Muhalla* Husain Agahi and that the plaintiffs in order to succeed in their suit, should have established the existence of a custom of pre-emption in this part but had failed to do so. We are of opinion that this conclusion Is based on wrong premises. There is no authority for the proposition that an accretion to or an overgrowth of an old sub-division of a town within the limits of that town is to be regarded as a new sub-division of it, though there are rulings to the effect that new suburbs beyond the limits of a town constitute new sub-divisions. In 84 P. R. 1910 it was held that a new *abadi* within the old *mauza* Garhi Awan though on the borders of the town of Hafizabad and now a part of that town was to be regarded as a new sub-division. Similarly in 2 Lah. 83 the land pre-empted was originally within the limits of the village *Khandrat Kalan* outside the walls of Delhi but now formed a suburb of Delhi and was known as Pahar Ganj. It was therefore held that this new suburb outside the city constituted a new sub-division. These two rulings therefore which are cited by the respondents' counsel are distinguishable and do not apply to the present case as here the new *abadi* is a natural expansion of the old city within its limits which are now defined by the Circular Road. It cannot be argued that a sub-division of a city cannot expand where its old boundary and the land adjoining it are divided by a steep declivity. An outgrowth or expansion can take place on the adjoining land whether it be on the same level as the old town or on a lower or higher level as in the case of hilly places. The evidence reviewed above fully establishes that this low-lying land was by general acceptance situated within Husain Agahi and the defendants could not show that it was ever previously asserted that it was not within that *Muhalla*. We therefore find that the land in dispute is situated within Husain Agahi and that the custom of pre-emption prevails in that *Muhalla*.

It may be stated here that the custom of pre-emption has been held to prevail generally not only in the Multan City but also in its new suburbs known as *Laraf Ravi* and *Berun Pak Darwaza vide* 42 *and* 57 *P. R.* 1906. Of the four judicial instances cited in the present case three relate to houses which are admittedly within the old *Muhalla* Husain Agahi. Having regard to all this and the defendants' admission, it may safely be conculded that the custom of pre-emption does obtain in the sub-division Husain Agahi.

There remains to be decided the question of price. The Commissioner appointed to determine the market value of the land in suit estimated its value at Rs. 12,000 and this valuation was accepted by the plaintiffs, but the Lower Court increased it to Rs. 13,000. We are of opinion that acording to the rates found by the Commissioner and referred to by the court below the value could not be less than Rs. 13,000. We therefore accept the appeal and reversing the judgment and decree of the court below grant the plaintiffs a decree for possession of the land on payment in the court below of Rs. 13,000 less costs in both courts, on or before the 10th of August next. In defaul the suit will stand dismissed with costs throughout.

Appeal allowed.

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* 1923 LAHORE 702.

MARTINEAU AND MOTI SAGAR, JJ.

Nanak Chand and others.....Plaintiffs—Appellants.

v.

Mir Muhammad Khan and another.....Defendants—Respondents.

F. A. No. 630 of 1919 decided on 8th May, 1923 from the decree of Senior Subordinate Judge, Simla dated 16th December, 1918.

(a) *Legal Practitioner—Admission on a point of law.*

An admission made by the counsel on a point of law cannot in any way bind client. [P. 705 Col. 1.]

(b) *Civil P. C., S. 11—Parties—Real beneficiaries are parties.*

The real beneficiaries are like the actual parties. 46 Cal. 566 Foll. In a proceeding by or against the benamidar the person beneficially entitled is fully affected by the rule of *res judicata*. [P. 705, Col. 2.]

(c) *Civil P. C., S. 11—Directly and substantially in issue.*

Where a pronote was executed on account of interest due on the mortgage in question and the suit on the pro-note could not have been decreed unless mortgage was found to be a valid mortgage, and in order to determine the validity of the consideration for the pronote it was necessary for the court in the previous suit to determine the validity of the mortgage. *Held*: that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and the finding that no undue influence had been established and that the consideration was proved operates as *res judicata* in the later suit. [P. 706, Col. 1.]

(d) *Limitation Act, S. 75—Alternative causes of action—Waiver.*

The covenant in the mortgage deed as to repayments was to the effect that the mortgage money with interest would be paid by monthly instalments of not less than Rs. 20 plus interest, the payment being made on the 1st day of November, 1899, and on the first day of every succeeding month, provided that the entire advance together with interest thereon would be fully liquidated within ten years from the date of the mortgage. It was also agreed that defaults in payment of monthly instalments and interest as agreed should constitute separate causes of action. *Held*: by providing that default in the payment of each monthly instalment should constitute a separate cause of action the parties clearly intended that prompt payments should be made and that the period of limitation should run from the date of default unless the payee waived the benefit of the provisions of prompt payment in case of default. Mere forbearance to sue would not stop limitation from beginning to run. [P. 706, Col. 2.]

Tek Chand for the Appellants.

Badri Das and Abdulla for the Respondents.

Moti Sagar, J.:—This is an appeal from a decision of the Senior Subordinate Judge, Simla, dated the 16th December, 1918, dismissing the plaintiffs' suit for Rs. 12,500, principal and interest, alleged to be due on a mortgage-deed dated the 7th of October, 1899. The material facts are shortly these:—

One Mrs. Gomes owned among other properties a dwelling house at Simla known by the name of Ayrcliffe. By a will dated the 15th of October, 1879, she bequeathed a life interest in this house to her husband Mr. Gomes and an absolute interest after his death to her sister Mrs. Elizabeth Moses. On the 4th of November, 1887, Mrs. Moses made a will under which she bequeathed the whole of her real and personal estate absolutely to her two daughters Charlotte Isabella Elliott and Mary Grace Elliott in equal shares. It appears that Mr. Jones, the husband of one of the daughters, was indebted to a large extent to the present plaintiffs who were pressing him for payment. In order to discharge this liability Mrs. Jones, his wife, exccuted on the 7th October, 1899, a mortgage of her reversionary interest in Ayrcliffe estate for Rs. 4,000 in favour of the plaintiffs. The consideration for this mortgage was made up, as stated by the plaintiffs in a prior litigation, of the sum of Rs. 3,252-3-0 due from Mr. Jones on previous *bahi* accounts and a sum of Rs. 743-13-0 alleged to have been paid in cash on the date the mortgage deed was executed. The mortgage carried interest at Rs. 18% per annum and it was stipulated that repayments would be made by monthly instalments of Rs. 20 plus interest, with a further stipulation that the entire advance with interest would be repaid within ten years from the date of the mortgage. On the 21st January, 1916, Mrs. Jones sold to defendant No. 1, Mir Muhammad Khan, her reversionary interest in this property. On the 31st May, 1918, the plaintiffs brought this suit for the recovery of Rs. 3,252-3-0 principal, minus Rs. 40 alleged to have been repaid by the defendant, and Rs. 9,287-13-0 interest from 18th March, 1902, to date of suit, total Rs. 12,500, impleading both Mir Muhammad Khan and Mrs. Jones as defendants to the suit.

The defendants resisted the suit on a variety of grounds, but their main contentions were:—(1) That it was barred by limitation, (2) That the deed was executed under undue influence, and (3) that the mortgage was void for want of consideration. The plaintiffs' case, on the other hand, was that the pleas as to the non-receipt of consideration and as to the exercise of undue influence were barred by the rule of *res judicata* inasmuch as it had been decided in a previous litigation between the same parties that the mortgage was good and valid to the extent of Rs. 3,252-3-0 which was exactly the amount claimed as principal in the present suit.

The trial Court found that undue influence on the part of plaintiffs had not been established, that of the principal, sum claimed, a sum of Rs. 1,672-3-0

only was within limitation, and that the pleas as to the non-receipt of consideration and the exercise of undue influence were not barred by *res judicata*. On the merits the learned Senior Subordinate Judge found that it had not been proved that the mortgage was for consideration and as a result of this finding dismissed the plaintiffs' suit in its entirety. Against this decision the plaintiffs have preferred this first appeal to this court through *Bakhshi* Tek Chand and we have heard Mr. Badri Das on behalf of the respondents.

The first contention raised by *Bakhshi* Tek Chand is that the finding of the court below on the question of *res judicata* is erroneous and that it should have been founded that the pleas of the defendants with regard to the non-receipt of consideration and the exercise of undue influence were barred by Section 11 of the Civil Procedure Code. In order to properly understand this contention it is necessary that a reference should be made to the history of the previous litigation between the parties. It appears that Mr. Jones dealt at the shop of the plaintiffs and also had money dealings with them. On the 17th October, 1899, a sum of Rs. 3,252-3-0 was due on these accounts. On that day Rs. 747-13-0 are alleged to have been paid in cash and a mortgage deed of her reversionery interest in Ayrcliffe estate executed by Mrs. Jones in favour of the plaintiffs. Interest on this mortgage was regularly paid for some time. but in May 1901, Mr. and Mrs. Jones executed a pro-note for Rs. 360 for six month's arrears of interest. Of this sum Rs. 240 were paid off leaving Rs. 120. Interest was then again paid regularly for some time and then a pro-note for Rs. 420 was executed, the consideration for which was made up as follows :—

Rs. 120 balance due on the pro-note of May 1901, Rs. 300 for interest on the mortgage-deed for five months, October, November and December, 1901, and January and February, 1902, This pro-note was executed in favour of one Devi Saran, who is said to have been a *benamidar* for the plaintiffs. On the 7th November, 1910, Devi Saran brought a suit against Mrs. Jones for Rs. 1087-4-3 principal and interest on the basis of this pro-note. In that suit it was pleaded by the defendant that the pro-note was without consideration, that the whole transaction was vitiated by undue influence, and that the debtor Mrs. Jones had been over-reached by the plaintiffs, who had manipulated the accounts and had made overcharges and had charged exorbitant interest. It was found in that case by the trial court that the consideration given to Mr. Jones for the mortgage was considerably less than Rs. 4,000, that Mrs. Jones had received nothing, and that she had been forced to execute the mortgage under duress, and that, therefore, it was bad for want of valid consideration. It was further found that the pre-note itself was bad in as much as the consideration alleged therein was not due. On appeal the learned Divisional Judge, concurred in the finding of the trial court and held that the plaintiff in that suit had failed to establish a valid mortgage in favour of the present plaintiffs. There was a second appeal from this decision to the Chief Court, and it was held by the learned Judges in their order dated the 24th May, 1915, that the finding of the courts below on the question of the validity of the mortgage was erroneous, and that the onus of proving want of consideration lay on the mortgagor, which had not been fully discharged. They found that except for the sum of Rs. 747-13-0, which did not appear to have passed, there was no reason to support that the mortgage was not for consideration. The mortgage was accordingly held good to the extent of Rs. 3,252-3-0. As to undue influence the finding was in favour of the present plaintiffs and it was held that no undue influence had been proved. The argument of *Bakhshi* Tek chand is that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and that as the parties in the two suits are the same the findings arrived at in the previous suit as to want of consideration and exercise of undue influence operate as *res judicata* in the present suit, Mr. Badri Das, on the other hand, points out that the plea of *res judicata* was given up by the appellants in the court below, nor has it been taken by them in the grounds of appeal to this court, and he consequently argues that they should not be allowed to raise this point in argument.

We do not think there is any force in this contention. The point had been distinctly raised by the plaintiffs in their pleadings and an issue framed thereon. The case was then adjourned to a particular date for the evidence of the parties. On that date the counsel of the parties appeared and stated that

they did not want to produce any evidence on this issue and on certain other issues with which we are not concerned in the present appeal. At the time of arguments in the lower court, plaintiffs' counsel stated that the points were not barred by the rule of *res judicata* by reason of the first judgment and asked the court to redecide the issues as to the passing of the consideration and as to the validity of the mortgage in question. We do not think that an admission made by the plaintiffs' counsel on a point of law can in any way bind them, and if the opposite party has not in any way been prejudiced by such an admission there is no provision of law under which the plaintiffs can be prevented from taking up this point in arguments with the permission of the court even if it has not been taken in the grounds of appeal. The defendants were given full opportunity to produce any evidence they liked upon this issue in the court below and they not having availed themselves of this opportunity cannot now have any cause for grievance. In our opinion the point goes to the root of the case and we do not see any reason why the plaintiffs should not be allowed to take it up now in arguments.

The only points to be considered in this connection are:—(1) Whether the parties in the previous case were the same as in the present case, and (2) whether the point was directly and substantially in issue in the previous case. On the first question we have no hesitation in holding that the parties in the two cases are the same and that Devi Saran in whose name the pro-note for Rs. 420 was executed and who instituted the previous suit was a *benamidar* for the plaintiffs. Chaudhri Mal, one of the plaintiffs, was examined as a witness in the previous case and stated that Devi Saran was due nothing, that it was his (Chaudhri Mal's) money, and that the pro-note was written in his name because he (Chaudhri Mal) was going away and he (Devi Saran) could recover in his absence. The defendant, Mrs. Jones, did not deny this fact in the previous suit and it was all along taken for granted by every one that the real plaintiffs in the previous case were the present plaintiffs and not Devi Saran. The learned Judges of the Chief Court also observed in their judgment that they noted that he (Chaudhri Mal) was the real plaintiff though Devi Saran in whose favour the pro-note stood was the nominal plaintiff. In order to find out whether the pro-note was or was not for consideration the court went into the previous account of the present plaintiffs and held that the pro-note had been executed on account of certain monies due on the mortgage executed in favour of the plaintiffs by the defendant, Mrs. Jones. There is nothing on the record to show that Devi Saran was in any way personally interested in the pro-note and we think that it has been sufficiently established that the real beneficiaries of the pro-note were the present plaintiffs, who, for the purposes of Section 11 of the Civil Procedure Code, must be held bound by the findings arrived at in the previous suit. It was held by their Lordships of the Privy Council in the case *Gur Narayan* v. *Sheo Lal Singh* (1) that in a proceeding by or against the *benamidar* the person beneficially entitled is fully affected by the rules of *res judicata*. If Devi Saran was a *benamidar* for the present plaintiffs in the previous case and the present plaintiffs are bound by any findings arrived at in that suit, there is no reason why the defendant, Mrs. Jones, who was also a party to the previous suit, should not be held equally bound by those findings. We hold that the present plaintiffs were parties to the previous case and that there is no substance in the defendant's contention that as the previous suit on the pro-note could not be maintained in their own names, the findings arrived at in that suit are not binding upon the parties.

As to the second question, there can be no doubt whatever that the question now at issue between the parties was directly and substantially in issue in the previous case. The pro-note was executed on account of interest due on the mortgage now in question and the suit on the pro-note could not have been decreed unless the mortgage was found to be a valid mortgage. In order to determine the validity of the consideration for the pro-note it was necessary for the court in the previous suit to determine the validity of the mortgage. Both the courts below dismissed the suit because they found that the mortgage was not valid. The Chief Court decreed the suit in part because it was found that the mortgage was valid to

(1) (1919) 46 Cal. 566=28 C. W. N. 521=17 A. L. J. 66=49 I. C. 1=33 M. L. J. 68=2 L. W. 335 (P. C.)

the extent of Rs. 3252-3-0. It is, therefore, clear that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and the finding that no undue influence had been established and that the consideration to the extent of Rs. 3,252-3-0 was proved operates as *res judicata* in the present suit. It is argued by Mr. Badri Das that the only point at issue in the previous case was whether the pro-note was or was not for valid consideration, and that in order to determine this point, it was not at all necessary to determine the question of the validity of the mortgage. We are unable to accede to this contention. Under the mortgage deed Mrs. Jones had incurred no personal liability. Under the pro-note she had become personally liable for the payment of Rs. 420 and interest. The question before the court was what was the consideration for the pro-note for which Mrs. Jones had become personally liable. It was found that the consideration was the overdue interest on the mortgage deed executed by Mrs. Jones which had not been paid by her in accordance with the terms of her contract. To find whether this was or was not a valid consideration for the pro-note it was absolutely necessary that a finding as to the validity of the mortgage on which the interest was claimed to be overdue should be arrived at. We, therefore, hold that the question of the validity of the mortgage was a question directly and substantially in issue between the parties in the previous case, and that this question is now *res judicata* between them.

The next question for consideration is that of limitation. It is argued by *Bakhshi* Tek Chand that on the terms of the mortgage deed the whole suit is within time, and that in any case limitation is saved by certain acknowledgments of liability made by the defendant Mrs. Jones in 1901 and 1904. Mr. Badri Das, on the other hand, contends that the suit as laid in the plaint was *prima facie* barred by limitation, and that under Order 7, Rule 6, Civil Procedure Code, the plaintiffs were bound to show in the plaint the ground upon which the exemption from the law of limitation was claimed. We think there is force in this contention. There is no reference in the plaint to the alleged acknowledgments of liability by the defendant so as to make Section 19 applicable to the case, and we do not, therefore, think that the plaintiffs are entitled to rely upon a ground of exemption from the law of limitation which was not contained in the plaint. The covenant in the mortgage-deed as to repayments was to the effect that the mortgage money with interest would be paid by monthly instalments of not less than Rs. 200 plus interest, the first payment being made on the 1st day of November, 1899, and on the first day of every succeeding month, provided that the entire advance together with interest thereon would be fully liquidated within ten years from the date of the mortgage. It was also agreed that defaults in payment of monthly instalments and interest as agreed should constitute separate cause of action. The learned Senior Subordinate Judge has found that these monthly instalments fell due on the first of each month beginning from the 1st November, 1899, and that as the suit was filed on the 31st May, 1918, every instalment that fell due more than 12 years from that date was barred. In other words, his finding is that every instalment that had fallen due before the 31st May, 1906, was barred by limitation. It is argued by *Bakhshi* Tek Chand that the terms of the mortgage deed show that an option only was given to the mortgagor to pay up by instalments, and that it was not absolutely necessary for the mortgagee to have brought a suit for the recovery of each instalment within 12 years from the date of its default. In our opinion the view taken by the learned Senior Subordinate Judge upon this point is correct. By providing that default in the payment of each monthly instalment should constitute a separate cause of action the parties clearly intended that prompt payments should be made and that the period of limitation should run from the date of default unless the payee waived the benefit of the provision of prompt payment in case of default. In the present case there is no sufficient proof of waiver. Except that the plaintiff did not sue there is nothing whatever in the present case which could be regarded as evidence of waiver. There is abundant authority for holding that mere forbearance to sue would not stop limitation from beginning to run. The case falls within the purview of Article 132 of the Indian Limitation Act, which provides 12 years'

limitation from the time the money sued for became due. Applying this article we hold that all the instalments prior to 31st May, 1906, are time-barred and that of the principal sum claimed only Rs. 1,672-3-0 is within time as found by the court below. The plaintiffs will be entitled to recover Rs. 1,672–3–0 principal with interest at the contract rate from the 31st May, 1906, till realisation, to be realised from the sale of the mortgaged property. We accordingly accept the appeal, and setting aside the order of the court below decree the plaintiffs' suit to the extent above indicated. The defendant shall also pay the costs of the plaintiffs in both courts on the proportionate amount decreed.

Appeal allowed.

1924 LAHORE 707.

ABDUL RAOOF AND FFORDE, JJ.

Ibrahim.....Plaintiff—Appellant.

v.

Jivan Das and others.....Defts.—Respdts.

S. A. No. 2436 of 1918 decided on 19th April, 1923 from the decree of the District Judge, Mianwali, dated the 26th June, 1918.

(a) *T. P. Act—Applies to Punjab in principle.*

The T. P. Act though not specifically applied to the Punjab is applicable in principle. 6 P. R. 1901 Foll.; 74 P. R. 1912 Foll. [P. 707, Col. 2.]

(b) *T. P. Act, S. 53—Father selling property to son—Consideration proved as passed—Son's good faith proved—Sale not void.*

A transfer of property though made with the deliberate object of avoiding the payment of just debts, is not in itself a good ground for setting aside the transaction. The knowledge and intention of the transferee are the determining factors in these cases. If the transferee buys in good faith and for valid consideration his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying his creditors. Where however the vendor and purchaser stand as father and son, it throws a certain amount of suspicion upon a sale of this kind, but such suspicion can of course be dispelled by the presence of other circumstances, the most important of which is the fact that valid consideration has passed and the transferee has gone into actual possession of the property. 16 B. 202 Foll. [P. 709, Col. 1.]

Ghulam Rasul, Advocate *and Rai Sahib Lala Mulchand*, Vakil for the Appellant.

Nanak Chand Chopra and B. A. Cooper Advocates for the Respondents.

Fforde, J.:—The circumstances out of which this appeal has arisen are briefly as follows:—

In April 1914 one Hakim sold 1245 *kanals*, 12 *marlas* of land to his son Ibrahim, the present appellant. In July 1914 Jiwan Das, Aya Ram and Handa Ram, certain creditors of Hakim, obtained a decree against him for payment of the sums due, and in execution of this decree they attached the land which had been sold. The vendee thereupon filed objections to the attachment, which were disallowed by the executing court. The vendee then brought the present suit for a declaration that the land in question was not liable to attachment and sale under the decree. In other words, he claimed that the property in the land duly passed to him by virtue of the sale to him by Hakim.

The execution creditors on the other hand contended that the sale was fraudulent and colourable transaction intended to defeat the execution of the decree and therefore voidable at their option under Section 53 of the Transfer of Property Act 1882.

Counsel for the vendee, the appellant in the present appeal, urges, firstly, that the Transfer of Property Act does not apply to the Punjab, and, secondly, that even if it does, the transaction was a genuine one, made for valuable consideration and without knowledge on his part of any fraudulent intent on the part of the vendor, and therefore cannot be impeached. So far as the first contention is concerned it is clearly unsustainable. It has been held in *Lakhmi Narain* v. *Tara Singh* (1) and in *Mt. Champo* v. *Shankar Das* (2) that the Act though not specifically applied to the Punjab is applicable in principle, and with this view we are in entire accord.

As to the second contention, the *onus* of proving the genuineness of the sale was placed by the court of first instance upon

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(1) (1901) 6 P. R. 1901.
(2) (1912) 74 P. R. 1912.

the vendee, and on the trial of this issue the court found in favour of the vendee, holding that the sale was made in good faith.

On appeal to the District Judge the latter was of opinion that the *onus* of proving that the sale was collusive and fictitious lay upon those who alleged fraud, that is, upon the present respondents, and he found as a fact that the sale was not fraudulent or collusive, and he further held that the consideration was not inadequate.

On appeal to the High Court, Broadway, J. was of opinion that the *onus* of proving his title to the land lay in the first instance on the vendee, and he thereupon allowed the appeal, set aside the decree in favour of the present appellant, and remanded the case to the Lower, Appellate Court for a fresh decision on the merits, with a direction to the court to deal with the case with due regard to the observations which he had made in regard to this question of *onus*.

On the matter again coming before the Lower Appellate Court a different District Judge to the one who first heard the appeal was sitting, and he ordered that a commission be issued to have the land valued with a view to ascertaining the adequacy of the consideration for the sale.

When the matter once more came before him the learned District Judge held that the *bona fide* nature of the sale had not been established, and accepting the appeal he dismissed the suit.

It is true that the *onus* of proving title to the property sold lay in the first instance upon the vendee. This has been established by a number of decisions, amongst others the case of *Naunbi* v. *Bhuri and another* (3), referred to by Broadway, J. But all that this case decided was that a person, who claims land which has been attached in pursuance of an execution decree, must in a suit brought under Section 283 of the Civil Procedure Code (corresponding to Order 21 Rule 63 of the present Code) give *prima facie* evidence of the genuineness of the document of sale. This *onus*, as Broadway, J. points out in his judgment, has been found by the court of first instance, to have been satisfactorily discharged by the vendee in the present case. The claimant to the land having shown a *prima facie* title, the *onus* was then shifted to the execution creditors to prove that the transfer was fraudulent and unreal. This they failed to do, according to the finding of the Lower Appellate Court when the case first came before it on appeal.

The matter at that time stood as follows:—The court of the first instance had found that the transferee had established a *prima facie* claim to the land. On appeal the Lower Appellate Court had found that the *onus* of proving fraud lay upon those who alleged it, and that not only had this *onus* not been discharged, but that in fact the sale was not fraudulent or collusive.

It appears to us that those findings of the Lower Appellate Court as to the genuineness of the transfer were not open to challenge on second appeal. The *onus* of proof does not appear to us to have been wrongly placed in either court, and even if it had been, as the issues were fully tried out, and no objection appears to have been raised by the defendants to the form of those issues, it is doubtful if the irregularity, if there were one, could be regarded as having in any way prejudiced them. As the matter now comes before us, however, we have to deal with a finding of the Lower Appellate Court dismissing the suit on the grounds: (1) that "even if the transferee was unaware of the debts due by the transferor the creditors could object to the sale as made with a knowledge that it would delay or defeat their claim." Having arrived at this conclusion the learned District Judge forms the opinion that the *bona fide* nature of the claim had not been established.

We are unable to agree with the expression of law which is involved in this finding, and upon which the judgment of the Lower Appellate Court is based.

(3) (1908) 30 All. 321=28 A. W. N. 125=5 A. L. J. 601.

It has been held in *Bhagwant Appaji* v. *Kedari Kashinath* (4) where the law on the subject was exhaustively reviewed that a sale was valid although made with the object of defeating the anticipated attachment of a judgment-creditor. It is quite clear from this and many other decisions of the courts in India since the passing of the Transfer of Property Act, that a transfer of property though made with the deliberate object of avoiding the payment of just debts, is not in itself a good ground for setting aside the transaction.

The knowledge and intention of the transferee are the determining factors in these cases. If the transferee buys in good faith and for valid consideration his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying his creditors. In each case it is a question of fact as to whether or not the transferee has bought in good faith and without knowledge of the transferor's object for selling. It is true that relationship of father and son as vendor and purchaser respectively, is an important element to be considered. Such a relationship must necessarily throw a certain amount of suspicion upon a sale of this kind, but such suspicion can of course be dispelled by the presence of other circumstances, and of these the most important is the fact that a valid consideration has passed, and the transferee has gone into actual possession of the property. In the present case there has admittedly been valid consideration for the sale. It has not been found, nor in our opinion could it be found, that the consideration was grossly inadequate, so as to raise a presumption of intent to defraud creditors within the meaning of the second part of Section 53 of the Transfer of Property Act.

Moreover it has been held by the court of first instance, and the finding has not been dissented from by the Lower Appellate Court that the transferee has in fact purchased in good faith. We hold, therefore, that on the true construction of Section 53 of the Transfer of Property Act as applied to the admitted facts of this case, the sale cannot be set aside in favour of the judgment-creditors.

We accordingly accept the appeal and reversing the finding of the Lower Appellate Court restore that of the court of first instance with costs throughout.

Appeal allowed.

(4) (1901) 25 Bom. 202=2 Bom. L. R. 986.

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* 1924 LAHORE 709.

CAMPBELL AND MOTI SAGAR, JJ.

Akhtar Beg and others...Defts.—Appellants.

v.

Haq Nawaz, Advocate, High Court Lahore, (Plaintiff) and Bashir Ahmed, Bar-at-law, son and legal representative of the Hon'ble Mr. Muhammad Shah Din, C. J., deceased.... Defendants Respondent.

F. A. No. 1139 of 1917 decided 10th April, 1923, from the Senior Subordinate Judge, Lahore, dated 21st February, 1917.

(a) *T. P. Act, Ss. 6 and 136—Mere right to sue—Breach of contract—Actionable claim, transfer of.*

Section 136 is not in force in the Punjab. An executory contract for the future sale of immoveable property is not a mere right to sue although a right to sue is involved in it on breach of its conditions. 33 I. C. 696 Foll. [P. 710, Col. 2. P. 711, Col. 1.]

(b) *Contract Act, S. 73—Breach of—Measure of damages—English Law.*

The law of India in respect of breaches of contract for the sale of immoveable property differs from that of England and the ordinary rule laid down in Section 73 of the Contract Act applies to such breaches. 40 M. 338; 38 C. 455; 32 B. 165 Ref. The measure of damages ordinarily should be the difference between the contract price and the market value at the date of breach. [P. 711, Col. 1.]

(c) *Limitation Act, S. 12 (1)—Mode of computation.*

Where cause of action arose on 17-2-13, in the case of breach of contract not in writing and registered, a suit filed on 17-2-16, is in time. [P. 710, Col. 2.]

(d) *Contract Act, S. 23.*

Purchase by a Judge of a house is not trafficking in an actionable claim.

M. C. Michael for the Appellants.

Tek Chand and Mehr Chand Mahajan for the Respondents.

Campbell, J.:—On 2nd February '1913' Mirza Asad Beg agreed to sell to the late Mr. Justice Shah Din of Lahore certain landed property at Azamabad in the Lahore District for Rs. 1,72,000 and was handed a cheque for Rs. 5,000 as earnest money, for which he gave Mr. Justice Shah Din a receipt. On the same date Mirza Asad Beg wrote to Mr. Shah Din saying that he would not be able to come to his house on either of the following two days as he would be busy with a case but that "the rest will be complied with." On 17th February, 1913, Mirza Asad Beg again wrote to Mr. Justice Shah Din returning him the cheque and saying that the agreement to sell had been dependent on the consent of his sons, that this consent had not been given and that he had decided not to sell the land. Mr. Haq Nawaz, Barrister, nephew of Mr. Justice Shah Din replied on the latter's behalf that Mirza Asad Beg could not withdraw from the agreement, and sent back the cheque. On the 1st March Mirza Asad Beg repeated his inability to conclude the sale and returned the cheque once more. The correspondence closed with a letter by Mr. Haq Nawaz, dated 25th March in which Mirza Asad Beg's obligation was again asserted. These facts are not disputed.

On 10th February, 1916, Mr. Justire Shah Din transferred to Mr. Hak Nawaz by registered deed of gift all his rights under the contract with Mirza Asad Beg of the 2nd February, 1913. Mr. Haq Nawaz gave notice the same day to Mirza Asad Beg to complete the sale and a week later on 17th February, 1916, instituted a suit against him with Mr. Justice Shah Din as the second defendant and claimed Rs. 15,000 damages for breach of contract stating the cause of action to be failure to reply to the notice of 10th February, 1916.

The suit was resisted by Mirza Asad Big but unsuccessfully.

The first three issues, which were as follows, were found against him.:—

(1) Whether the assignment of Mr. Justice Shah Din in favour of the plaintiff is invalid ;(2) whether the suit is within limitation and (3) whether there was a condition in the contract that it will be performed, if the sons of defendant No. 1 (Mirza Asad Beg) agree. On the fourth issue regarding the damages to which the plaintiff was entitled, the trial court awarded him the full sum claimed. Mr. Asad Beg's sons have appealed, he having died.

The principal points which have been argued on their behalf are in regard to the first and last issues. The contention that the suit is time barred, because the breach took place on17th February, 1913 and the suit was instituted one day over 3 years later *i. e.* on 17th February, 1916, is effectively answered by reference to the provisions of Section 12 (i) of the Limitation Act. Regarding the third issue we agree with the ccurt below that there is no proof of the contract having been subject to the reservation that Mirza Asad Beg's sons should consent. The terms of Mirza Asad Beg's letter to Mr. Justice Shah Din dated 2nd February, 1913, are inconsistent with any such arrangement.

On the first issue it is asserted that the transfer to the plaintiff by Mr. Justice Shah Din was invalid and could not be the basis of an action, (1) because what was transferred was a mere right to one (Section 6 (e) of the Transfer of Property Act), (2) because the transaction offended against the provisions of Section 136 of the Transfer of Property Act and (3) because it was contrary to public policy in that Mr. Justice Shah Din could not under the rules governing the conduct of the public servants purchase land without the previous sanction of competent authority. The short answer to (2) and (3) is that Section 136 of the Transfer of Property Act is not in force in the Punjab, that although Mr. Justice Shah Din was a Judge and Mr. Haq Nawaz his nephew is a legal practitioner there was no buying or trafficking in or stipulation for any share of or interest in an actionable claim and that it was neither pleaded in the court below nor proved that Mr. Justice Shah Din acted in contravention of any of the Government servants cnnduct rules.

Nor was it a mere right to sue that was transferred to Mr. Haq Nawaz. The deed of gift (Exhibit P. 3 printed on page 12 of the record) conveyed to him all Mr. Justice Shah Din's rights under what was an executory contract for the future sale of immoveable property. Such a contract as pointed out by the Madras High Court in 33 I. C. page 696 is not a mere right to sue, although a right to sue is involved in it on breach of its conditions. In the present instance Mirza Asad Beg had refused before the transfer to complete the sale, but the contract for sale had not thereby become incapable of specific performance and one of the rights transferred undoubtedly was a right to demand or enforce such performance.

There remains the question of the amount of damages. The plaintiff was clearly entitled to sue at his option either for specific performance or for compensation for breach of contract or for both. He has chosen to sue for compensation. It has been pointed out in 40 Mad. 338, 38 Cal. 455 and 32 Bom. 165 that the law of India in respect of breaches of contract for the sale of immœvable property differs from that of England and that the ordinary rule laid down in Section 73 of the Contract Act applies to such breaches. The Calcutta and Bombay cases also lay it down that the measure of damages ordinarily should be the difference between the contract price and the market value at the date of breach though it is remarked in 32 Bom. 165 that each case has to be considered on its own merits.

In the present case Mirza Asad Beg deliberately and unmistakably repudiated the contract and has failed to prove that he had any good reason for doing so. We are clear that loss was caused and that damages are due but the difficulty in the case lies in the assessment of the damages since there is no direct evidence of the market value of the estate at the dates when the cheque was returned to Mr. Justice Shah Din *viz.* the 17th February and the 1st March, 1913. One witness, it is true, has estimated that the land was worth Rs. 2,00,000 on 2nd February, 1913, but he is Mian Amin Din, Mr. Justice Shah Din's father-in-law a person who could not fairly be asked for an unbiased opinion, and there is no satisfactory explanation forth-coming of why Mirza Asad Beg should be prepared to sell an estate worth Rs. 2,00,000 for Rs. 28,000 less. The outside price which he attempted to obtain at that time, according to the plaintiff (see letter exhibit A page 6 of the printed record) was Rs. 1,75,000.

Mr. Tek Chand for the defendant has attempted to argue that the Lower Court was wrong in fixing the 17th February, 1913, as the date of breach, but in the light of the authorities above quoted the Lower Court was right. There was a definite and positive refusal to sell the land on the part of defendant No. 1 on the 17th February, 1913, and when the cheque was returned for the second time on the 1st of March, 1913, Mr. Justice Shah Din could have been left in no doubt that the contract had been repudiated, Mr. Justice Shah Din no doubt had the period allowed to him by law to sue for specific performance, but the measure of damages cannot be the highest value within that period. In 38 Cal. page 458, it was held that the plaintiff had no power to postpone the date of the breach of contract to that on which he demanded a conveyance for the last time.

The trial court came to the definite conclusion that the land in question was worth not less than 2,00,000 in February, 1913, but the evidence on which it relied related to conditions in 1915 and 1916. The evidence of Jamal Din, P. W. 3, a broker referred to what happened in 1916. Mr. Justice Shah Din said that the same Jamal Din asked him to pay a higher price than that fixed in February, 1913, but this was in November or December 1915. A letter

was produced (Exhibit P. W. 2). dated the 15th April, 1916, in which Akhtar Beg, son of Mirza Asad Beg asserted that offers had been received of Rs. 2,30,000 and Rs. 2,35,000. The learned Subordinate Judge received all this evidence, attached much importance to the opinion of Jamal Din that the land in 1916 was worth more than Rs. 2,00,000 (which is not precisely what Jamal Din said) and, remarking that there was no evidence on either side of any sudden rise in land values, concluded that the value must have been not less than Rs. 2,00,000 in 1913.

Against this conclusion, however, there are two important facts. The first is that Mirza Asad Beg is not shown to have even asked for more than Rs. 1,75,000 in 1913, and another is that Mr. Justice Shah Din after 1st March, 1913 did not press the matter. He did not sue for specific performance and three years later he gave away for nothing his rights under the contract of sale to Main Haq Nawaz, a relative, it is true, but not his nearest heir, who was his own son. The words of Section 73 of the Contract Act are:— "Compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, was likely to result from the breach of contract." Then follows an express reservation that such compensation is not to be given for any remote and indirect loss sustained by reason of the breach. What we have to try to determine in the present instance is the value of the bargain to Mr. Justice Shah Din, when it was repudiated in February 1913. We find that he was asked to pay Rs. 1,75,000 but refused to pay more than Rs. 1,72,000. He tells us, and there is no reason to disbelieve him, that he wanted to purchase the land, in order to improve the estate which he already owned in Azamabad. He received back his cheque for the earnest money promptly and thus was not deprived of the use of the Rs. 5,000. He evidently considered that he had made a good bargain, for the correspondance shows that he turned a deaf ear to the somewhat pathetic entreaties of Mirza Asad Beg made in the name of old friendship that he should cancel the agreement. At the same time the loss to which he was put was not sufficient to inspire him to any definite action with a view to escaping from it or minimising it.

We think on the whole that the value of the estate may be taken, for purposes of calculating damages, as Rs. 1,75,000 the amount demanded by Mirza Asad Beg in his negotiations with Mr. Justice Shah Din. The land may have been worth Rs. 2,00,000 or more in 1916, but it is impossible to reconcile any idea that it was worth Rs. 15,000 more than the contract price in 1913 with the conduct of Mr. Justice Shah Din and Mirza Asad Beg. The latter made no attempt, as far as we know, to sell the land elsewhere until 1916.

We, therefore, accept the appeal to the extent of reducing the decree of the plaintiff to one for Rs. 3,000 with proportionate costs in the trial court. In this court the appellant will have his costs on the amount by which he succeeds.

Appeal partly allowed.

* 1924 Lahore 713.

SHADI LAL, C.J. AND MALAN, J.

The Arya Pradishak Pratinidhi Sabha through Lala Hans Raj—Plaintiff-Appellant.

v.

Chaudhri Ram Chand and others—Defendants-Respondents.

S. A. No. 2396 of 1920, decided on 19th May, 1924, against the Order of the Sub-Judge, 1st Class, Lahore, dated 29th July, 1920.

Specific Relief Act, S. 19—Damages not prayed for can be granted even along with specific performance—Specific performance.

Court can award damages in a suit for specific performance though not specifically prayed for. It *ought* to award damages when it thinks that damages should be awarded. This principle applies even in cases where specific performance is decreed. [P. 716, C. 1.]

Tek Chand and *Rama Nand*—for Appellant.

Sheo Narayan, Manohar Lal, Shamair Chand and *Jewan Lal Kapur*--for Respondents.

Shadi Lal, C. J.:—This appeal arises out of an action for the specific performance of a contract for the sale of a house situated at Lahore, and before dealing with the main issue I consider it necessary to set out briefly the facts showing how the various persons, who are parties to the suit, are interested in the property. The house in dispute belongs to the first defendant, Ram Chand, who mortgaged it on the 10th December, 1913, to the third defendant, Jia Lal, for Rs. 10,000. The mortgage was without possession, but the mortgagor agreed to pay interest at the rate of one per cent. per mensem. It appears that Ram Chand owed a large sum of money to the second defendant, the Co-operative Bank, and that in July 1915 the Bank obtained a consent decree against him for the recovery of the debt and for future interest. The decree provided that the amount awarded to the Bank was to constitute a charge on certain immoveable properties including the house in question, but this provision in the decree was not to affect adversely the prior mortgage in favour of Jia Lal.

The judgment-debtor Ram Chand did not discharge the debt due to the Bank, with the result that the decree-holders applied to the Court for the sale of the hypothecated property. The mortgagee Jia Lal objected to the sale of the house in dispute on the ground of the prior incumbrance in his favour, and the Court entertained the objection and decided on the 9th February, 1917, that his claim amounted to Rs. 10,000 with simple interest at one per cent. per mensem, and that he would be entitled to recover the amount due to him out of the sale-proceeds of the house. It is to be observed that Jia Lal did not appeal against this order which has now been treated as a final determination of his claim against the mortgaged property.

The decree-holders gave further time to the judgment-debtor to satisfy the decree, and upon his failure to do so they again applied for the sale of the house. It appears that the Court, after attaching the property, ordered it to be sold by public auction on the 27th January, 1919. On that date the judgment-debtor made an application to the Court, stating that he had previously entered into a contract with the plaintiffs, the Arya Pradishak Pratinidhi Sabha, for the sale of the house for Rs. 16,600 and prayed for permission to make the proposed sale. On this application the Court passed the following order in the presence of the judgment-debtor and the attorney for the decree-holders :—

"The permission is granted on the condition that either the consideration money be paid to the decree-holder so that he, after paying the money to previous mortgagee and receiving the remaining amount, should deposit the receipts in the Court or the whole consideration money be deposited in the Court.

The proceedings regarding the sale by auction be postponed and the sale proclamation be taken back without service."

On the 30th January, 1919, the matter again came up before the Court, but on account of the absence of the parties the case was adjourned to the 1st March, 1919. On that day the parties again absented themselves, and the Court thereupon disposed of the execution proceedings by the following order :—

"None is present. The case be consigned to the record room. The property in dispute be released."

It is common ground that the executing Court, after giving permission to the judgment-debtor to make a private sale of

the house, released it from attachment, and did not control him in the disposal of the property. Now, it is not disputed that a valid contract was entered into between Ram Chand on the one side and the plaintiffs on the other for the sale of the house for Rs. 16,600, and that Ram Chand received Rs. 100 as earnest money. The trial Judge also finds that this contract was assented to by the Co-operative Bank, and his finding has not been challenged before us. The learned Judge, however, holds that the consent of the Bank was obtained "on the condition that the sale would be completed in a few days." The record does not show that this condition was ever imposed by the Agent of the Bank, and our attention has not been invited to any evidence which could reasonably support that conclusion. Indeed, the learned *Vakil* for the Bank does not offer any opposition to the contention put forward on behalf of the plaintiffs that they are entitled to the specific performance of the contract.

The only other person interested in the property was Jia Lal, and it is not suggested that he ever gave his consent to the contract. His interest in the property is, however, confined to the recovery of his debt, namely, the principal amount Rs. 10,000 and simple interest thereon, at Re. 1 *per cent. per mensem.*

Coming now to the dispute between the plaintiffs and Ram Chand, the crucial question for determination is whether the plaintiffs have succeeded in proving that this contract was broken by Ram Chand. The trial Judge finds that time was not of the essence of the contract, but that it was contemplated that the price should be paid within a reasonable period, and that the plaintiffs having failed to make such payment or tender of the price committed breach of the contract. He has, accordingly, dismissed the suit *in toto*. The learned Judge also makes a reference to some conditions imposed by the executing Court as to the payment of the money, but the only directions given by the Court are to be found in the order quoted above which was passed on 27th January, 1919. These directions, however, related only to the mode of payment, namely, the person or persons to whom the payment was to be made, and did not lay down any condition fixing a definite period for payment, which if not strictly complied with, would constitute a breach of the contract. Moreover, as pointed out above, the Court released the house from attachment on the 1st March 1919 and consequently left the parties free to deal with the property in any way they liked.

As regards the question of tender or payment of price, the evidence on the record shows that the plaintiffs were always ready and willing to pay the price on the execution of the sale-deed, and that it was Ram Chand who, despite repeated requests failed to execute the conveyance. It is common ground that the plaintiffs paid him Rs. 170 for purchasing the stamp paper on which the sale-deed was to be written, and that the stamp paper was purchased on the 8th February, 1919. After considerable delay he got plans of the property prepared in May, but did not take any further action thereafter. The plaintiffs thereupon made an application to the Court which has an important bearing upon the issue before us. This application, which was made on the 12th June, 1919, recites the fact that Ram Chand had promised to sell the house to the plaintiff for Rs. 16,600 and received not only Rs. 100 by way of earnest money, but also Rs. 170 for purchasing the stamp paper, and then proceeds as follows:—"But inspite of repeated requests he does not get the document registered. Hence Rs. 16,330, the remaining consideration money, may be allowed to be deposited in Court, and it is prayed that either the sale-deed may be got registered by the judgment-debtor or sale certificate may be granted..... A separate suit will be brought for damages and interest." The pleader for the plaintiffs subsequently realised that the Court was not seized of the case and could not compel the vendor to perform his part of the contract. It was for this reason that he did not appear before the Court on the 19th of June when an order was passed to the effect that there was no objection to the payment of the money by the plaintiffs or any other person on behalf of the judgment-debtor, but that the Court having released the property from attachment could not grant a sale certificate

There is no documentary evidence to show whether any action was taken by the purchasers between the 12th June and 24th October 1919 when they served a notice upon Ram Chand requiring him to execute the conveyance within two days

and to receive the balance of the price; and reminding him of the fact that he had already been informed that they had deposited Rs. 16,500 in a bank for payment to him. The trial Judge blames the purchasers for failure to take action during the period mentioned above, but he has overlooked the evidence of Mr. Rama Nand, a *vakil*, of this Court, who, on their behalf repeatedly asked the vendor to take the balance of the price and complete the sale, but the latter at first put him off and finally refused to perform the contract. The veracity of this witness has not been impeached and his testimony receives corroboration from the above mentioned notice of the 24th October, 1919, to which no reply whatever was sent by the vendor. On the 3rd November, the plaintiffs sent him a cheque for Rs. 16,500, which was returned a month later with a letter stating that the vendor would orally explain the reasons for returning the cheque. The promised explanation was never offered, and the vendees then invoked the help of the Court by bringing the present action on 9th March, 1920, for the specific performance of the contract.

Now the evidence produced by the plaintiffs has not, in any way been rebutted by Ram Chand, and it is significant that he has not ventured to go into the witness box to support his own version of the affair. We asked Mr. Sheo Narain, who appeared for Ram Chand's legal representatives (Ram Chand having died during the pendency of the appeal in this Court), whether he could invite our attention to any evidence which would show that Ram Chand had offered to execute the conveyance and to perform his part of the contract, but the learned Advocate expressed his inability to do so.

It must be remembered that the execution of conveyance by the vendor and the payment of price by the purchaser are in law presumed to take place simultaneously, and that if the vendor beforehand signifies his refusal to execute the conveyance, the purchaser need not tender the purchase money. There is, however, ample evidence in the case before us that the plaintiffs often asked the vendor to take the money and indeed sent him a cheque but the latter made no response to their requests and ultimately declined to receive the cheque without assigning any reason. The circumstances of the case point to the conclusion that he wanted to back out of the bargain in order to sell the property for a higher price to some other person. Be that as it may, the evidence both oral and documentary, produced by the purchasers leaves no doubt that the contract was broken by the vendor, and that there was no such delay in bringing the suit as would deprive them of their right to enforce the contract in *spice*.

Now, so far as the terms of the contract are concerned, the purchasers are liable to pay only Rs. 16,500; and it is not disputed that this sum would have been sufficient to satisfy the claim of the mortgagee Jia Lal, if the vendor had performed the contract, within a reasonable time. The interest on the mortgage has, however, accumulated in the meanwhile, and the amount now due to the mortgagee far exceeds the sum payable by the plaintiffs under the contract. The learned Advocate for the purchasers concedes that his clients cannot reasonably ask the mortgagee to release the property unless they pay him the entire sum now due under the mortgage. It is, at the same time, clear that Ram Chand is responsible for the loss thus caused to them and that he is liable to make compensation for that loss. Moreover, he would be primarily responsible for the payment of the interest which has accumulated, and he has also been realizing the rent of the property.

The rule of law, which is enacted by section 19 of the Specific Relief Act, is to the effect that if in a suit for the specific performance of a contract the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly; and the second illustration to the section is apposite here. Mr. Sheo Narain does not seriously dispute the liability of the vendor for the payment of compensation, but he contends that neither the plaint nor the memorandum of appeal to this Court contained any express prayer for the award of compensation in addition to the specific performance of the contract and that the Court should, therefore, decline to grant a decree for damages. The object of the rule embodied in the section is clearly to prevent a multiplicity of suits, and to do complete justice between the parties. Indeed, it has been often held

that the plaintiff is not obliged in a suit for specific performance to pray specifically for damages, and that the court has always a discretionary power to award damages in a suit for specific performance and ought to exercise that discretion when it is of the opinion that damages should be given, *vide inter alia*, *Callianji Harjivan* v. *Narsi Tricum* (1), and *Kallian Dass* v. *Tulsi Dass* (2).

The principle, upon which these decisions rest, applies equally to those cases in which damages are granted in addition to, and not merely in lieu of specific performance. The Civil Procedure Code of 1908 confers ample discretion upon the court in the matter of granting appropriate relief, and Order 7, rule 7, provides that it is not necessary to ask in the plaint for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. There is, therefore, nothing in the law to prevent the court from granting damages in addition to specific performance, if the court considers that mere specific performance is not sufficient to satisfy the justice of the case.

The loss, which the plaintiffs have sustained by the vendor's failure to perform the contract, is represented by the sum by which the amount to be paid to the mortgagee exceeds Rs. 16,500, the balance of the price payable by them under the contract. The amount due to the mortgagee on the 10th May 1924 was :—

	Rs.	A.	P.
Principal	10,000	0	0
Interest for ten years five months	12,500	0	0
Total ...	22,500	0	0

The mortgagee is also entitled to interest at the rate of Rs. 100 per mensem from 10th May 1924 up to the date of payment. It is, therefore, clear that the vendor is liable to pay to the purchasers not only Rs. 6,000 (Rs. 22,500 — Rs. 16,500) but also the amount which they may be required to pay to the mortgagee on account of interest accruing after the 10th May 1924.

For the aforesaid reasons I hold that the plaintiffs are entitled to enforce the contract specifically, and I, therefore, allow the appeal and grant them a decree accordingly for the possession of the house against the respondents on payment of Rs. 22,500 by them (plaintiffs) to the mortgagee Jia Lal, and also for Rs. 6,000 against the legal representatives of Ram Chand to be realized out of the estate of the deceased. The plaintiffs shall also pay to Jia Lal the amount which may be due to him on account of interest accruing after the 10th May, which amount they shall recover from the said legal representatives. The respondents, other than the Co-operative Bank, must pay the costs incurred by the plaintiffs in this Court as well as in the Court of the Sub-Judge.

Before concluding I may mention an application which was made by Ram Parshad asking us to implead him as a respondent to the appeal. The applicant claims to be the purchaser of the house in execution of a decree said to have been obtained by the mortgagee Jia Lal during the pendency of the appeal in this Court, but the alleged purchase is stigmatised by the plaintiffs as a collusive transaction. Considering that the purchase was made *pendente lite*, I decline to introduce further complications into the case by impleading a person whose title could not be tried upon the present record.

Malan, J.:—I concur.

Appeal allowed.

(1) (1895) 19 Bom. 764.
(2) (1899) 23 Bom. 786=1 Bom. L.R. 459.

1924 Lahore 716.

SCOTT-SMITH, J.

Jug Lal—Plaintiff-Appellant.

v.

Ganga Ram—Defendant-Respondent.

S. A. No. 301 of 1924, decided on 27th May, 1924, against the decree of the District Judge, Karnal, dated 20th December, 1923.

Punjab Pre-emption Act, section 25—Word 'debt' in the proviso includes a mortgage debt.

Where the sale price represents mainly old debts which greatly exceed the market value of the property the Court should fix the market value as the price and may put the vendee to the option specified in the proviso. [P. 717, C. 2.]

Shamair Chand—for Appellant.

Mehr Chand Mahajan, for *Jagan Nath*—for Respondent.

Scott-Smith, J.:—This is a second appeal by the plaintiff in a pre-emption suit from an order of the District Judge of

Karnal, fixing the price to be paid by him on account of the land in suit at Rs. 2,000 which is the full price entered in the deed of sale. The right of pre-emption is not denied. The consideration for the sale was :—

(1) Rs. 37 paid as earnest money. (2) Rs. 30 as registration expenses. (3) Rs. 1,933 due on a prior mortgage.

The date of sale was the 19th June 1922, and the prior mortgage was dated the 4th June 1918, and was for Rs. 1,600 in favour of the vendee. To this Rs. 313 was added as interest. The consideration for the mortgage-deed was made up of Rs. 500 due to one Kunja prior mortgagee ; Rs. 800 paid to Hardwari, a creditor of the mortgagor and a brother of the mortgagee ; Rs. 150 on account of the price of the bullocks ; and Rs. 150 paid in cash before the Sub-Registrar. The trial Court held that the price entered in the deed was not fixed in good faith and assessed the market value at Rs. 940. As the sum of Rs. 500 had not been paid to Kunja it decreed the claim for pre-emption on payment of Rs. 440. Both the parties appealed to the District Judge, who held that the price of Rs. 2,000 was fixed in good faith and passed the decree appealed from. The finding of the learned District Judge that the price was fixed in good faith is a finding of fact and is based upon the evidence on the record.

The main point urged by the appellant before me is that the proviso to section 25 of the Punjab Pre-emption Act has not been taken into consideration by the learned District Judge. This proviso lays down that " when the price at which the sale purports to have taken place represents entirely or mainly a debt greatly exceeding in amount the market value of the property, the Court shall fix the market value as the price of the land or property for the purposes of the suit, and may put the vendee to his option either to accept such value as the full equivalent of the consideration for the original sale or to have the said sale cancelled, and the vendor and vendee restored to their original position." It is contended that in the present case the price of Rs. 2,000 represents mainly the mortgage debt of Rs. 1,933 which greatly exceeds in amount the market value of the property which is, according to the trial Court, found to be Rs. 940 only. If the market value is as found by the trial Court, there can be no doubt that the debt included in the sale price does not greatly exceed in amount that value and the proviso in question should have been taken into consideration. It is contended, however, by Counsel for the respondents that the word " debt " in this proviso does not include a mortgage debt but it means merely an unsecured debt. But he has cited no authority for this contention and *Haidar* v. *Ishwar Das* (1) is a case in which a mortgage debt was held to come within the proviso. It was also contended that this point was never raised in the Lower Appellate Court and that this is clear from the remark of the District Judge that the two appeals in his Court can be decided on the sole point whether the market price was fixed and paid in good faith. It appears to me probable that nothing was said about this proviso in the Lower Appellate Court, but the Court was bound of its own motion to act upon it and to take it into consideration. This it has not done. The Lower Appellate Court should find what the market value is and state whether it agrees with the finding of the first Court. If it finds that the price of Rs. 2,000 represents mainly a debt greatly exceeding in amount the market value of the property, the Court then should fix the market value as the price of the land or property in suit, and may put the vendee to the option specified in the proviso.

I also note that though Rs. 500 due to Kunja, mortgagee, has not yet been paid to him, the District Judge ordered that the full sum of Rs. 2,000 less whatever has been deposited should be paid into Court. It should have deducted this Rs. 500 which would remain as a charge upon the property due to the mortgagee which the pre-emptor can pay at his own pleasure. I accept the appeal and, setting aside the order of the learned District Judge, remand the case to him for redecision of the plaintiff's appeal under Order 41, rule 23 of the Code of Civil Procedure. Stamps in this Court will be refunded and other costs will be costs in the case.

Appeal allowed.

(1) (1906) 22 P.R. 1906=115 P.L.R. 1906.

1924 Lahore 718 (1).

CAMPBELL, J.

Gokal—Petitioner.

v.

Phuman Singh and others—Respondents.

Crim. Rev. No. 480 of 1924, decided on 16th May, 1924, against the Order of the District Magistrate, Jullundhur, dated 27th February, 1924.

Penal Code, Ss. 363 and 366—Finding of a girl over 16 is not sufficient—Magistrate should consider what other offence was committed.

Where the Magistrate finds in a case under S. 363, I.P.C., that there is *prima facie* sufficient evidence that the girl was enticed away, the Magistrate should examine and decide whether an offence under S. 366 or some other cognate offence against a female of over 16 was committed and should not remain content with finding that the girl was not proved to be under 16. [P. 718, C. 1.]

Nand Lal—for Petitioner.

Khazan Singh—for Respondents.

Campbell, J.:—Phuman Singh and four others were sent up for trial by the police for an offence under section 363 of the Indian Penal Code against the person of *Mst.* Parbhi who was alleged to be under 16 years of age. The Magistrate in a detailed order discharged the accused on the ground that the girl was not proved to be under 16, and the learned District Magistrate refused to order further inquiry. Gokal, the father of the girl, has come to this Court on revision.

The Magistrate began by saying that there was *prima facie* sufficient evidence perhaps to show that the girl was enticed away as alleged. Having said this much he should not have been content merely with finding that the girl was not underage but he should have examined and decided the question whether the accused could have been charged with an offence under section 366 or some other cognate offence against a female of over 16. The District Magistrate also appears to have lost sight of this point. I have, however, examined the evidence and have heard Counsel on both sides at some length, and in the particular circumstances I am not prepared to interfere on revision.

The petition is dismissed.

Petition dismissed.

* 1924 Lahore 718 (2).

MOTI SAGAR, J.

Kalian Singh and others—Defendants-Appellants.

v.

Mt. Shanno alias Govind Kaur—Plaintiff-Respondent.

Mis. A. No. 693 of 1924, decided on 5th June, 1924, from an order of the Senior Subordinate Judge, Amritsar, dated 11th March, 1924.

Civ. Pro. Code, O. 39, r. 1—No injunction can be granted unless provisions are strictly complied with.

Unless plaintiff proves by definite evidence that the defendant threatened to remove or dispose of his property with a view to defraud his creditors a temporary injunction cannot be granted. [P. 718, C. 2.]

Nand Lal—for Appellants.

Badr-ud-Din Qureshi—for Respondent.

Moti Sagar, J.:—This is an appeal from an order of the Senior Subordinate Judge, Amritsar, dated 11th March, 1924, granting plaintiff a temporary injunction, restraining defendant from alienating his property and from realising a certain sum of money due from one Ajit Singh till the decision of the suit. The application for a temporary injunction was not accompanied by an affidavit and no other evidence was produced to show that the defendant intended to alienate his property with a view to defraud his creditors as required by Order 39, rule (1) (*b*), Civil Procedure Code. A copy of a statement made by the defendant in another case, dated the 30th April, 1923, was put in in which the latter is alleged to have stated that on account of necessity he has been raising money by the mortgage of his property. No notice was given to the defendant to show cause why injunction should not be granted and I do not see how the statement relied on could be regarded as evidence in the case. The learned Senior Subordinate Judge, without calling upon the plaintiff to prove the allegations which she had made in her application, granted the temporary injunction prayed for and restrained the defendant from alienating his property till further orders of the Court. In my opinion there was no justification for passing such an order. The requirements of Order 39, rule (1), Civil Procedure Code, had not been complied with and no injunction could be granted until the plaintiff proved

by definite evidence that the defendant threatened or intended to remove or dispose of his property with a view to defraud his creditors. This was not done and under the circumstances the prayer for a temporary injunction ought to have been refused.

I accept the appeal, set aside the order of the learned Senior Subordinate Judge and dismiss the plaintiff's application with costs.

Appeal allowed.

1924 Lahore 719.

MOTI SAGAR, J.

Pokhar Mal—Defendant-Appellant.

v.

Jai Bhagwan—Plaintiff-Respondent.

S.A. No. 300 of 1923, decided on 27th May, 1924, against the decree of the District Judge, Delhi, dated 23rd November, 1922.

Civ. Pro. Code, S. 100—Inferences of fact that entries were unreliable cannot be interfered with.

Inferences from the entries of the pocket book to the effect that the debit entries were unreliable are inferences of fact and not of law and High Court cannot interfere even if inferences are not correct. [P 719, C. 2.]

Sardha Ram—for Appellant.

Nand Lal—for Respondent.

Moti Sagar, J.:—This was a suit for rendition of accounts by a principal against an agent. The defendant pleaded that he was not an agent and that the plaintiff was not entitled to sue for accounts. The plaintiff's case was that he had deposited Rs. 2,180-11 9 with the defendant and that the latter was bound to show how the sum had been expended and disposed of. On the 9th December, 1920, a preliminary decree for rendition of accounts was passed in favour of the plaintiff and the defendant was called upon to file his pleas on the merits. The main contention of the defendant on the merits was that he had paid off the whole off the money which had been deposited with him by the plaintiff and that nothing remained due.

The payments, it was alleged, were entered in a pocket book belonging to the plaintiff in the possession of the defendant, and it was further stated that the relevant entries therein were in the handwriting of the plaintiff himself. The plaintiff admitted that the entries were in his handwriting, but denied that the pocket book was his or that the entries related to the deposit in question. The following issue was framed :—"Had the plaintiff got back the sum of Rs. 2,180-12-0 from the defendant and was nothing due to the former in view of the entries made in the pocket book." The trial Court found that the defendant was not an agent of the plaintiff and that a suit for rendition of accounts was consequently not maintainable. On the merits also the finding was in favour of the defendant and it was held that the whole of the money alleged to have been deposited by the plaintiff with the defendant had been paid off.

On appeal the learned District Judge held that the Munsif was not justified to go behind the preliminary decree calling upon the defendant to render accounts and that the finding originally arrived at that the latter was an agent of the plaintiff was conclusive for purposes of this case. On merits also the learned District Judge disagreed with the Munsif and held that payments had not been fully established and that the debit entries in the pocket book relied on were utterly unworthy of credit. A sum of Rs. 442 was found to be due on accounts and a decree to the extent of that sum was passed in favour of the plaintiff against the defendant.

Against this decision the defendant has preferred a second appeal to this Court, and it has been strenuously urged on his behalf by Mr. Sardha Ram that the learned District Judge has not drawn correct inferences from the entries in the pocket book and that they conclusively establish the repayment of the entire sum to the plaintiff. In my opinion the appeal must fail on the short ground that the finding arrived at by the learned District Judge is clearly a finding of fact and that no point of law arises in the case. The inferences drawn by the learned District Judge from the documentary evidence relied on are inferences of fact and not of law, and it is not competent to this Court to go behind a finding of fact even if the inferences in question are not correct. The entries in the pocket book have been fully considered and the finding of the learned District Judge is that they are worthless and that they do not clearly show what has happened to the deposit made by the plaintiff. The finding is not vitiated by any misapprehension or error of law and must be accepted as final for purposes of this appeal.

I reject the appeal with costs.

Appeal rejected.

* 1924 Lahore 720.

SCOTT-SMITH and HARRISON, JJ.

Kundan Singh alias *Kundu and others* —Appellants.

v.

The Crown—Respondent.

Cr. App. No. 1271 of 1923, decided on 8th March, 1924, against the order of the Additional Sessions Judge, Amritsar, dated 29th October, 1923.

Penal Code, S. 302—Death caused by a gun shot which went off during the struggle justifies acquittal.

Where there was a fight in the course of which one *J.* died owing to a shot from *T's* gun but whether the shot which killed him was fired by *S.* as the prosecution alleged or by *T* or whether it was the result of an accident due to the gun going off of itself during the struggle for its possession was doubtful and the probability was that the gun went off during the struggle.

Held, benefit of doubt must be given to the accused.

Ram Chand Manchanda—for Appellants.

The Public Prosecutor—for Respondent.

Scott-Smith, J.:—This is an appeal from the order of the Sessions Judge, Amritsar, convicting the appellants of the murder of Jetha Singh by shooting him with a gun on the 20th of April, 1923. Sadhu Singh and Samanda Singh have been sentenced to death and Kundan Singh, Lal Singh and Nandu to transportation for life. They have filed a joint appeal to this Court through *Lala* Ram Chand Manchanda, and the cases of Sadhu Singh and Samand Singh are also before us for confirmation of the sentences of death under section 374, Criminal Procedure Code.

One Pala Singh was also tried but was acquitted. Four other persons are said to have taken part in the assault on Jetha Singh and others and to be absconding. These are Harnam Singh, Gangu, Chandu and Gandu. Gandu, Kundan Singh, Sadhu Singh and Samand Singh are the sons of the Lal Singh. Pala Singh who was acquitted is the brother of Lal Singh and Nandu is a sweeper of village Usman, to which all the appellants belong. Jetha Singh deceased and Bahadar Singh, Hazara Singh and Tara Singh and Sohan Singh P. Ws. belong to the neighbouring village of Dhotian. There was a charge under section 420, Indian Penal Code against Kundan in connection with taking away of Hazara Singh's mare from Amritsar at the time of the Basakhi Fair shortly before the occurrence. Early in the morning of the 20th April Thakur Singh, Head Constable (P. W. 10), Hakim Ali and Gulab Singh, Constables (P.Ws. 8 and 9) together with a large body of villagers from Dhotian some 50 in number went to Usman village to search for the missing mare in the house of Kundan Singh. The search was without result. After it was over the majority of the Dhotian villagers left to return to their own village, whilst the Policemen who belonged to Amritsar set out for Taran Taran with Tara Singh, Jetha Singh, Hazara Singh, Sohan Singh and Bahadur Singh. Whilst the party were on the way to the main road to Taran Taran they are said to have been set upon by the appellants and the absconding accused and to have been beaten. Tara Singh was at the time armed with a gun and Kundan Singh, Sadhu Singh, Samand Singh and Nandu are said to have wrested it from him at the instigation of Lal Singh. Samand Singh is said to have fired two shots at Jetha Singh and his companions which hit no one. Sadhu Singh is then said to have taken the gun from him and to have fired at Jetha Singh killing him on the spot. Sadhu Singh fired a second shot at Jetha Singh's companions as they were running away. The learned Sessions Judge has accepted the evidence for the prosecution and has convicted the appellants.

Tara Singh's gun was a double barrelled breech loading hammerless one. We sent for it and inspected it. It has a safety catch and after the gun has been fired and reloaded it cannot be fired again until the safety catch has been pushed up. According to Tara Singh the gun was unloaded and the cartridges which were in his pocket were taken out by some of the appellants who loaded the gun and fired it four times. The evidence of Mr. Lobb (P. W. 23) is to the effect that he examined the gun before appearing as a witness in the Committing Magistrate's Court and found that there was no trace of gun powder in the left barrel. In his opinion the right barrel only had been used. We may, therefore, take it that any shots that were fired from the gun at the time of the assault were fired from the right barrel. Now it appears

to us in the first place to be improbable that the appellants would have had time to load the gun and fire it four times in the way stated by the prosecution witnesses before the members of the other party had scattered. It is also probable seeing that there were three Police constables amongst the party, that they would not have been allowed to fire so many times. The evidence for the prosecution shows that one empty cartridge case Exhibit P. 3 which had contained A A shot was found near the body of the deceased after the occurrence. Mohammad Sharif, Sub-Inspector (P. W. 20) says that one Kesar Singh handed him another empty cartridge case but Kesar Singh was not produced as a witness and there is no evidence to show where this cartridge case was found. There is, therefore, evidence as to one empty cartridge case only having been found at or near the spot of occurrence. This points at once to exaggeration in the story of the prosecution. Moreover, in the F. I. R. which was made by Bahadar Singh P. W. 11 it was stated that only two shots were fired one by Samand Singh and one by Sadhu Singh.

The evidence of Lieutenant - Colonel Keates, Civil Surgeon, who conducted the post mortem examination on the body of Jetha Singh shows that death was due to a gun shot wound in the front of the chest on the level of the second rib and only two inches from the middle of the chest. The wound was $\frac{1}{8}$th of an inch wide and went inwards and backwards and passed through the right lung and the membrane round the heart and the main artery just above the heart and then entered the back of the left lung in the lower part of which a large shot was found. Only one shot was found and the medical evidence shows that only one entered the body. From the fact that the wound was in the front of the chest and near the middle, it is clear that the gun must have been fired at Jetha Singh from a considerable distance, say 50 yards at least, for otherwise the shot would not have scattered so much and other wounds would have been found in his body. There is considerable discrepancy in the evidence as to the distance at which the shot was fired. According to Hakim Ali P. W. 8 Jetha Singh was at a distance of 20 or 25 Karams when Sadhu Singh fired at him. According to Thakar Singh P. W. 10 the distance was only 14 or 15 yards. Bahadar Singh puts it at 15 or 20 yards and Hazara Singh at 10 or 12 yards whereas Gulab Singh P. W. 9 says that Jetha Singh was only at a distance of two or three Karams when Sadhu Singh fired at him. These discrepancies are in our opinion very important and throw a good deal of doubt upon the evidence for the prosecution.

In the F. I. R. it was stated that Lal Singh shouted out to his sons "Snatch away the gun and kill them, never mind if any one of us is hanged." Bahadur Singh in his evidence in Court has made a similar statement but Hazara Singh says that Kundan Singh and Lal Singh instigated the others. Tara Singh says that instigation was given by Lal Singh, Pala Singh and Kundan Singh whereas Sohan Singh says that nobody spoke at all before the attack and does not refer to any instigation of any sort. The police constables and the witnesses who belong to village Usman say nothing about any instigation. Under these circumstances we think it would be extremely unsafe to rely upon the evidence as to instigation to kill anybody.

According to the prosecution evidence when the police constables who were some distance behind the rest of the party saw the fight beginning they shouted out to Tara Singh to shoot with his gun. Upon this some of the members of the Police party grappled with Tara Singh to seize the gun. The learned Sessions Judge is of opinion that the primary object was to seize the gun so as to prevent Tara Singh using it against them and in our opinion there is no doubt that this was their object. The evidence is to the effect that out of the appellants' party Kundan Singh and Lal Singh were armed with *Chhavis* but made no attempt to use them against Jetha Singh and his companions. It is argued from this that they had no intention to do any serious harm to the other side. It would have been perfectly easy for Kundan Singh and Lal Singh to attack Tara Singh with their *Chhavis* and in this way there would have been no difficulty in getting the gun out of his hands. The fact that *Chhavis* were not used is, in our opinion, a ground for holding that at first there was no intention to kill or greviously injure any of the members of Jetha Singh's party. The statement of Kundan Singh at

the trial was that Tara Singh aimed his gun at him and shot Jetha Singh who was behind him by mistake. Before us the argument is that the gun probably went off by accident when the parties were struggling for its possession. There can be no doubt that Jetha Singh was at a distance of not less than about 50 yards at the time that he was shot. This lends probability to the theory of an accident. In our opinion the story of the prosecution is an improbable one and the evidence in support of it is unsatisfactory. If the shooting of Jetha Singh was an accident it would be quite in accordance with probabilities that a false charge of murder should be brought against the members of the other party as it was necessary for the police constables and their companions to explain how Jetha Singh met his death.

We regret to find that the learned Sessions Judge has made use of the *zimnis* in an improper manner. Referring to the omission of Nandu's name from the F. I. R. he states at page 38, line 10 of the judgment that this omission was set right in the first *zimni* report written up by the Sub-Inspector who proceeded at once to the spot. If the prosecution desired to explain away the omission of Nandu's name from the F. I. R. questions should have been put to the Sub-Inspector as to when Nandu's name was mentioned. The omission could not be made up by a reference to the *zimni*. Again regarding the omission to produce Wadhawa Singh as a prosecution witness the Court states that it finds from the police *zimnis* that a futile attempt had been made to secure his presence but that he could not be found at his residence.

Some of the accused persons pleaded *alibis*. In regard to them the learned Sessions Judge at page 36, line 32 says "Pala Singh is definitely telling a lie in saying that fight did not take place in his presence and that no man had been killed before he left for Taran Taran". The Court then goes on to refer to some telegrams to the address of the Deputy Commissioner and the Superintendent of Police, Amritsar, which were handed in at Taran Taran at 10-45 a. m. These telegraphic messages are to the following effect:—

"Dhotian residents atttacking Usman furiously. One dead. Kindly help immediately. Serious case." The Court says that the mention of the death of one man could not have found place in the telegrams unless and until Pala Singh and Buta Singh who went to Taran Taran to hand over these messages had known of it before leaving their village. These telegrams have not been proved and there is no evidence on the record to show that they were despatched by Buta Singh and Pala Singh, and the learned Sessions Judge was in error in taking them into consideration without their being proved.

There can be no doubt that there was a fight between the appellants or some of them and the Dhotian witnesses on the morning of the 20th April and that in the course of that fight Jetha Singh met his death owing to a shot from Tara Singh's gun but whether the shot which killed him was fired by Sadhu Singh as P. Ws. depose, or by Tara Singh, or whether it was the result of an accident, the gun going off of itself during the struggle for its possession we find it impossible to say, but in our opinion the probability is that the gun went off during the struggle and a false charge of murder has been made up against the appellants. The latter must be given the benefit of the doubt, and we therefore accept the appeal and setting aside the convictions and sentences acquit the appellants.

Appeal allowed.

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*1924 Lahore 722.

MARTINEAU, J.

Makhan Singh and others—Appellants

v.

The Crown—Respondent.

Cr. Ap. No. 1293 of 1923, decided on 14th April, 1924, from an order of the Sessions Judge, Lahore, dated 21st November, 1923.

Evidence — Identification — In absence of immediate identification parade, identification after many months is worthless.

Evidence of identification of persons previously unknown after a number of months that certain persons took part in an attack is unreliable, unless there was a regular identification parade in which the witnesses picked out those persons from among others, especially where it is not stated that such persons bear any distinguishing marks by which they can be recognised. [P. 723, C. 1.]

Nand Lal—for Appellants.

R. C. Soni, for the Government Advocate—for Respondent.

Martineau, J.:—It appears that on the night of the 22nd October, 1922, cattle were stolen from Dhara Singh's and Hazara Singh's *haveli* at Sarhali Kalan in the Lahore District. The tracks of the thieves were followed and the tracking party eventually reached one Bur Singh's *haveli* at Asal, where a discussion took place about the '*bhunga*' demanded by the thieves, which was at length settled at Rs. 600. Dhara Singh departed ostensibly in order to bring the money, but he came back with a head constable and two constables. The head constable tried to enter the *haveli*, but was knocked down with a lump of earth which was thrown at him, and then men sallied out of the *haveli* and attacked the tracking party and the police causing injuries to several of them, the injuries sustained by one man, namely, Prem Singh, being fatal. Five persons, namely, Makhan Singh, Sulakhan Singh, Nikka Singh, Gurdit Singh *alias* Guria, and Sohan Singh, have been convicted of an offence under section 326, Indian Penal Code, read with section 149, in respect of the injuries inflicted on Prem Singh, and they have appealed.

The first four of the appellants above mentioned live at Asal and Sohan Singh lives at Hudiara. Ujagar Singh, P. W. 5 and head constable Sadik Muhammad say they knew Sohan Singh by appearance, but do not say when or how they came to know him. They did not know the remaining appellants, and the other witnesses who have deposed to the occurrence admittedly did not know any of the appellants before. No reliance can be placed on the evidence of witnesses professing, after many months, to identify persons, previously unknown to them, as having taken part in the attack at Asal unless it is shown that there was a regular identification parade in which they picked out those persons from among others, as it is not stated that the appellants bear any special distinguishing marks by which they can be recognized. Now it does not appear that any such parade was held for the identification of the appellants Makhan Singh, Sulakhan Singh and Sohan Singh. Sub-Inspector Wali Muhammad (P. W. 14) says he had Nikka and Guria identified by some of the prosecution witnesses at *thana* Barki on the 8th November, 1922, but the identification report prepared by him, on which so much would depend, is not forthcoming as he says it has been lost, and of the various witnesses whom he mentions as having identified Nikka and Guria only two, Phagga Singh and Ujagar Singh, speak about the identification. It is hardly safe to rely on Phagga Singh's statement. He identified Tek Singh (one of the accused in the case) at a parade held at Kasur, although for reasons given by the Magistrate there was considerable doubt about Tek Singh's guilt. With regard to Ujagar Singh it is to be observed that there were two eye-witnesses of that name, and as one of them, namely Ujagar Singh, P. W. 5, says he was not asked by the police to identify the accused probably Ujagar Singh mentioned by Sub-Inspector Wali Muhammad is P. W. 22, who speaks about an identification. That witness, who is said to have identified both Nikka and Guria, is also not to be relied upon as he says they were armed with spears at the time of the assault whereas according to the other witnesses they had sticks. The two constables Nazar Hussain and Rahim Baksh say they identified Nikka and Guria at the *thana*, but Sub-Inspector Wali Muhammad, who held the identification, makes no mention of those two persons having been identified by anybody.

In the report of the occurrence which was sent to the *thana* by head constable Sadik Muhammad it was stated that Bur Singh, Makhan Singh, Sulakhan Singh, Nikka Singh, Tehl Singh and Sohni (*i.e.*, Sohan Singh) were identified, but admittedly none of the prosecution witnesses had given those names as the names of the persons who had committed the assault, for none of them knew the names. The head constable says that he learnt the names from Sant Singh, Lambardar of Asal, but Sant Singh has not been called as a witness, so that the fact the names of four of appellants appear in the First Information Report in no way strengthens the case for the prosecution but on the contrary the case is weakened by the fact that Sant Singh is not produced.

Evidence has been given as to Prem Singh, who was Sant Singh's son-in-law, having told his companions on the way to Asal the names of the thieves, including the names of some of the appellants. But the question whether or not the appellants took part in the theft of the cattle is quite distinct from the question, with which this

case is concerned, whether they were concerned in the attack subsequently made on the tracking party and the police at Asal. There is, in my opinion, no reliable evidence that they were concerned in that attack, the evidence as to the identification being far from satisfactory.

I accordingly accept the appeals Nos. 1293 of 1923 and 60 of 1924, set aside the convictions and sentences, and acquit all the appellants and direct that they be released and that the fines, if paid, be refunded.

Appeals allowed.

1924 Lahore 724 (1).

SCOTT-SMITH AND FFORDE, JJ.

Mul Singh—Applicant-Appellant

v.

Ram Singh, Jamiat Singh and others—Creditors-Respondents.

F.A. No. 2052 of 1923, decided on 25th March, 1924, from the order of the District Judge, Lyallpur, dated 15th June, 1923.

Provincial Insolvency Act, S. 10—*Prima facie inability to pay debts justifies an order.*

Where a debtor is unable to pay his debts and the assets are less than the liabilities an order of adjudication should be made.

M. L. Puri—for Appellant.

Jawahir Singh for Kharak Singh—for Respondents.

Scott-Smith, J.:—This is an appeal from an order of the District Judge of Lyallpur, dismissing an application by Mul Singh to be declared an insolvent on the ground that he is not unable to pay his debts. The amount of liabilities entered in the petitioner's schedule is Rs. 37,000. He has one square of land, and certain other property which is stated to be worth Rs. 6,000. The learned Judge says that the square of land is worth over Rs. 32,000 and that, therefore, the assets exceed the liabilities. It appears, however, that some of the creditors, who were present, said that the debts due to them exceeded the sums entered by the petitioner in his schedule. If the amount of their debts is as stated by them, then the total liabilities exceed Rs. 40,000, and even taking the market value of the square to be Rs. 32,000 the assets are less than the liabilities. The learned District Judge apparently considers the square to be worth more than Rs. 32,000, because one of the creditors, who was present, offered to buy it for that sum. We are not sure that this offer was a genuine one, but in any case it appears to us *prima facie* that the appellant is not able to pay his debts. Some of the creditors, who were present, offered to accept the square of land owned by the appellant in satisfaction of all the liabilities mentioned in his schedule, but the petitioner refused this. From his refusal the learned District Judge has drawn an inference unfavourable to him. It appears that the petitioner refused partly because he does not consider that he is entitled to sell this square, see his 2nd and 3rd grounds of appeal.

We accept the appeal and, setting aside the order of the learned District Judge, we remand the case to him in order that he may pass an order adjudicating the appellant an insolvent and proceed further in accordance with law. We make no order as to costs.

Case remanded.

1924 Lahore 724 (2).

MOTI SAGAR, J.

Faiz Mahommad—Plaintiff-Appellant.

v.

Latif—Defendant-Respondent.

Civ. Ap. No. 1987 of 1923, decided on 5th February, 1924.

Evidence Act, S. 13—*Easements and quasi easements pass with sale.*

Where a person grants a portion of his land, reserving a portion to himself, he grants with it all the easements and *quasi* easements, which had been formerly used over the part reserved, by the part granted and which were necessary thereto. (50 P. R. 1888, *Foll.*) [P. 725, C. 1.]

Shamair Chand—for the Appellant.

Jagan Nath—for the Respondent.

Judgment:—The facts of the case out of which this second appeal has arisen are simple enough, and the only question for determination is whether the plaintiffs are entitled to the use of a certain staircase by which a certain shop owned by them in the town of Rohtak is bounded on the North. The shop originally belonged to the defendant and was admittedly transferred to the plaintiffs by a registered deed of sale, dated the 4th of July, 1922. The plaintiff's case is that when the shop was transferred

the right of user in the staircase was also transferred, and that the defendant has no right to restrain them from making use of the same. The defendant, on the other hand, denies having parted with any rights in the staircase, and contends that the plaintiffs have no right to maintain this suit. The trial Court found in favour of the plaintiffs, but the learned Senior Sub-Judge came to a contrary conclusion and dismissed the suit.

The plaintiffs have now come up in second appeal to this Court, and it has been urged on their behalf that the learned Senior Sub-Judge has taken an entirely erroneous view of the matter, and that the sale-deed executed by the defendant in their favour has been wholly misconstrued. After hearing the learned Counsel on both sides, I am of opinion that this contention is well founded and must prevail. The staircase has, all along, been used as a means of access to the upper storey of the shop, and unless the right of its user was expressly reserved by the sale-deed, it must be presumed that there was an implied grant of the same when the shop to which that right was appurtenant was transferred in their favour. It is well settled that where a person grants a portion of his land, reserving a portion to himself, he grants with it all the easements and *quasi* easements, which had been formerly used, over the part reserved, by the part granted, and which were necessary thereto.

In 50 P.R. 1888 it has been laid down that on the grant, by an owner of a tenement, of part of that tenement, as it is then used and enjoyed, the grantee of the part will acquire all those easements which are necessary to the reasonable enjoyment of the tenement granted. The doctrine of implied grant of easements upon severance of tenements is in accord with justice, equity, and good conscience, and there can be no doubt that it would be most inequitable to hold that, though the shop and the upper storey were transferred to the plaintiffs, the means of access to the upper storey was withheld and not transferred.

Apart from the question of an implied grant, however, I am of opinion that the right of user in the staircase was expressly transferred to the plaintiffs by the deed of sale executed by the defendant in their favour. The deed recites that the shop had been transferred to the plaintiffs with all its appurtenant rights. The important words are :—*dukan mazkura bala ko mai jumla haq haquq dakhli wa kharji wa haq amad-o-raft wa asaish wa mori wa parnala wa jumla hachaquq balai manzil wa malba bar kisam manzil zerin wa manzil balai wa farokht kar diya.* These words, in my opinion, clearly indicate that the right of user in the staircase, which was necessary for a reasonable enjoyment of the building transferred had also been transferred. In my opinion, the learned Judge of the Court below has not properly construed the deed of sale, and the appeal must, therefore, succeed.

I accept the appeal and decree the plaintiff's suit with costs throughout.

Appeal allawed.

1924 Lahore 725.

MOTI SAGAR, J.

Tegha and others — Defendants-Petitioners

v.

Ram Singh and others—Plaintiffs—Respondents.

Civil Case No. 401 of 1923, decided on 22nd December, 1923, for revision of the decree of the Subordinate Judge, 4th class, Kangra, dated the 5th April, 1923.

Civ. Pro. Code. O. 22, r. 4—Death of one party before close of hearing of arbitration—Subsequent award is not binding on the representatives if they never agreed to the submission—Arbitration.

In a submission to arbitration if before the death of a party the hearing of the case has been completed and nothing remains to be done except the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding upon his representatives in interest. But where the hearing had not terminated and a great deal remained to be done before the arbitrator could come to a final decision, the representatives of a deceased party who had never agreed to the submission could not be bound by the award. [P. 776, C. 2 and P. 727, C. 1.]

Mehr Chand Mahajan—for the Petitioners.

Fakir Chand—for the Respondents.

Judgment :—The facts of the case out of which this application for revision has arisen are very simple and are shortly these :—On the death of one *Mt.* Nagro her property was mutated in the names of her collaterals, the heirs of Naurang and Labha, in equal shares. Thereupon on

the 1st of June, 1922, the plaintiffs, who are the heirs of Naurang, brought this suit for a declaration that they were the sole heirs of *Mt.* Nagro, that Labha had by his conduct relinquished his rights in her property and that the mutation effected in his favour by the revenue authorities was null and void. During the pendency of the suit the parties decided to refer their dispute to arbitration, and on the 12th of October, 1922, a deed of reference was drawn up and filed in Court appointing one Salig Ram as their sole arbitrator. On the 17th of October, 1922, Labha is alleged to have died. No application to bring his legal representatives on the record was made to the Court in which the suit had been instituted. On the 6th of November, 1922, two of the sons of Labha, who were prosecuting the case on behalf of their father as his *Mukhtars*, appeared before the arbitrator, and stated that they had no oral evidence to produce and that they relied on documentary evidence only. On the 8th of November the plaintiffs brought the fact of Labha's death to the notice of the arbitrator, and on the 18th of November, 1922, they made an application before the arbitrator that the sons of Labha should be brought on the record as his legal representatives. On the 19th of November the arbitrator ordered that the sons of Labha should be summoned to appear before him on the 1st of December, 1922. On that date all the parties were present including the sons of Labha, and the latter stated that they did not want to produce oral evidence and that they relied on the documentary evidence only which had already been produced. On the same date the arbitrator gave an award in favour of the plaintiffs which was filed in Court on the 7th of December. On the 18th of December the sons of Labha filed certain objections to the award, and the very first objection taken by them was that as one of the parties had died before the arbitrator had delivered his award, his authority had come to an end, and that the award subsequently delivered was void and inoperative in law. The trial Court disallowed the objections and passed a decree in terms of the award.

Against this decision the sons of Labha have come up in revision to this Court, and the only point urged on their behalf by Mr. Mehr Chand Mahajan is that the death of one of the parties before the award was made operated in law as a revocation of the authority of the arbitrator, and that the award must consequently be set aside. In my opinion this contention is well-founded and must prevail. It has been contended by Mr. Fakir Chand on the authority of 27 Mad. 112 and 13 I.C. 161 that "the rule of the English law that a "submission to the arbitration stands "revoked by the death of one of the "parties is not applicable to this country, "and that the test to be applied in such "cases is what is the true nature of the "submission." It is pointed out that regard must be had to the nature of the rights in controversy and that if it appears from the circumstances of the case that the intention of the parties was that not merely themselves but their representatives in interest should also be bound by the decision of the arbitrator, the submission clearly does not stand revoked merely by the death of one of the parties. It is argued that in the present case the matter in difference submitted for the decision of the arbitrator was not personal to Labha but that the intention clearly was that his representatives in interest would also be affected by the decision of the arbitrator. There is no doubt that this was so, but it is also clear that if the arbitrator had not completed his inquiry and the representives of the deceased party were to be held bound by the award, it must have been shown that they were parties to the submission. I am fortified in this view by certain observations made by the learned Judges in the case reported as 13 I.C. 161 on which reliance has been placed by the learned Vakil for the respondents. The learned Judges, in that case observe: "If the "hearing had not been completed it would "have been necessary to bring the represen-"tatives of the deceased party on the record "and to make them parties to the submis-sion. The same view has been held in 70 I.C. 459 where it has been laid down that there is no rule or procedure by which an arbitrator could substitute certain persons as legal representatives of a deceased party. It is true that if before the death of a party the hearing of the case has been completed and nothing remains to be done except the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator,

the award delivered after the death of the party would be binding upon his representatives in interest. In the present case, however, it is clear that the hearing had not terminated and a great deal remained to be done before the arbitrator could come to a final decision. In such circumstances I do not think that the sons of Labha who had never agreed to the submission could be held bound by the award.

I accept the revision, set aside the award and remand the case to the lower Court under Order 41, rule 23 of the Code of Civil Procedure for a decision in accordance with law. No order as to costs.

Revision accepted.

1924 Lahore 727.

SCOTT-SMITH, A. C. J.

Hazara Singh and others—Appellants

v.

The Crown—Respondents.

Crl. Ap. No. 351 of 1924, decided on 18th June, 1924, against the order of the Sessions Judge, Hoshiarpur, dated 28th February, 1924.

(a) Evidence—Lists of articles discovered.

Lists of discovery of stolen articles can be used by the persons in order to refresh their memory at the time of giving evidence, but the lists are not themselves evidence. [P. 728, C. 1.]

(b) Evidence Act, S. 193—Mere company with the approver a few days before dacoity is no corroboration of approver, but, production of part of property stolen in the dacoity is sufficient corroboration.

Mere fact that the accused were seen with the approver a few days before the dacoity is not a material corroboration of the evidence of the approver to the effect that they joined him in the dacoity. If the accused person produces certain property which is identified at the trial as having been stolen in the course of the dacoity, it is sufficient corroboration. [P. 728, C. 2.]

Nand Lal—for the Appellants.

Abdul Rashid, for *Government Advocate*—for Respondent.

Scott-Smith, A. C. J.—This is a joint appeal from the order of the Sessions Judge of Hoshiarpur convicting Hazara Singh, Partap Singh I of Littar, Thakar and Partap II of Fatehpur, of dacoity under section 395, Indian Penal Code, and sentencing each of them to 8 years' rigorous imprisonment. The dacoity was committed in the shop of Kanshi at Bassi Jalal on the night between 14th-15th August 1923 and a large amount of property was said to have been stolen. According to Kanshi, jewellery worth Rs. 200, cloth worth Rs. 1,750 and cash to the amount of Rs. 525 were stolen. The evidence upon which the convictions are based is that of Teku approver, corroborated by evidence of association and by the alleged production of certain articles out of the stolen property by each of the appellants. I have not the least doubt and it is admitted by Counsel for the appellants, that a dacoity was committed in the shop of Kanshi as described by him and other eye-witnesses. I also do not think that there can be any doubt that Teku approver was one of the dacoits, but the point which has to be decided is whether his statement is materially corroborated as against each of the appellants by other evidence upon the record.

The learned Sessions Judge has divided the story of the approver into various sections. He relies upon the evidence of Mehr Singh and Waryam Singh (P. Ws. 10 & 12) as corroborating incidents B. and E. and upon the evidence of Puran Singh (P. W. 18) as corroborating incident D. Now, as regards B and E the evidence is that Hazara Singh, Teku and Partap Singh of Fatehpur were going about together some three days before the dacoity. The evidence of Puran Singh is to the effect, that Partap Singh, Teku and the two absconders, Banta Singh and Waryam Singh, were together on the day preceding the dacoity. Now, even assuming that the evidence of these witnesses is true it does not at all follow that the persons named all took part in the dacoity along with Teku. In full the evidence shows that Teku's companions were constantly changing and even if these persons were with him a few days before the dacoity, it does not follow that they remained with him and along with him committed the dacoity in question. I therefore cannot regard this evidence as any material corroboration of the evidence of the approver to the effect that any of the appellants joined him in the dacoity.

There remains the evidence as to the production of certain articles alleged to have been stolen from the shop of Kanshi at the time of the dacoity. The evidence of respectable witnesses is to the effect

that each of the accused took the Police to various places not in their exclusive possession, and dug up or produced articles which at the time Sundar, the brother of Kanshi, identified as part of the stolen property. The evidence of witnesses to the effect that Sundar identified these articles is, of course, inadmissible as being hearsay. The only evidence admissible would be evidence given in Court by Sundar himself to the effect that any or all of the appellants gave information which led to the recovery of articles of stolen property. When Sundar came into Court the various articles had, it appears, all been mixed together and he was quite unable at that time to identify them or to say which accused had produced which article. Again, there was evidence, that as each appellant produced articles a list was prepared by a Police Officer and signed by respectable persons. The latter have given evidence to the effect that they signed these lists and the lists themselves appear to have been used by the learned Sessions Judge as substantive evidence in the case. There seems to be a general impression among the subordinate Courts that lists of this sort are themselves evidence, but this is an erroneous view of the law. Such lists could no doubt be used by the persons who actually wrote them in order to refresh their memory at the time of giving evidence, but this is not the way in which they have been used in the present case. There is thus no admissible evidence in this case to show what articles of stolen property, if any, were produced by each of the appellants.

In order to corroborate the evidence of the approver it was necessary to prove that a certain accused person produced certain property which property was identified at the trial as having been stolen in the course of the dacoity. These facts, however, have not been proved by any admissible evidence upon the record. There is, however, one exception and that is in regard to Exhibits 65 and 66, a ring and a *tandiri* which were said to have been in a box produced by Thakar accused and which have been identified in Court by Kanshi. It would, however, in my opinion be unsafe to consider this evidence as a sufficient corroboration of the statement of the approver especially as the articles were, as admitted by the learned Sessions Judge, not found in the exclusive possession of Thakar.

There are various other matters which need to be noticed. Kanshi states that prior to the dacoity he knew Hazara Singh, Partap Singh of Littar and Thakar appellants who often came to his shop. This being so it is remarkable that he failed to identify any of them at the time of the dacoity even though their faces were wrapped up in *mundassas*. Sundar has gone so far as to say that he identified Thakar and Partap Singh of Littar after the lamp was lighted by the dacoits, but his evidence in this respect is unworthy of credit seeing that their names were not mentioned in the first information report. The greater part of the property which has been recovered consists of cloth said to be parts of whole *thans* stolen in the dacoity. It is remarkable however that cloth stolen was worth Rs. 1,750 but that recovered is valued only at Rs. 307. It was urged on behalf of the defence that the cloth recovered was really cloth belonging to Kanshi which had been left behind by the dacoits and that there were no real recoveries at all at the instance of the appellants. The suggestion was that the Investigating Officer had hidden the various articles in the places from which they were subsequently said to have been produced by the appellants. There certainly is the possibility that the productions were not genuine though I see no reason to disbelieve the evidence of respectable persons who gave evidence in support of the recoveries. Again it is remarkable that though jewellery of large value is said to have been stolen from Kanshi, the amount stolen, according to the approver, was quite small. There are other serious discrepancies between the statement of the approver and that of Kanshi and there cannot be the least doubt that Kanshi has very largely exaggerated his loss. In the absence of any admissible evidence to show what stolen property was produced by any one of the appellants, it is impossible to regard the evidence of production as material corroboration of that of the approver. The evidence of association has already been dismissed and I have held that it also does not in any way connect any of the appellants with the dacoity. The only clear evidence then which connects the appellants with the dacoity is that of the approver Teku and it certainly would not in this case be safe to depart from the general rule that the evidence of an accomplice may be deemed

to be unworthy of credit unless it is corroborated in material particulars.

I, therefore, accept the appeal, set aside the convictions and the sentences and acquit all the appellants, and direct that they be forthwith released from custody.

Appeals accepted.

1924 Lahore 729 (1).

SHADI LAL, C.J. AND ROSSIGNOL, J.

Partap Das—Plaintiff-Appellant.

v.

Nand Singh (mortgagee) and Dasondhi (mortgagor)—Defendants-Respondents.

Letters Patent Appeal No. 216 of 1923, decided on 28th March, 1924, against the decision of Harrison, J., dated the 19th June, 1923, in C.A. No. 534 of 1923.

Transfer of Property Act, S. 10—Restraint on alienation of estate with full proprietary title is void though embodied in a compromise.

Restrictions on the power to alienate land with full proprietary rights is a derogation from the full proprietary rights and is consequently void though it is the result of compromise. [P. 729, C. 2.]

Nand Lal—for the Appellant.

Dev Raj Sawhney—for the Respondents.

Rossignol, J:—A dispute between the parties regarding the title of the respondents to a large area of land was terminated by a compromise between them before the revenue authorities. The compromise provided that the defendants-respondents should surrender to the plaintiff possession of a certain portion of the area and that the residue in the possession of the defendants-respondents should be entered as theirs in proprietary right subject to the condition that the respondents should have no power to alienate the land the proprietary title in which was thus conceded to them. Subsequently the defendants alienated a portion of the land by a mortgage and this appeal arises out of a suit brought by the plaintiff for a declaration that the mortgage is null and void.

The learned Judge in Chambers dismissed the plaintiff's suit on the ground that when a full proprietary right had passed to the defendants the restriction in respect of the alienation was null and void in as much as it is opposed to the principles underlying section 10 of the Transfer of Property Act and results in the creation of a title which is unknown in law.

Having heard counsel for both sides we are of the opinion that the decision of the Court below is correct, that the restriction contained in the compromise on the power of alienation is a derogation from the full proprietary right conferred upon the defendants and is consequently void.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

1924 Lahore 729 (2).

SCOTT-SMITH, A.C.J. and MALAN, J.

Jahangir—Convict-Appellant.

v.

The Crown—Respondent.

Criminal Appeal No. 176 of 1924, decided on 8th July, 1924, against the order of the Sessions Judge, Mianwali, dated the 11th February, 1924.

Penal Code, S. 193—Inquiry under S. 11 of the Frontier Crimes Regulations is not a judicial proceeding.

Inquiry by the Magistrate, *elaka* under orders from the District Magistrate to find out whether action under S. 11 of the Frontier Crimes Regulation is necessary, is not a judicial proceeding and giving false evidence therein is no offence under S. 193. [P. 731, C. 1.]

Sagar Chand, Naval Kishore for M. Shah Nawaz—for the Appellant.

The Government Advocate—for the Respondent.

Scott-Smith, A.C.J:—This judgment disposes of the appeals of 4 persons, Jahangir, Sher Khan, Shah Jahan and Gulaya, who have been convicted by the Sessions Judge of Mianwali of offences under section 193 of the Indian Penal Code, and also the four appeals by the local Government which ask that they should be convicted instead of offences under section 194 of the Code. The facts are briefly as follows:—On the 25th June, 1923, Abdul Qadir made a complaint to the District Magistrate, Mianwali, under sections 302-118 of the Indian Penal Code against Alam Khan and others to the effect that they had murdered his son Hamid Ullah Khan on the 17th June, 1923 and had thrown his body first into a pond and later into the river Indus. The District Magistrate sent this complaint to the Superintendent of Police for enquiry

under section 202 of the Criminal Procedure Code. Whilst it was being investigated by the Police Abdul Qadir, on the 10th July, 1923, made a further application to the District Magistrate in which he repeated his previous story and said that nothing was being done by the Police owing to the influence of a certain Honorary Magistrate whom he named and asked accordingly that the District Magistrate should refer the case to a Council of Elders under section 11 of the Frontier Crimes Regulations of 1901. On this the District Magistrate passed the following order:—" Magistrate *Ilaqa*: Kindly make a summary enquiry into this case. A complaint has been made to the Police which they are investigating." The Magistrate *Ilaqa*, Pir Haidar Shah took the statement of Abdul Qadir on the 19th July, and those of the four appellants as witnesses on subsequent dates. These witnesses supported the allegations against the accused persons in regard to the murder of Hamid Ullah Khan. On the 25th August, the Magistrate reported that the murder had been committed, but the District Magistrate on the 14th September, ordered the Police to make a further enquiry. On the 17th September, the Superintendent of Police reported that the complainant wanted the case to be sent to a *jirga*. On the 22nd September Hamid Ullah Khan, who was alleged to have been murdered turned up alive. In consequence of this complaints were framed against Abdul Qadir and the four present appellants. Abdul Qadir was acquitted and the appellants were convicted as already stated.

It is contended on behalf of the appellants that the application of the 10th July, 1923, was not a complaint within the meaning of the Criminal Procedure Code, and that it was not sent to the Magistrate *Ilaqa* for enquiry under the provisions of section 202 of the Criminal Procedure Code. It is further pointed out that the District Magistrate in fact merely directed a Subordinate Magistrate to make an informal and extra-judicial enquiry in order to enable him to decide whether or not he should take action under section 11 of the Frontier Crimes Regulations. It is contended that the Magistrate *Ilaqa* in making this enquiry has not acted in his judicial capacity as no judicial proceedings were before him and he was therefore not empowered to examine the witnesses on oath, and that therefore they could not be prosecuted for false evidence in regard to their statements under section 193, Indian Penal Code.

The learned Government Advocate admits that the application of the 10th July, 1923, is not a complaint, for it was not an allegation made to the Magistrate with a view to his taking action under the Code of Criminal Procedure. The object of the informant was that action should be taken under section 11 of the Frontier Crimes Regulations. The Government Advocate however, contends that a complaint had already been lodged on the 25th June, which had been sent to the Police for investigation and that the application of the 10th July, was merely in continuation thereof. In our opinion the application of the 10th July, was quite distinct from the complaint of the 25th June, 1923. Action had already been taken on the latter, but the complainant being afraid that the accused would not be prosecuted made a further application that the District Magistrate should take action and refer the case to a *jirga* under section 11 of the Frontier Crimes Regulations. The District Magistrate though he referred in his order to a previous complaint, and did not treat the application as in continuation thereof. He directed the Magistrate *Ilaqa* to make a summary enquiry, and having regard to the prayer in the application, it is clear to us that his object was to ascertain whether there were sufficient grounds for taking the action which the complainant asked should be taken. Under these circumstances we consider that the enquiry made by *Pir* Haidar Shah was clearly an extra-judicial one and was rather of an executive character. The case reported as *Fatteh Ali* v. *Queen-Empress* (1) has been referred to by Counsel for the appellants and appears to us to be in point. That was a case in which the District Magistrate had received a demi-official communication from the Secretariat regarding publication of a certain pamphlet. He ordered enquiries to be made, and it was held that there having been no complaint before the District Magistrate, section 202 of the Code of Criminal Procedure was inapplicable and that the Magistrate had no lawful

(1) (1894) 15 P.R. 1894 Cr.

authority to administer an oath to accused on the occasion in question, *i.e.*, when he was examined as a witness, inasmuch as the proceedings, though taken by a Magistrate, were not magisterial proceedings taken in pursuance of any authority given by the Code of Criminal Procedure. The present case, in our opinion is very similar. The statements of the appellants were no doubt taken by a Magistrate, but they were not taken by him in the course of any judicial proceeding, and he had no more authority to administer an oath to them than a private individual would have had. We, therefore, hold that the appellants cannot be convicted of giving false evidence under section 193, Indian Penal Code, and we accept their appeals, set aside the convictions and sentences and acquit them and direct that they be released from custody. The appeals filed at instance of the Local Government are dismissed.

Appeals allowed.

1924 Lahore 731.

ZAFAR ALI, J.

Khan Mohammad Khan and another—Defendants-Appellants.

v.

Musammat Nur Jahan Begum—Plaintiff Respondent.

Civil Second Appeal No. 158 of 1924, decided on 5th June, 1924, against the decree of the District Judge, Karnal, dated the 18th August, 1923.

(a) *Custom—Applicability.*

A notification by Government that a tribe is an agricultural tribe does not raise the presumption that it is governed by custom. [P. 732, C. 1.]

(b) *Limitation Act, S. 5—Filing copy of order referred to as part of the judgment after time may be excused if judgment is filed in time.*

Filing copy of order referred to in the judgment as part of it after expiration of the limitation, where copy of the final judgment is filed in time may be excused under S. 5. [P. 731, C. 2.]

(c) *Custom—Mahomedan Law.*

Pathans of the village Kutel in the District of Karnal are governed by Mahomedan Law in matters of inheritance. [P. 732, C. 2.]

Mool Chand for *Ghulam Rasul*—for the Appellants.

Shamair Chand—for the Respondent.

Zafar Ali, J.:—Counsel for the respondent raises a preliminary objection that the appeal is barred by time, in that, copy of a portion of the judgment of trial Court was supplied after the expiration of the period of limitation. The judgment of that Court opens thus:—

"This order should be read as being in continuation of my previous order in English, dated the 29th January, 1923."

The appellant filed with the appeal copy of the final judgment in which the above sentence occurs but not of the order of 29th January, 1923 until called upon by the office to do so. There can be no doubt that the judgment was incomplete unless read with the previous order and therefore the appellant ought to have filed copy thereof with the appeal. But if he did not do so the case falls within the purview of section 5 of the Limitation Act and I extend time under that section because, strictly speaking the last order constituted the final judgment of the Court and the appellants under that impression presumably did not file with the appeal copy of the previous order also.

As regards the merits, the only controversial question in the case was whether in matters of inheritance the parties were governed by custom or Muhammadan Law. The suit was by a sister against her two brothers for her share in the landed property left by their mother as well as by the son of their mother's sister. When the inheritance fell out the plaintiff was a minor and so her brothers ignored her and succeeded to the entire estate of their mother as well as of their cousin. The trial Court found that the parties were governed by custom, but the learned District Judge arrived at the conclusion that they followed Muhammadan Law and decreed plaintiff's suit. There can be no doubt that the decision of the learned District Judge is correct.

(1) The parties are Pathans of the village Kutel in the tahsil and District of Karnal. According to the riwaj-i-am of that district "Pathans invariably follow the *Shara* and admit no customs"; and it appears that the *Shara* has invariably been the rule of succession in the family of the parties themselves. In the first place on the death of Mohammad Ali Khan his estate devolved upon his daughter Mt. Karim-ul-Nisa. (See the pedigree table given in the judgment of the District Judge). The record does not show whether Mohammad Ali Khan had any

male collaterals or not. Mt. Karim-ul-Nisa was married to Muhammad Khan Pathan who came from Panipat, and bore him three daughters. On her death her husband as well as three daughters (1) Mt. Naziran, (2) Mt. Naziban and (3) Mt. Bashiran succeeded to her estate according to Muhammadan Law. No. (1) was the mother of the parties and No. (2) was the mother of their cousin Mohammad Yasin deceased. The Courts below missed the point that the land had descended from two ladies and the last owner in one case was a female. The rule of custom set up by the defendants applied to the ancestral landed property of the father and not to that of the mother or to that derived from a male proprietor. (See article 23 of Rattigan's Digest of Customary Law). No authority was cited to show that the same rule applied to the ancestral landed property of female. It is noteworthy that Pathans of Panipat, to which place Mohammad Khan belonged are admittedly governed by Mohammadan Law.

(2) The four points on the strength of which the trial Court found that the parties were governed by custom were quite insufficient to prove that. The first point was that the village was founded by Pathans; but the learned Counsel for the appellants could not show from the record that this was so. On the other hand, it was in evidence that there was only one family of Pathans in the village, *i.e.*, the family of the parties to the suit. The second point that the members of the family cultivated land themselves showed that they were agriculturists, but Pathan agriculturists in the district follow Muhammadan Law. The third point also that Pathans are a notified agricultural tribe of the district possesses no force—because it has been held in several cases that came up to this Court that a notification by Government that a tribe is an agricultural tribe does not raise the presumption that it is governed by custom (*Jowahir Singh* v. *Yaqub Shah* (1) and *Faquir Muhammad* v. *Fazal Muhammad* (2). The fourth and the last point was that two of plaintiff's own witnesses deposed that daughters did not succeed in the presence of sons, but in the absence of any instance this evidence is no better than the personal opinion of the witnesses and could carry no weight. All that has been stated above supports the conclusion that the parties follow, Muhammadan Law and not custom, and I therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1905) 5 P.R. 1906=59 P.L.R. 1906.
(2) (1906) 16 P.R. 1906=66 P.L.R. 1906.

1924 Lahore 732.

MARTINEAU, J.

Amirchand and his wife Mussammat Permeshri—Petitioners.

v.

The Crown—Respondent.

Crl. Mis. No. 73 of 1924, decided on 29th July, 1924, against the order of the 1st Class Magistrate, Jhelum.

Crim. Pro. Code, S. 177—Offence of bigamy is triable where second marriage took place—Crim. Pro. Code, S. 181.

The offence of bigamy and the abetment of bigamy is triable only in the district in which the second marriage or the abetment took place and not in the district in which the woman is reported to have been enticed away. [P. 732, C. 2.]

Shamair Chand—for the Petitioners.

I. C. Ohopra—for the Respondents.

Martineau, J.:—The Magistrate has replied to the petitioners' allegations and there appears to be nothing in his proceedings which would afford a sufficient reason for transferring the case. But I think it would be proper to transfer the case on another ground. The petitioners objected that the Chakwal Court had no jurisdiction. The Magistrate overruled the objection on the ground that the complainant's wife, Sita Devi, was said to have been enticed away in the Jhelum District, but that was not a correct view as the prosecution is not for an offence under section 498, I. P. C., but for bigamy and abetment of bigamy, the allegation being that the petitioners got Sita Devi married to Sadhu. The case would be triable only in the district in which the second marriage or the abetment took place. Up to the present the complainant has refrained from stating where it did take place, while the accused, or those of them have appeared, deny that there has been a second marriage. Counsel for the complainants is even now unable to inform me where the second marriage took place. Now the petitioners

ilve in the Rawalpindi district, apparently in a very remote part of the district. There have been many hearings of the case, and it is exceedingly inconvenient for them to take the long journey to Chakwal for each hearing. There is at present nothing to show whether or not there is any evidence against them, as no evidence has yet been recorded, the case having been repeatedly adjourned on account of the attendance of the principal accused, Sita Devi, not having been secured. It is apparently not known where Sita Devi is.

In these circumstances I think it is not right that the petitioners should be harassed by having continually to take journeys to Chakwal for the hearing of a case with regard to which it is still not known whether the Court at Chakwal has jurisdiction.

I transfer the case to the Rawalpindi District to the Court of such Magistrate of the 1st Class as the District Magistrate of Rawalpindi may nominate for the trial of the case.

Case transferred.

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* 1924 Lahore 733.

BROADWAY AND CAMPBELL, JJ.

Kakar Singh—Convict-Appellant

v.

The Crown—Respondent.

Cr. Rev. Case No. 1316, decided on 25th March, 1924, against the order of the Sessions Judge, Ferozepore, dated the 17th December, 1923.

(a) *Evidence Act, S. 14—Statement by accused immediately after the offence is relevant but statement by another person to the accused must be proved by the person who heard it—Evidence Act, S. 60.*

A statement by an accused person immediately after the occurrence of an offence is relevant as showing his state of mind but a repetition of what some other persons said to the accused, by the accused, is not relevant and it has to be proved by direct evidence of the person who heard it. [P. 734, C. 1.]

(b) *Evidence Act, S. 105—Exception 1 to S. 300, I.P.C., must be pleaded and proved by the accused.*

Accused must prove that his case came within the Exception 1 to S. 300 of the Penal Code and the Court is bound to presume the absence of any such case. [P. 734, C. 1.]

(c) *Accused person—Need not speak truth.*

An accused person is not bound to speak the truth and he cannot be pinned down to any statement that he may have made. [P. 734, C. 1.]

Shamair Chand and *Sagar Chand*—for Appellant.

Public Prosecutor—for Respondent.

Broadway, J.:—The appellant Kakar Singh, son of Ruldu Singh appeals against a sentence of transportation for life passed on him by the learned Sessions Judge on a conviction under section 302, Indian Penal Code, of having murdered Mt. Karmon.

It has been proved that Kakar Singh and his wife Mt. Karmon were on bad terms. She had recently eloped with one Gorkhi and after staying with him for a month had two days before her murder been induced to return to her husband's house. It is said that at the time of her elopement she had taken with her jewellery of the value of Rs. 400. This jewellery she did not bring back with her.

It is admitted that Kakar Singh killed his wife on the 17th of September, 1923, during the last *Pahar* before sunrise. The only question is whether the learned Sessions Judge has rightly held that the appellant's offence amounts to murder.

The defence set up by the appellant was that he had gone out to look at his cattle and on his return found his wife and her paramour Gorkhi in the act of sexual intercourse, that Gorkhi had escaped but that he had lost his power of self-control and had killed Mt. Karmon with a *Kahi*. An attempt was made to support this plea by introducing into the statements of some of the prosecution witnesses, who are related to the appellant, a story that they had seen Gorkhi running away from the appellant's house. The learned Sessions Judge has dealt with this suggestion very thoroughly and adequately and has pointed out the utter incredibility of the story. With his conclusion, and reasons therefor, we concur.

Mr. Shamair Chand for the appellant, however, in the alternative contended that the statement of Hira Singh (P. W. 6) was sufficient to bring the act of the appellant within the first Exception to section 300, Indian Penal Code. What Hira Singh is recorded to have stated is this :

" I asked him (appellant) what had happened and he said ' what had to be'. He also said that the deceased had said to him ' let Gorkhi come and have intercourse with me and I will then prepare your food. If you do not, I will not prepare your food".

The learned Counsel contends that this statement is not only relevant but should be regarded as conclusively proving the fact that Mt. Karmon actually used these

words. It is obvious that this contention cannot be allowed to prevail. A statement made by an accused person immediately after the occurrence of an offence is no doubt relevant as showing the existence of any state of mind, but as laid down in section 60 of the Evidence Act oral evidence must in all cases whatever be direct and if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it.

While it may be accepted that the appellant gave Hira Singh this account as the reason of his action, it cannot be held that Hira Singh's statement proves that the woman used these words. It may amount to proof that the appellant immediately after the occurrence was in a state of excitement due to something either said or done by the deceased, but what was said or done cannot be regarded as having been proved. In this case it has to be borne in mind that the defence set up is entirely opposed to the assertion made to Hira Singh and the appellant's own statement in Court amounts to a contradiction of what Hira Singh has said. No doubt Mr. Shamair Chand is correct in saying that a person accused of crime is not bound to speak the truth and cannot be pinned to any particular statement he may have made, but the burden of proving the existence of circumstances bringing the case within Exception 1 to section 300, Indian Penal Code, lies on the appellant and under section 105, Evidence Act, a Court is bound to presume the absence of any such circumstances.

We therefore agree with the learned Sessions Judge in holding that the appellant has failed to prove that he was deprived of the power of self-control by grave and sudden provocation given by the deceased. The appeal is dismissed.

Appeal dismissed.

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* 1924 Lahore 734.

MOTI SAGAR, J.

Nanak Chand and others—Accused-Appellants

v.

Crown—Respondent.

Cr. Rev. Case No. 715 of 1923, decided on 10th December, 1923, against the order of the First Class Magistrate, Jullundur, dated the 18th June, 1923.

(a) *Crim. Pro. Code, S. 235—Mere existence of some general purpose or design does not constitute community of purpose—Each act if it is a completed act so far as that act is concerned will not go to form continuity of action—Crim. Pro. Code, S. 239.*

Though community of purpose or design and continuity of action are essential elements in determining whether or not the number of acts are so connected together as to form part of the same transaction, yet to constitute community of purpose the mere existence of some general purpose or design is not sufficient. There can be no continuity of action where each act is a completed act in itself and the original design is accomplished so far as that act is concerned. Joint trial of the accused for falsely inducing various people at different times to pay money to the accused, for securing employment at handsome wages in a foreign country is illegal. [P. 737, C. 2 and P. 738, C. 1.]

(b) *Crim. Pro. Code, S. 342 — Non-compliance vitiates entire proceedings.*

The provisions of S 342 as to the stage at which the examination of the accused person should take place imperative and non-compliance with them is an illegality vitiating the entire proceedings. [P. 736, C. 1.]

Badri Das—for Appellants.

Dalip Singh, Assistant Legal Remembrancer—for the Crown.

Judgment:—In this case the five appellants G. Mayya Das, Nanak Chand, Hassan Lal, Gurdit Singh and Thakar Das have been jointly tried and convicted by a section 30, Magistrate at Jullundur of an offence under section 420 of the Indian Penal Code. G. Mayya Das has been sentenced to seven years' rigorous imprisonment and a fine of Rs. 5,000, and the other accused have been sentenced to 5 years' rigorous imprisonment and a fine of Rs. 1,000, each. Against these convictions two separate appeals have been preferred to this Court one by G. Mayya Das through Dr. Gokal Chand Narang and the other a joint appeal by the remaining four convicts through *Lala* Badri Das *Vakil*; while Mr. Dalip Singh has appeared and addressed me on behalf of the Crown.

The facts are fully stated in the judgment of the learned trial Magistrate, and it is not necessary to repeat them here at length. The accused are all residents of the Jullundur District except one Thakar Das who resides in the Kapurthala State. The principal accused G. Mayya Das was a shipping agent at Bombay, and the others were either his assistants or his partners in the business. The charge against the accused is that they defrauded a large number of up-country people by holding out assurances to the effect that there was

a great demand for labour in France and that they would secure employment on very handsome wages for each of such persons as would like to emigrate to that country. It is alleged that, misled by these assurances, a large number of persons expressed their willingness to go, and did actually sail for France. It is further alleged that, in consideration of the promises so held out, the emigrants paid large sums of money to the accused which were considerably in excess of their passage-money, but that when they landed in France they found to their cost that they had been sent on a fool's errand, that there was no scope for employment for an Indian in that country, and that they had practically been cheated out of their monies by a gang of clever swindlers. They remained in Marseilles for a few days in search of employment, but when their attempts in this direction failed and their funds were exhausted, they solicited the help of the British Consul who was gracious enough to provide them with their passage-monies, and to send them back to Bombay. On their return to Bombay they went to the house of G. Mayya Das to demand an explanation of the frauds that had been practised upon them, but the latter, becoming apprehensive of violence at their hands, tried to run away and to leave the station. He was, however, not allowed to do so and caught and eventually *challaned* along with his other associates under section 420 of the Indian Penal Code. The accused were placed on their trial originally before a Magistrate at Bombay, but the case was subsequently transferred to the Jullundur District probably on the ground that the complainants and the accused were mostly residents of that district and also because it was thought that it would be easier for the parties to produce evidence at Jullundur than at Bombay. The defence set up by the accused before the trial Magistrate was that they had held out no inducements, that the complainants had of their own accord gone to France in search of employment and that the monies which they had paid had been legitimately earned by them (the accused) in lieu of services rendered. The learned Magistrate came to the conclusion that this defence was false and that the charge under section 420, Indian Penal Code, was fully established.

In appeal the first contention raised by the learned *vakil* for the appellants is that the trial is vitiated by reason of the fact that the Magistrate has not strictly complied with the provisions of section 342 of the Code of Criminal Procedure as to the examination of the accused persons at the conclusion of the case for the prosecution. It appears that in the present case 38 witnesses in all were produced on behalf of the prosecution, out of which 19 only were examined before the statements of the accused were recorded. The remaining 19 witnesses were examined afterwards, and it is admitted that the accused were not generally questioned on the case at the the close of the whole of the prosecution evidence. Now section 342 provides that "for the purpose of enabling the accused "to explain any circumstances appearing "in the evidence against him, the Court "may, at any stage of any inquiry or trial, "put such questions to him as the Court "considers necessary, and shall for the "purpose aforesaid, question him generally "on the case after the witnesses for the "prosecution have been examined, and "before he is called on for his defence." It is contended that the appellants have been seriously prejudiced by the omission of the Court to examine them in accordance with the provisions of the law contained in this section, and that the convictions on this ground are illegal. Reliance is placed in support of this contention on the cases reported as 1 P. R. 1918 (Cr:). I. L. R. 50 Cal. pages 223 and 308 and I. L. R. 4 Lah. 61. Mr. Dalip Singh, on the other hand, contends that the Punjab cases are clearly distinguishable, while in the Calcutta cases the rule of law on this point appears to have been too widely stated. He argues that failure to apply correctly the provisions of section 342 of the Criminal Procedure Code is not an illegality which entirely vitiates the trial, but a mere irregularity which may be condoned under the provisions of section 537, Criminal Procedure Code. It is pointed out that in the present case the appellants were given an opportunity at the conclusion of the trial to make a further statement, but that they declined to avail themselves of this opportunity. It is, therefore, urged that they have not in any way been prejudiced by the failure of the Court to examine them at the proper stage, and that the convictions cannot, therefore, be set aside. I have given a most careful

consideration to this matter and have examined a large number of authorities which have a bearing upon this question, and the conclusion at which I have arrived is that the contention of *Lala* Badri Das is sound and must prevail. The principle of law now seems to be firmly established that the provisions of section 342 of the Code of Criminal Procedure as to the stage at which the examination of the accused should take place are imperative, and that an omission by the Court to examine him in accordance with its provisions is an illegality which vitiates the entire proceedings. It is true that in the case reported as P. R. 1918 one of the accused persons was never examined at any stage of the case at all, but the correctness of the principle that there is a duty imposed upon the Court by section 342 of Code of Criminal Procedure to question the accused generally on the case after all the witnesses for the prosecution have been examined and before he is called on for his defence was never doubted ; and it was laid down that the omission to perform such a duty must be presumed to have seriously prejudiced the accused, and necessitated a retrial. In another Punjab case reported as 65 I.C. 618 it was held by Sir William Chevis, J. that the procedure prescribed by section 342 of the Criminal Procedure Code is binding on the Courts, even in summons cases, and that failure to comply with its provisions is not a mere irregularity such as can be cured under section 537 of the Code, but is an illegality vitiating the trial. The same view was taken by a Bench of the Bombay High Court in a case reported as 59 I.C. 129 where it was laid down that the omission to examine the accused as required by section 342, Criminal Procedure Code could not be condoned. In *Tilak Gope* v. *Bhaya Ram* (1) Mr. Justice Bucknill held that an omission to examine the accused after the case for the prosecution has been closed or rather after all the witnesses for the prosecution have been examined is a fatal defect and cannot be cured by trying to bring into operation the provisions of section 537 of the Criminal Procedure Code. Recently in I.L.R 46 Mad. 449 a Full Bench of the Madras High Court has laid down that the provision in the latter part of section 342 (1) of the Criminal Procedure Code directing the Court to question the accused generally on the case is mandatory and not merely discretionary, and that failure to comply with the terms of the section is an illegality vitiating a trial and not a mere irregularity which can in a proper case, be cured under section 537 of the Code. In I. L. R. 4 Lahore 61 the facts were no doubt slightly different, but it was nowhere laid down by the learned Judge that under section 342 of the Criminal Procedure Code it was not obligatory on the Magistrate to examine the accused after all the witnesses for the prosecution had been examined. In that case the statement of the accused was recorded by the Magistrate before the charge was framed but after all the witnesses for the prosecution had been examined and cross-examined at considerable length. After the framing of the charge most of the prosecution witnesses were recalled for further cross-examination under section 256, Criminal Procedure Code. At the termination of this cross examination the Magistrate proceeded to record the defence evidence without questioning the accused again. It was held that the provisions of section 342 of the Criminal Procedure Code had been substantially complied with and that even if they were not, the irregularity was such as could be cured under section 537, Criminal Procedure Code. It is obvious that this case fully supports the contention that the provisions of section 342, Criminal Procedure Code are mandatory and that if there has been a substantial compliance with those provisions, the trial is not vitiated. Mr. Dalip Singh has drawn my attention to a case reported as I.L.R. 45 All. 124, and has contended that a contrary view as to the scope of this section was taken in that case. That case, however, is clearly distinguishable and cannot be accepted as an authority in support of the contention put forward by the learned Counsel for the Crown. In that case the witnesses for the prosecution were examined in chief up to a certain date, and on that date the accused were questioned generally on the case by the trying Magistrate under the provisions of section 342 before they were called on for their defence. After that the witnesses for the prosecution were cross-examined and one witness a head constable was examined for the first time for the prosecution. The evidence which he gave was only to

(1) (1921) 22 Cr. L.J. 598=62 I.C. 870.

the effect that he had arrested the accused. Objection was taken that in examining the head constable after the statements of the accused had been taken, the trying Magistrate had acted in contravention of the provisions of section 342, Criminal Procedure Code and that the trial was consequently vitiated. The learned Judge held that the evidence given by the constable was not very material and that the accused had not in any way been prejudiced by the failure of the Magistrate to examine them in accordance with the provisions of section 342 of the Criminal Procedure Code. In the present case a large number of witnesses whose evidence was very material for the prosecution were examined after the statements of the accused had been recorded, and no opportunity was given to the latter before they entered upon their defence to explain away the circumstances to which the witnesses had subsequently deposed. In my opinion a vital rule of procedure was contravened, and the result of this contravention is that the entire proceedings are vitiated.

The next question for consideration is whether the case should be sent back to the lower Court for a retrial. This necessitates a consideration also of the question as to whether the trial is or is not open to objection on the ground of multifariousness. *Lala* Badri Das contends that on the facts alleged by the prosecution the accused were guilty of distinct offences and that under section 233 of the Criminal Procedure Code they ought to have been separately tried for each of those offences. He further argues that though it might possibly be said that the offences alleged to have been committed by the accused were of the same kind, they were not committed in one series of acts so connected together as to form the same transaction within the meaning of sections 235 and 239, Criminal Procedure Code. His argument, in brief, is that a large number of persons, more than 50 in number, are alleged to have been defrauded in consequence of certain inducements held out by different accused to different persons at different times, that each of these inducements was an offence complete in itself and not merely one of several offences so connected together as to form the same transaction, and that, therefore, the joint trial of all the accused was illegal. He relies mainly in support of this contention on the case of *Chooragudi Venkatadri* v. *Emperor* (2) where the expression "same transaction" in section 235, Criminal Procedure Code, has been fully discussed. Mr. Dalip Singh, on the other hand, argues that the acts complained of were so connected together by community of criminal intent and continuity of action and purpose as to constitute one transaction, and that the accused could, therefore, legally be charged with and tried at one trial for every offence committed in such series of acts. After carefully considering the arguments of the learned Counsel on both sides I am of opinion that the rule laid down in I.L.R. 33 Mad. 502 is the correct rule and should be followed. The facts in that case were very similar to those of the present case. A Provident Company was constituted which was found in fact to be a bogus concern, its object from its very inception being to defraud the public and to swindle the unwary and ignorant. The accused, who were the Directors of the Provident Fund, were charged with having falsified certain accounts and with having cheated specific persons on different dates. They were jointly tried and convicted. In appeal section 235, Criminal Procedure Code was relied on by the Public Prosecutor, and it was contended that the several offences could be tried at one trial, inasmuch as they were committed in one series of act so connected together as to form the same transaction. This contention was not accepted by the learned Judges constituting the Bench, and it was laid down that though community of purpose or design and continuity of action were essential elements in determining whether or not the number of acts were so connected together as to form part of the same transaction, yet to constitute community of purpose the mere existence of some general purpose or design was not sufficient. It was observed by Abdur Rahim, J., that "the purpose in view must be something "particular and definite such as where a "man with the object of misappropriating "a particular sum of money or of cheating "a particular individual of a certain "amount falsifies books of account or "forges a number of documents." It was further laid down in this case that there was no continuity of action where each

(2) (1910) 33 Mad. 502=(1910) M.W.N. 65=7 M.L.T. 229=20 M.L.J. 220=5 I.C. 847=11 Cr. L.J. 258.

act was a completed act in itself and the original design accomplished so far as that act was concerned. In the present case, as in the Madras case, there is no definite allegation as to how the offences were connected together by community of criminal intent, nor can it be said that there was any continuity of action between one act of fraud and another. Each act of inducement held out by the accused was a completed act in itself, and the original design to defraud was accomplished as soon as the particular person defrauded had paid the money demanded of him and had agreed to emigrate to France as the result of the inducements held out to him. The Bombay decisions, I.L.R. 15 Bom. 491; 27 Bom. 135; 29 Bom. 449 and 30 Bom. 49 on which reliance has been placed do not lay down any rule to the contrary, and have been fully considered by the learned Judges in the case reported as I. L. R. 33 Mad 502. In my opinion the trial was illegal on the ground of misjoinder of charges, and no useful purpose will be served by sending the case back to the lower Court for a retrial.

I accept both the appeals, set aside the convictions and sentences and acquit the accused.

Appeals allowed.

1924 Lahore 738.

ABDUL RAOOF AND ABDUL QADIR, JJ.

Ragho and Mallo — Defendant-Appellants

v.

Dwarka Das, (Plaintiff) and Gopal Singh and others—Defendants-Respondents.

First Appeal No. 3538 of 1916, decided on 31st May, 1922, against the decree of the Senior Subordinate Judge, Kanga at Dharmsala, dated 29th September, 1919.

(a) *Transfer of Property Act, S. 41—Inquiry and good faith are necessary to pass title.*

A transfer of immoveable property by an ostensible owner does not pass title where the transferee does not make inquiry and has not acted in good faith.

(b) *Civ. Pro. Code, O. 34, r. 8—Redemption by an unauthorised person.*

Redemption of a mortgage by an unauthorised person does not validly discharge the mortgage. [P. 740, C. 1.]

(c) *Mesne profits—Limitation.*

Mesne profits can be claimed only against the person who is in actual possession and limitation for its recovery is three years from the date when the cause of action for its recovery arises. [P. 740, C. 2.]

Sheo Narain—for Appellants.

Sohan Lal, N. C. Mehra, for Dwarka Das and *Moti Sagar* for *Raghbir Singh* and *Tekchand for Gopal Singh* — for Respondents.

Judgment:—This was a suit for possession as a mortgagee of 1223 *Kanals*, 2 *Marlas* of land being $\frac{1}{8}$th share of 9784 *Kanals*, 17 *Marlas*, situated in *Mauza* Thakardwara, Tahsil Nurpur in the District of Kangra. The plaintiff is the *Mahant* of the shrine known as the Datarpur shrine. The facts are somewhat complicated, but the issue for decision is a very simple one. The following facts will disclose the nature of the dispute and the position of the parties to the suit :—

The 9784 *Kanals*, 17 *Marlas* above mentioned were owned by a number of cosharers. One-fourth of this, that is, 2446 *Kanals*, 4 *Marlas*, belonged to one Luchhman. Luchhman was succeeded by his three sons, Ragho, Hirde and Malhar. Half of this said one-fourth was mortgaged to one Ram Dass for Rs. 900. This mortgage was redeemable in 1888. The other half of the said $\frac{1}{4}$th was under mortgage with Punjab Singh. This latter mortgage was redeemable in 1895. On the 5th May, 1888, *Mussammat* Mehtabo, as the mother and guardian of the three sons of Luchhman, mortgaged the entire $\frac{1}{4}$th share to *Mahant* Hari Das for Rs. 2,340 for a term of 20 years. The previous mortgage in favour of Ram Das was ripe for redemption and was redeemed by Hari Das who took possession of the land redeemed, namely, 1/8th share. The previous mortgage in favour of Punjab Singh, however, could not be redeemed and possession of the land, mortgaged, could not be delivered to Mahant Hari Das. On the 6th May, 1888, another land measuring 14 *Ghamaons* and 12 *Marlas* was mortgaged to *Mahant* Hari Das in substitution for the mortgaged land in possession of Punjab Singh. A condition was entered in the mortgage-deed that the mortgagors would redeem Punjab Singh's mortgage and would deliver possession to the *Mahant* over the 1/8th share and take back the 14—*Ghamaons* and 12 *marlas*. In 1895 *Mahant* Hari Das died

One Dhiraj Das, *chela* of the *Mahant* succeeded to the *gaddi* and mutation in respect of all properties held by Mahant Hari Das was effected in his favour. Bharat Das another *chela* of the *Mahant* instituted a suit for the recovery of the *gaddi* against Dhiraj Das and obtained a decree. In April, 1897, possession was taken by Bharat Das in execution of this decree. Defendants Nos. 1 and 2 are the representatives of the original owner, Lachhman. They in 1899 redeemed the land mortgaged with Punjab Singh and mortgaged it to one Atma Singh. They did not fulfil the condition entered in the document dated the 6th May, 1888, for they did not hand over the land to the *Mahant*. On the 24th February, 1902, Bharat Das, the then *Mahant* in possession of the properties attached to the shrine, assigned the mortgagee rights in the entire $\frac{1}{4}$th share to one Kharku whose son Gopal Singh is the defendant No. 3 in this suit. On the 8th December, 1902, Kharku brought a suit for possession of the $\frac{1}{3}$rd share mortgaged to Atma Singh and impleaded the representatives of the original mortgagor Lachhman, Atma Singh and Bharat Das as defendants. This suit was decreed and Kharku obtained possession in execution of his decree. Thus Kharku obtained possession over the entire $\frac{1}{4}$th share as mortgagee. On the 26th August, 1901, the present plaintiff Dwarka Das brought a suit against Bharat Das for a declaration that he was the real *Mahant* being the senior *chela* and having been nominated by *Mahant* Hari Das as his successor to the *gaddi*. On the 2nd November, 1901, to the declaratory relief already claimed in the plaint, a further relief was added to the effect that the plaintiff should be installed on the *gaddi* as the *Mahant*. Later on a further amendment of the plaint was effected and a relief for possession of the properties attached to the *gaddi* was added. For the first time then a list of the properties claimed was appended to the plaint and this list included also the property now in dispute. The assignment in favour of Kharku had already been effected on the 24th February, 1902, as mentioned above. In this suit besides Bharat Das, Dhiraj Das and Ghirdari Das, the two other *Chelas* of *Mahant* Hari Das, were impleaded as defendants, but Kharku was not made a party. The suit was decreed by the first Court on the 29th July, 1903, and the decree was upheld by the Chief Court. In execution of this decree possession was taken by Dwarka Das, the present plaintiff, on the 27th November, 1903. The proceedings relating to the delivery of possession over the mortgaged lands in dispute are printed at pages 26-30 of the paper book (B). The report of the *Girdawar* relating to the delivery of possession is translated and printed at page 29 of the paper book 'B' and is to this effect :—

"In compliance with the Court's order I came to the spot to day, the 27th November, 1903, and put Maya Das, the general agent of *Mahant* Dwarka Das, in possession of the land, mentioned in the warrant, together with the standing crop, in the presence of the *lambardars* and the *Zemindars*, by beat of a drum. The report along with the papers is, therefore, submitted. The area of the land situate in *mauza Thakarduara*, entered at *Khutauni* Nos. 94 to 363 in the *Jamabandi* papers for 1900-01, is shown to be 9,784 *kanals* and 17 *marlas*, while in the warrant it is entered as 9,694 *kanals* and 17 *marlas*. It has been entered in the warrant as 9,684 *kanals* and 17 *marlas* by mistake."

This report is signed by a number of persons as *lambardars* including Kharku, the assignee of Bharat Das. At page 30 is to be found the *dakhlnama* executed by the decree-holder Dwarka Das, acknowledging the receipt of possession over the mortgaged lands of *Mauza* Thakardwara. During the pendency of the above suit shortly before the decree was passed in favour of Dwarka Das defendants Nos. 1 and 2 mortgaged half of the entire $\frac{1}{4}$th share to one Gangi for Rs. 4,140 laying down the following condition in paragraph 5 of the mortgage-deed, namely, that Gangi mortgagee was to remain in possession of 111 *Kanals*, 12 *Marlas* (14 *Ghumdons* 12 *Marlas*) until he was able to get possession after redemption over the $\frac{1}{3}$th share mortgaged to him. Raghbir Singh, defendant No. 5 in the suit, is the son of Gangi. He redeemed the entire $\frac{1}{2}$ share which was in possession of Kharku, kept $\frac{1}{2}$ of this $\frac{1}{4}$th himself and handed over half of the $\frac{1}{4}$th to defendants Nos. 1 and 2. He also handed back the 111 *Kanals*, 12 *Marlas*. The present suit was instituted on the 17th July, 1915, for the recovery of possession over $\frac{1}{2}$ of the 1/11th share originally mortgaged by Lachhman together with mesne profits on the allegation that in collusion with Bharat Das, defendants Nos. 1-5, had taken possession of 1223 *Kanals*, 2 *Marlas* of land,

namely, the $\frac{1}{8}$th share of the land owned by defendants Nos. 1 and 2. The main contention put forward on behalf of the plaintiff is contained in paragraph (1) (*f*) of the plaint which runs thus :—

"Bharat Das, defendant No. 4, was not competent to sell the mortgagee right in respect of the land in dispute, during the pendency of the case or after the passing of the decree referred to in clause (*b*) nor was defendant No. 3 empowered to purchase the said mortgagee rights from Bharat Das, defendant No. 4, nor yet was defendant No. 5, as a mortgagee, competent to take possession of the said land. Moreover, defendants Nos. 1-3 were not in any way competent to give possession of the said land. The plaintiff is not in any case, bound by any act or the alienation on behalf of the defendants. The plaintiff, as a mortgagee, is entitled to take possession of 1293 *kanals* and 2 *marlas* of the land of the share of defendants Nos. 1-3 entered in clause (*a*)."

The suit was contested by defendants Nos. 3 and 5 mainly. Defendant No. 3 mainly based his defence on the assignment of the mortgagee rights by *Mahant* Bharat Das in favour of his father Kharku, defendant No. 5 set up the mortgage in favour of his father Gangi by defendants Nos. 1 and 2 and pleaded that he had redeemed the previous mortgage. Defendant No. 1 appeared but put forward a half hearted defence. He denied his liability for mesne profits. The facts stated above are practically admitted by the parties. The main question which arose for decision on the above facts was whether the assignment of the mortgage rights by Bharat Das in favour of Kharku was validly made and whether the mortgage of the 5th May, 1888, in favour of the Dalapur shrine had been validly discharged and the plaintiff was entitled to claim possession as a mortgagee. The learned Senior Subordinate Judge has held that the assignment in favour of Kharku was made during the pendency of the suit of the present plaintiff against Bharat Das the assignor, and that, therefore, the assignee was bound by the decree passed in that suit. It also held that Kharku had notice of the defective title of Bharat Das and of the legal rights of Dwarka Das, the plaintiff, and that, therefore, the assignment of the mortgagee rights by Bharat Das in his favour was invalid and not binding on the plaintiff. The learned Senior Subordinate Judge has further held that defendant No. 5 or his father Gangi, when redeeming the mortgage of 1888 by payment to Kharku, was aware of the latter's defective title and must have known that the payment should have been made to the rightful manager of the shrine, *viz.* the plaintiff, and that therefore, there was no valid discharge of the mortgage of 1888. On the above findings the Court granted a decree for possession over 1223 *Kanals*, 2 *Marlas* in equal shares against defendants Nos. 1, 2 and 5. On the question of mesne profits the Court held on the evidence that Rs. 400 per annum would be a fair estimate and granted a decree for the amount of Rs. 2,200 for a period of $5\frac{1}{2}$ years, directing the amount to be paid in equal shares by defendants Nos 1 and 2 on the one hand and defendant No. 5 on the other. Mr. Sohan Lal for the plaintiff respondent, has however, admitted that the claim for mesne profits beyond three years could not be sustained as it would be barred by time.

Three appeals have been preferred against the decision of the lower Court. First Appeal No. 3538 of 1916 is on behalf of Ragho and Mallo who are represented by Pandit Sheo Narain. First Appeal No. 408 of 1917 is on behalf of Raghbir Singh, defendant No. 5, who is represented by *Rai Sahib Lala* Moti Sagar. First Appeal No. 112 of 1917 is on behalf of Goval Singh, son of Kharku, in which Mr. Tek Chand has appeared for the appellant.

The main argument has been addressed to us by Mr. Moti Sagar in First Appeal No. 408 of 1917. He has contended that the rule of *lis pendens* cannot be applied to the transfer in favour of Kharku, as the plaint as originally presented did not contain a claim for possession of the land in dispute and that the decision in Kharku's favour was made on the 24th February, 1902, long before the plaint was amended on the 15th May, 1902, so as to include a relief for possession of the land. On the evidence, however, it is quite clear that Kharku must have been aware of the institution of the suit by Dwarka Das against Bharat Das. The suit must be taken to have been instituted on the date on which the plaint was first presented. Leaving aside the question of *lis pendens* the transfer in favour of Kharku must be held to be bad in view of another rule of equity. That rule is thus stated in section 41 of the Transfer of Property Act IV of 1882 :—

"Where, with the consent express or implied, of the persons interested in

immoveable property, a person is the ostensible owner of such property and transfers the same for consideration the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

Now, in this case there is not a tittle of evidence to show that Kharku had made any attempt to ascertain whether Bharat Das had the power to make the transfer. On the other hand, there is evidence on this record to show that he had notice of Dwarka Das's suit and of his rights as the rightful *Mahant*. The record of Civil Suit No. 80 of 1902, and the remarks of the learned Judges in their judgment exhibited as p. 7 on this record show that Kharku had express notice of the suit between the plaintiff and Bharat Das. He, therefore, cannot be said to have acted in good faith. The transfer in his favour, therefore must be held not to be binding on the plaintiff. The same rule of equity applies to the case of defendant No. 5. As found by the lower Court the sum of Rs. 2,340 was paid to Kharku by Hari Singh D. W. 3, the agent of defendant No. 5. He and defendant No. 5 are residents of Dasuya Tahsil on the Hoshiarpur District. The mortgage-deed in favour of Gangi referred to the mortgage of 6th May, 1888. This ought to have put Gangi on his guard and he ought to have made more necessary enquiries contemplated by section 41 of the Transfer of Property Act. The redemption of the mortgage of 1888 from Kharku, therefore, cannot be said to have been made in good faith. No valid discharge of the mortgage of 1818 in favour of the shrine can be held to have taken place. Mr. Moti Sagar has strenuously contended that the suit of the plaintiffs must be dismissed as the claim is confined only to a portion of the mortgaged property, *i.e.*, half of the one-fourth share. It was the plaintiffs' look-out to claim as much of the mortgaged property as he liked. If he considers only half of the mortgaged property to be a sufficient security for his money, it is not the business of this Court to hold that he ought to have claimed possession over the entire mortgaged property. Mr. Moti Sagar has been enabled to cite any rule of law in support of his contention. We see no force in the pleas urged on behalf of Raghbir Singh. His appeal, therefore, must fail except in one respect, namely, that the claim of mesne profits would be confined to three years only.

In First Appeal No. 3538 of 1916 *Pandit* Sheo Narain, the learned Counsel for Ragho and Mallo appellants, has contended that the suit being for the recovery of the $\frac{1}{8}$th share in the possession of defendant No. 5 a decree for possession and mesne profits has wrongly been passed against the appellants and that the decree should have been against defendant No. 5 above. A careful examination of the plaint bears out the contention of the learned Counsel. In paragraph (1) (*e*) of the plaint the plaintiffs state that defendant No. 5 is in possession of the land in dispute as mortgagee. Mr. Moti Sagar, the learned *Vakil* for defendant No. 5, has frankly admitted that his client is in possession of the $\frac{1}{8}$th share which had been redeemed from Punjab Singh and was subsequently mortgaged to his clients. In our opinion the decree for possession and mesne profits passed jointly against defendants Nos. 1 and 2 and defendant No. 5 cannot be maintained.

In First Appeal No. 172 of 1917 filed on behalf of Gopal Singh, defendant No. 3 Mr. Tek Chand has contended that inasmuch as the suit was not defended by his client a decree for costs should not have been passed against him. Gopal Singh's father Kharku was the main cause of this dispute, and it is not quite correct to say that the suit was not defended by him. A reference to the written statement filed by him clearly shows that he did defend the suit and it cannot be said that he was wrongly impleaded as a defendant. We see no ground for interfering with the order of costs made against him by the Court below.

The result is that the appeal of Raghbir Singh, defendant No. 5, is dismissed except in so far that the decree for mesne profits is reduced to Rs. 1,200 only; that the appeal of defendants Raghu and Malhu is so far allowed that the decree for possession and mesne profits as against them is set aside and a decree is made for the possession of the entire $\frac{1}{8}$th share together with mesne profits against defendant No. 5 above and the appeal of defendant No. 3 is dismissed with costs. Having regard to the special features of the case we leave the order of the lower Court as to costs undisturbed.

Decrees varied.

1924 Lahore 742.

MARTINEAU, J.

Gulab Singh and Mukand Singh—Appellants.

v.

The Crown—Respondent.

Criminal Appeal No. 393 of 1924, decided on 28th July, 1924, against the order of the Sessions Judge, Ferozepore, dated the 16th April, 1924.

Penal Code, S. 300, 1st exception—Mere remonstration with the accused's father for diverting the course of old water channel is not a grave and sudden provocation.

Where the deceased remonstrated with the accused's father for diverting the course of the old water channel which led to a quarrel, and then the accused came to support his father and assaulted the deceased.

Held there was no grave and sudden provocation. [P 743, C. 2.]

Nand Lal—for the Appellants.

Des Raj Sawhney for Government Advocate—for Respondent.

Martineau, J.:—The appellants Gulab Singh and Mukand Singh have been convicted, the former under section 326, I.P.C., and the latter under section 325, of causing grievous hurt to Lal Singh, who was half-brother of Gulab Singh's father Hari Singh and of Mukand Singh's father Narain Singh, and have been sentenced to five years' imprisonment and two years' imprisonment respectively. It is not denied that on the 1st September last Lal Singh had a quarrel with his half-brother Hari Sigh and Narain Singh about an old water-course which these two men were clearing, and that he received a blow on the head with a sharp weapon (a "*chhavi*" according to the prosecution witnesses and a '*kahi*' according to the defence witnesses) and a blow on the left foot with a stick. Both injuries were grievous. The fifth metatarsal bone of the foot was fractured, and the head injury resulted in Lal Singh's death 12 days later.

According to the prosecution Gulab Singh and Mukand Singh came up, when the quarrel began and Gulab Singh struck Lal Singh on the head and Mukand Singh struck him on the foot, while according to the defence witnesses one Mangalia, a "Siri" of Hari Singh dealt the blow on the head, and Hari Singh dealt the other blow and Gulab was not present at all.

Lal Singh's brother Sundar Singh, whose presence on the spot at the time of the occurrence is admitted, says that Gulab Singh struck Lal Singh with a *chhavi* on the head, and that Mukand struck him with a *dang* on the foot, and this accords with the report that he made at the *thana* at 8-30 p. m. on the 1st September, except that in the report he said that the weapon that Gulab Singh had was a *gandasi*. The statements of Shahra, Nand and Sardari who were engaged in digging a water-course for Lal Singh, not far from the place where the latter was assaulted, also support the prosecution, though these witnesses have to some extent resiled from the statements they made before the committing Magistrate. Shahra at first said that although Gulab Singh and Mukand Singh were present he saw no weapons in their hands, but after he had been referred to his statement before the committing Magistrate he admitted that Mukand Singh struck Lal Singh with a *dang* in his presence and that Gulab Singh also was in the fight. He said he did not see who inflicted the blow on Lal Singh's head, but in his statement before the Magistrate which was transferred to the record of the Sessions Court, he had said that Gulab Singh had a *gandasi* and Mukand Singh a *dang* and that he was present, when the accused struck Lal Singh, who was hit on the head with the *gandasi* and on the foot with the *dang*. Nand says that Mukand Singh struck Lal Singh with a *dang* and that Gulab Singh also was in the fight. He says that there was a *chhavi* in Hari Singh's hand, but that he did not see any one using it, as Lal Singh had been struck on the head before he came up to the spot, but he admits that before the Magistrate he stated that Gulab Singh had a *chhavi* in his hand and had struck Lal Singh on the head with it, though he seeks to explain away that statement by saying that he made it at the bidding of Sundar Singh. Sardari says that when he reached the spot the fight was over and a *chhavi* was lying on the ground. He too admits that he stated before the Magistrate that Gulab Singh struck Lal Singh on the head with a *chhavi* and that Mukand Singh struck him on the foot. His explanation of having made that statement, which contradicts the statement now made is similar to that given by Nand.

In addition to the evidence of the witnesses above mentioned there is the statement of the deceased Lal Singh, recorded

by a Magistrate on the 9th September in which he said that at the instigation of Hari Singh, Gulab Singh struck him with a *chhavi* on the head and Mukand Singh struck him with a *dang* on the foot. Counsel for the appellants lay some stress on the fact of a correction having been made in a sentence near the end of Lal Singh's statement. It appears that in that sentence Lal Singh had at first said that when Hari Singh and others were beating him his brother Sundar Singh came up on hearing the noise, but when the statement was read over to him he had the name Hari Singh altered to Gulab Singh. It seems clear, however, that the original mention of the name Hari Singh in that sentence was a mistake, because in the earlier part of the statement Lal Singh had said quite clearly that his assailants were Gulab Singh and Mukand Singh.

The defence witnesses who depose that Lal Singh's assailants were Mangalia and Hari Singh are Mahindar Singh, Badan Singh, Sajjan Singh, and Hira Singh. The learned Sessions Judge is wrong in saying that they are all connected in some way with Gulab Singh, as it is only the first of them who is shown to be a relation Gulab Singh. But their evidence does not appear to be entitled to much weight. They say that they told the Sub-Inspector that Mangaliya and Hari Singh were the guilty persons, and not Gulab Singh and Mukand Singh, and that the Sub-Inspector would not listen to them. I am not prepared to believe this and the Sub-Inspector has himself deposed that no compliant was made to him by the village people that Gulab Singh and Mukand Singh had been falsely accused. It is also to be observed that the appellants themselves did not state that Lal Singh had been assaulted by Mangalya and Hari Singh, and that this was stated only by the witnesses whom they produced. Gulab Singh's defence was an *alibi*. Mukand Singh says that he, his father, his uncle Hari Singh, and 3 Siris, named Kishna, Bakar and Mangalya were making a water-course; that Sundar Singh, Lal Singh and their four *Siris* Nand, Shabra, Sajjan and Sardari came and told them to desist and began to demolish the water-course; and that there was a struggle between the 12 men; and that he does not know who hit Lal Singh. That version is entirely inconsistent with the story told by the defence witnesses.

There appears to be no doubt that Lal Singh was struck by the appellants, as he himself said in his statement of the 9th September, and as has been stated by Sundar Singh whose evidence receives support from the statements of Shahra, Nand and Sardari and notwithstanding that these witnesses have tried to retract a part of what they said before the committing Magistrate. It is not explained why, if Lal Singh's assailants had been Mangaliya and Hari Singh, Sundar Singh should have wanted to screen them and should have falsely accused Gulab Singh and Mukand Singh.

I uphold the convictions of the appellants. It remains to consider the sentences. The learned Sessions Judge says in his judgment in his description of the occurrence that Lal Singh was assaulted on his proceeding to demolish the work that Hari Singh and Narain Singh had been doing. If this had been the case it might have been pleaded that the appellants acted under provocation, but I see nothing to support the learned Judge's view on this point except the statements of two of the defence witnesses, Sajjan Singh and Hira Singh whom he has himself disbelieved. I do not find in the evidence for the prosecution any mention of Lal Singh having demolished the work done by Hari Singh and Narain Singh. What that evidence shows is that Lal Singh remonstrated with Hari Singh and Narain Singh for diverting the course of the old water-channel. That led to a quarrel, and then the appellants appear to have come up to support their fathers and assaulted Lal Singh.

It cannot therefore be said that they acted under provocation, and I do not think that the sentence passed on Gulab Singh is excessive. The blow on Lal Singh's head must have been a heavy one, for it had cut through the skull and had also cut the membranes of the brain to a depth of about an inch and a half. But in the case of Mukand Singh it has to be taken into consideration that he is only 18 years of age and that the blow that he gave Lal Singh with his stick was struck not on the head or other dangerous part, but on the foot and that, although it caused fracture of a bone of the foot, the consequences would probably not have been very serious.

I dismiss the appeal so far as Gulab Singh is concerned and while maintaining

the conviction of Mukand Singh, I reduce the sentence passed on him to one of six months' rigorous imprisonment.

Appeal partly accepted.

1924 Lahore 744.

SCOTT-SMITH, A.C.J.

Vir Singh—(Defendant)-Appellant.

v.

Bhola Singh and others,—(Plaintiffs)-Respondents.

Civil Appeal No. 513 of 1924, decided on 26th June, 1924, against the decree of the District Judge, Ferozepore, dated the 23rd November, 1923.

Civ. Pro. Code, O. 8, r. 5—Fact admitted by defendant's Muktear may be required to be proved by Court—Admission.

A fact admitted by the defendant's Muktear prior to the framing of the issues is not conclusive, for the Court may require it to be proved otherwise. [P. 744, C. 2.]

Durga Das—for the Appellant.

Nand Lal—for the Respondents.

Scott-Smith, A.C.J.:—The plaintiff respondent sued for a declaration that an alienation of land effected by Sawan Singh for a consideration of Rs. 700 in favour of Vir Singh on the 2nd August, 1919, should not affect his reversionary rights. The first Court held that the land was ancestral and that the alienation was valid to the extent of Rs. 530-6-0 and passed a decree in accordance therewith. The vendee filed an appeal in the Court of the District Judge who refused to allow the question, whether the land was ancestral or not, to be raised. He said, "The allegation in the plaint that it was ancestral was never specifically denied by the defendant who merely pleaded ignorance on the point. This, in my opinion, constitutes no such denial as would warrant the framing of an issue." On the merits he dismissed the appeal.

In second appeal it is contented that the District Judge was wrong in not allowing the question of the ancestral nature of the land to be raised. In his written pleas the vendee said "I do not know whether the land is ancestral. I do not admit that it is ancestral." Order 8, rule 5, C. P. Code, says "every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted . . . . provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission." Now in the plaint it was alleged that the land was ancestral and the defendant in his pleadings clearly stated that he did not admit this allegation. The allegation, therefore, could not be taken to be admitted and the plaintiff was bound to prove it. It is, however, contended on behalf of the respondent that the defendant's *mukhtar* prior to the framing of the issues did admit that the land was ancestral. Now in the first place the vernacular record of his statement might according to the appellant's counsel be read as "*zamin jaddi nahin.*" The plaintiffs counsel reads it as "*zamin jaddi the.*" Considering that the defendant in his written pleas stated that he did not admit that the land was ancestral, I think the Court was perfectly justified in framing an issue on the point because in accordance with the proviso to rule 5 the Court may require any fact so admitted to be proved otherwise than by such admission. The name of the *mukhtar* who is said to have made this admission is not given on the record and there is no power-of-attorney on the record of the trial Court appointing any one as a *mukhtar* of the vendee defendant. In my opinion this at least is open to doubt whether the so called *mukhtar* of the defendants made the alleged admission. But even if he did the Court was right to put the matter in issue. Evidence was produced upon it and the trial Court gave a considered finding thereon. Under all the circumstances of the case I consider the vendee was entitled to raise the point in his grounds of appeal in the lower appellate Court and the District Judge was wrong in refusing to decide the point.

I therefore accept the appeal and under Order 41, rule 23, C. P. Code, remand the case to the lower appellate Court for redecision of the appeal. Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal allowed.

THE END.

Acc. No. 177109
Dated 14.11.1980